

Education managers' understanding and implementation of due process during learner discipline

by

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DECLARATION

I, Nicholus Tumelo Mollo (Student number 04315103) declare that

Education managers' understanding and implementation of due process during
learner discipline

is my own work and that it has never been submitted in any form for a degree or
diploma before in any tertiary institution. All the sources that I have used or quoted
have been indicated and acknowledged by means of complete references.

Signature : _____

Date : _____

DEDICATION

This study is dedicated to my wife Cathrine and my children Tshepiso, Tswelopele and Hlonolofatso, who have played an important role in my studies. Your patience, understanding, encouragement, sacrifice, support and love made the completion of this study possible.

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Firstly, my acknowledgement is extended to God the almighty for His protection, strength and wisdom that He gave me throughout the process of my studies.

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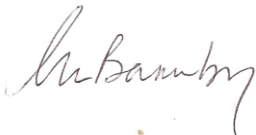
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To whom it may concern

This letter serves to confirm that I, Alexa Kirsten Barnby, ID No. 5106090097080, a fulltime language practitioner with the University of South Africa and a member of the South African Translators' Institute, have edited Nicholus Tumelo Mollo's doctoral thesis entitled, "Education managers' understanding and implementation of due process during learner discipline". The onus is, however, on the student to bring about the changes suggested and address the comments made.



AK Barnby

ABSTRACT

The purpose of this study is to investigate how education managers conceptualise due process and how their understanding of due process influences the way in which they discipline learners. It adopted a qualitative approach that was based on an interpretative paradigm and followed a case study design. The data collection techniques that were used include semi-structured interviews and document analysis. Research was conducted in eight secondary schools.

The findings of this study indicate that the majority of education managers have a good understanding of preliminary disciplinary investigation, a right to information, the disciplinary committee, who should participate in a disciplinary hearing and the appeal process. The minutes of few selected schools provide that schools do consider the school's code of conduct for learners when disciplining learners.

The study found that education managers lack sufficient understanding the implementation of due process and the correct steps to follow when conducting fair disciplinary hearings. Misunderstandings about the learners' right to information, who should be involved in disciplinary committees, the involvement of witnesses and learner representation were common. Most schools did not include sufficient information in their notices for hearings. Some participants indicated that, for various reasons, they often avoid holding hearings and others avoid following correct procedures of learner discipline. In addition, there is a lack of understanding that the reasons given for a decision by a disciplinary committee must be based on the evidence presented during the hearing. Some participants do not know which acts/laws/policies and learner disciplinary documents apply to learner discipline and did not ensure the safekeeping of minutes for their disciplinary hearings. Most schools do not keep detailed minutes of the hearings conducted and the majority did not have disciplinary policies. Moreover, there is still a lack of understanding about which learner behaviours constitute serious misconduct and whether a disciplinary hearing should be organised for learners who have committed criminal offences in a school. Only about a half of participants consider the age of learners when they discipline them. Some are not sure about number of days that are required for learner and parents to lodge an appeal.

Key words: education managers, understanding, implementation, due process, learner discipline, preliminary investigation, disciplinary hearing notice, disciplinary hearing, decision, appeal

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CHAPTER 1

INTRODUCTION AND ORIENTATION

1.1 INTRODUCTION

The concept of fair treatment during disciplinary proceedings is an important concept internationally. The concept may be traced back to 1215 in Article 39 of the Magna Carta of England (The Great Charter, 1215). It is also contained in the American Bill of Rights Article 15 of 1791 (US Constitution, 1787).

Major universal treaties, such as the Universal Declaration of Human Rights (hereinafter referred to as the UDHR) (United Nations General Assembly (UNGA), 1948), the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) (UNGA, 1966) and the Convention on the Rights of the Child (hereinafter referred to as CRC) (UNGA, 1990), have played a vital role in ensuring fairness in disciplinary processes. One of the major aims of these documents has been to address the abuse in the education context that was taking place throughout the world. Such abuse was often in the name of discipline.

The leadership of regional institutions found it necessary for regional institutions to develop instruments that would deal with abusive disciplinary actions within their specific regions. Accordingly, regional human rights instruments such as covenants, charters and declarations were developed in order to ensure that the disciplinary process was fair. The European Convention on Human Rights (hereinafter referred to as the ECHR), the Council of Europe (hereinafter referred to as CE), the American Convention on Human Rights (hereinafter referred to as the ACHR), the Organisation of American States (hereinafter referred to as OAS) and the African Charter on Human and People's Rights (hereinafter referred to as the ACHPR) all represent attempts to ensure fair disciplinary process.

The Republic of South Africa (hereinafter referred to RSA) is one of the countries that promotes and protects the fair treatment of learners. Section 33 of the Constitution of the Republic of South Africa, 1996 (RSA, 1996a) (hereafter referred to as the Constitution), sections 8(5) and 9(3)(c) of the South African Schools Act 84 of 1996 (RSA, 1996b) (hereafter referred to as the Schools Act), Paragraph 13(1) of

the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (Department of Education, 1998) (hereafter referred to as the Guidelines) and section 3 of the Promotion of Administrative Justice Act, 2000 (RSA, 2000) (hereafter referred to as PAJA) all promote and protect fair treatment when disciplining learners.

Discipline is an important aspect of education and helps to ensure that effective teaching and learning take place in schools. Whether a misdemeanour is serious or not serious, it is essential that punishment is carried out in a fair way and, thus, it is essential that education managers understand and implement due process. Joubert and Prinsloo (2009:106) concur with this viewpoint when they state that it is impossible for teaching and learning to take place in schools in which there is no order. However, both educators and education managers are finding it difficult to control learners. This may be the result of their lack of understanding of education legislation and regulations.

If all stakeholders were to come to understand their roles in learner discipline, then it would be possible for order to prevail in schools. Educators are *in loco parentis* and, thus, they have a duty to discipline learners. If a learner has behaved in a manner that is seriously unacceptable, then the learner must be taken to the principal (Department of Education, 1998). This is supported by Joubert (2008:13), who states that principals and educators have a duty to discipline learners because they are acting *in loco parentis* and one of their duties is to take care of learners at school. Educators are given the authority in terms of the law to act responsibly in the way in which good biological parents would behave. It is, thus, imperative that educators and education managers not shirk their responsibility in ensuring that schools are places of order and safety.

It is important to ensure that the roles of education managers and school governing bodies are clearly laid down. In other words, when learners are disciplined in a school it is essential that both the school governing body (hereafter referred to as the SGB) and the education managers fulfil their legal roles. This will prevent disciplinarians from acting *ultra vires*.

The SGB cannot develop and implement a code of conduct for learners without consulting school's stakeholders. "In terms of section 8(1) of the Schools Act, the SGB of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school" (RSA 1996b), while section 8(5)(a) states that SGBs should adopt codes of conduct for learners that contain "provisions of due process". These provisions should be designed in such a way that they "safeguard the interests of the *learner* and any other party involved in disciplinary proceedings". When I interpret this law, I assume that codes of conduct for learners that do not include provisions for due process should be regarded as incomplete. Section 8(6–9) of the Schools Act stipulates that the SGB is responsible for conducting the disciplinary hearings. In South Africa, education managers are not allowed to conduct learner disciplinary hearings. However, there is sometimes confusion regarding the roles of the disciplinary committees and the SGBs. This study attempts to resolve this confusion.

Education managers have an important role to play in learner discipline when there has been serious misconduct on the part of learners. According to section 16A(2)(a)(v) of the Schools Act, "the principal is responsible for the safekeeping of all school records" (RSA 1996b). In other words, it is incumbent on the principal to ensure that disciplinary documents are stored in a safe place. In addition, as regards learner discipline, it is the responsibility of the principal to "assist the SGB in handling disciplinary matters pertaining to learners" (s 16A(2)(d) of the Schools Act) (RSA 1996b). Thus, the principal must always advise the SGB and the disciplinary committee on the correct procedure that must be followed when learners are disciplined while he/she must also "inform the SGB about policy and legislation" (s 16A(2)(f)) (RSA 1996b). In addition, it is the responsibility of the principal to advise the SGB on what policy and legislation have to say about learner discipline to ensure that the SGB does not act in an incorrect way. According to Squelch (2001:142), even if some schools are fortunate enough to have members of their SGBs with expertise in education-related matters, the majority of SGBs do not have the capacity to formulate policy (learner discipline policies).

The members of school management teams (SMTs) are the first to investigate serious misconduct on the part of a learner. If the transgression is serious then the

principal alerts the SGB and refers the problem to it; the SGB will then conduct a disciplinary hearing. It is the responsibility of the SGB to send notice of the disciplinary hearing to both the learner and the learner's parents. The SGB may delegate the task of sending such notices to the education managers; however, the notice must be signed by the chairperson of the SGB. It is also the responsibility of the SGB committee to keep minutes of the hearing, although this task may be delegated to an educator who is also a SGB member and who has been appointed as a member of the disciplinary committee.

The current situation is that there are schools that have been taken to court for not following due process and have lost as a result of the lack of understanding and implementation of the "due process" and "codes of conduct for learners" that are consistent with South African legislation.

1.2 RATIONALE

The concept of due process did not originate in South Africa. In 1215 in England, King John signed a document known as the Magna Carta and it is with this document that due process was established (Alexander & Alexander, 2005:765). According to Davidson (2003:9–10), the right to due process is included in "the Fifth and Fourteenth Amendments of the US Constitution". Even if the concept of "due process" is not formally included in the South African Constitution, section 33 (just administrative action) of the Constitution contains an element of due process. Joubert (2008:43) maintains that due process is not a common concept in South African legal literature and, in fact, the SA Schools Act is the only legislation that is applied to learner discipline in South Africa that mentions the concept of due process, namely, in section 8(5).

What is crucially important is that education managers must understand and be able to implement due process when they discipline learners. Researchers have not paid sufficient attention to explaining the way in which education managers understand and implement due process when disciplining learners. During the literature review, it was not possible to find any empirical study in South Africa that had been conducted specifically to investigate in detail the understanding and implementation of due process in public schools. This indicated a very serious gap. However, Ishak (2004),

Mokhele (2006), Lekalakala (2007), Joubert (2008), Mncube (2008), Van der Westhuizen and Maree (2009), Mncube (2009), and Maphosa and Shumba (2010) have all conducted studies that partially discuss either the concept of due process or the content of the right to due process in the form of a statement or paragraph. These empirical studies are discussed in detail in the literature review. However, this gap in the existing literature aroused a need for a study about how education managers understand and implement due process during learner discipline. Therefore, it is imperative to conduct a study that will fill in an existing gap in the understanding and implementation of due process.

Furthermore, there have been critical incidents reported in the newspapers about cases that are related to due process in schools. The following headlines in newspapers led to a need to find out how education managers understand and implement due process when disciplining learners:

Schoolboy faces hearing for stabbing mate: The 13-year-old Mpumalanga schoolboy, who seriously injured a classmate by allegedly stabbing him with a knife in class, is due to appear before the disciplinary committee this week (*Sowetan*, McKeed, Kotlolo, 14 May 2007).

Judge sets aside school's unilateral expulsion: A unilateral decision by a high school in Port Elizabeth to expel a Grade 10 pupil who allegedly punched a teacher was yesterday overturned by the Port Elizabeth High Court (*The Herald*, Piet Van Niekerk, 16 May 2007).

SACS prefects face hearing today on 'manhole torture': Six new SACS prefects appear before a disciplinary hearing at the Newlands school today after a Grade 9 pupil claimed he was bullied and forced to climb into a manhole (*Saturday Weekend Argus*, Zara Nicholson, 20 October 2007).

Disciplinary hearing against six SACS prefects postponed: A disciplinary hearing against six SACS prefects accused of torturing a Grade 9 pupil, which had been scheduled for yesterday, will now be heard on Friday. The respondent declined to say what reason was given for the postponement, saying she had been asked by the school not to speak to the media (*Sunday Argus*, 21 October 2007).

Expulsion rumpus over school hosted discipline: Learners were expelled from school because they repeatedly misbehaved and that led them to “accumulate more than 60 points for minor offences”. One of the parents mentioned that his child did not perform wrong things such as “smoking, drinking alcohol, stealing or doing something unbecoming”. The parent insisted that the reasons for expelling learners from school were “petty offences”. Therefore, they were not “valid” (*Daily Dispatch*, Chandre Prince, 29 October 2007).

Expulsion row head dubious on new plan: Yesterday the Education MEC announced that his department planned “to widen the definition of serious misconduct to include bad behaviour”. The intention of his plan was to make things easier for educators to “report unruly pupils” who were to be removed temporarily or permanently from the school because of their serious misconduct (*Cape Argus*, Candes Keating, 16 April 2008).

Pupil wounded in school stabbing: In an incident that took place in one of the high schools in Johannesburg where a “Grade 12 learner was stabbed and wounded, allegedly by another boy”, the department mentioned that the “school will institute its own disciplinary hearing against the learner (alleged attacker) after his release” (*Mail & Guardian*, 24 February 2009).

Matrics arrested after initiation: “When the incident was first reported on Monday 9 February by a parent, the boarding house master was immediately instructed to conduct an investigation, which resulted in all Grade 12 boys admitting to being guilty. They were suspended from the boarding house with immediate effect and given a letter for their parents stating that they would have to attend a disciplinary hearing on 13 February” (*Cape Times*, 3 June 2009).

Pupils face expulsion over cellphone thefts: Three Grade 8 learners from Durban’s Westville School attended a disciplinary hearing for “allegedly stealing cellphones from their classmates”. This misconduct would lead to “expulsion or suspension” from the school (*Saturday Star*, Bronwyn Gerretsen, 13 June 2009).

“Bullied” boy to face hearing after attack: A deputy principal in one of the high schools in Wynberg said that, in line with the school’s policy, a disciplinary hearing would be convened by the SGB (*Cape Times*, Luvuyo Mjekula, 23 September 2009).

“Pupil, school face off over dreadlocks”: A fifteen-year-old schoolboy has been temporarily “suspended” from school after refusing to cut the “dreadlocks” from his head (*Mail & Guardian*, 10 March 2011).

The disciplinary problems cited in these newspaper articles and the accompanying problems in addressing them led to an awareness of the need to conduct this study. These newspapers include the *Sowetan*, 14 May 2007; *The Herald*, 16 May 2007; *Saturday Weekend Argus*, 20 October 2007; *Sunday Argus*, 21 October 2007; *Daily Dispatch*, 29 October 2007; *Cape Argus*, 16 April 2008; *Mail & Guardian*, 24 February 2009; *Cape Times*, 3 June 2009; *Saturday Star*, 13 June 2009; *Cape Times*, 23 September 2009; and *Mail & Guardian*, 10 March 2011.

Some incidents in schools that ended up in courts include cases such as *High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province, 1999, (Vryburg)*; *Antonie v SGB, the Settlers High School and Head, Western Cape Education Department, 2002 (Antonie)* and *Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa, 1998 (de Kock)*. All of these stem from disciplinary problems that had taken place in schools.

Another incident that underpinned the rationale behind the study is the case of Layla Cassim, a 14-year-old girl who laid a complaint with the Human Rights Commission, which stated that she had not been treated fairly during a disciplinary process and had subsequently been suspended from Crawford College (Van Vollenhoven & Glenn, 2004:151). This case also raised the need to conduct a study about how education managers understand due process and how this understanding influences the way they discipline learners. This study is needed in order to address a gap of the way education managers integrate procedural due process and substantive due process in order to mete out fair discipline.

1.3 STATEMENT OF PURPOSE

The purpose of this study is to investigate the way in which education managers conceptualise due process and how their understanding of due process influences the way in which they discipline learners.

1.4 WORKING ASSUMPTION

It would appear from the above-mentioned court cases that reported on learner discipline, and the decisions of the judges involved, that it was a lack of understanding and implementation of due process that had led to these court cases. In the cases of *Vryburg, Antonie and de Kock*, due process was not followed. These three court cases are discussed in the following paragraphs:

In the High Court, Judge Khumalo declared the case of *Vryburg* “null and void”. The reason for this ruling was based on the fact that the proceedings of the disciplinary hearing against Babeile had not been fair as his parents had not been notified, while the rules of natural justice had been infringed by the disciplinary committee (Joubert et al., 2004:82; Mollo, 2009:39).

In the case of *Antonie* the court held that a learner cannot be suspended for growing dreadlocks. Growing dreadlocks does not amount to serious misconduct and the smooth running of the school is not disturbed by this act (Joubert & Prinsloo, 2009:122). According to due process, the reasons for decisions must be correct, factual and not biased. Thus, reasons that are not specific, clear, proper and factual are “likely to be set aside” (Joubert & Prinsloo, 2009:134–135). So, in this case, the court found that the reasons which had led to suspension had been inappropriate for the case of defying the “school code of conduct that required that the hair must be tied up if below the collar” (Joubert et al., 2004:81 & Joubert, De Waal & Rossouw, 2005:212).

Floris de Kock was expelled from Overberg High School on the grounds of alleged serious misconduct. However, the SGB had not followed due process when investigating the offence and the decision that had followed this investigation was considered null and void by the court (Netshitahame, 2008:2). The principal of the school had acted as prosecutor, judge and witness (Joubert & Prinsloo, 2009:132); but due process does not allow one person to act as a referee, player and judge simultaneously. If one person plays so many roles, the disciplinary action will not be fair, just and appropriate.

The court cases discussed above all refer to the element of due process discussed in the literature review.

My assumption is that education managers may lack understanding of both the concept of due process and the way in which due process should be implemented when disciplining learners. If schools are to take fair disciplinary action, it is essential that education managers have a proper understanding of due process and are able to implement due process.

1.5 PROBLEM STATEMENT

The main problem in respect of due process and which is evident in the court cases mentioned above, for example the cases of *Vryburg, Antonie and de Kock*, is that schools do not follow due process when disciplining learners. It is also not clear either how education managers conceptualise due process or how their understanding of due process influences the way in which they discipline learners who have committed a serious misconduct.

This study focuses on the understanding of due process by education managers and whether due process is implemented in such a way as to safeguard the interests of the learners during the disciplinary process in public high schools.

1.6 RESEARCH QUESTIONS

The aim of this study was to address the problem statement discussed above. The following research questions guided the study.

1.6.1 Main research question

How do education managers conceptualise and implement due process when disciplining learners in schools?

1.6.2 Sub-questions

How do education managers understand due process?

How does their understanding of due process influence the way in which they discipline learners?

1.7 DELIMITATION OF THE STUDY

The study focused on education managers' understanding of due process and their implementation of due process in public high schools in Mpumalanga.

1.8 EPISTEMOLOGICAL AND ONTOLOGICAL STANCE

According to Cohen, Manion and Morrison (2000:6) and Huff (2009:108), epistemology concerns the way in which we come to know about what exists. The epistemological stance of this research study was to investigate education managers' knowledge of due process. This was done through social interaction, using the interview method.

The study is based on the interpretative paradigm:

This means that when we conduct an investigation on human activities, that it should be done in terms of meanings – why people say this, do this or act like this or that way – and must be interpreted by relating them to other human activities so that there is more understanding. When we conduct a qualitative research there is an interactive relationship between the person who is conducting a research and participants. There is an interactive relationship between the participants and their experiences. This means that reality is constructed based on experiences (Nieuwenhuis, 2010a:55).

In interpretative research the investigator builds up an extensive collection of thick description (detailed records concerning context, people, actions and the perceptions of the participants) as the basis for the inductive generation of an understanding of what is going on or how things work. "Interpretative research enables the researcher to understand the setting for social action from the perspective of the participants" (Locke, Silverman & Spirduso, 2010:184). I intended to adopt an interpretative approach in order to acquire knowledge about how education managers understand and implement due process when disciplining learners. This knowledge was generated using both interviews and document analysis.

Huff (2009:108) maintains that ontology considers what already exists. In other words, ontology means that people are involved in the creation of the reality that they perceive (Huff, 2009:113). Thus, in the context of this study, education managers have played an important role in the creation of reality. The creation of knowledge is informed by the way in which people experience things and how they perceive reality. In this study the ontological stance ensured that the participants stated what they already knew and what they had implemented in real-life school situations in order to contribute to the creation of reality.

1.9 CONCEPTUAL FRAMEWORK

Section 1 discusses the core concepts that governed this study – their meanings and relationships as they apply to a fair learner disciplinary process. These core concepts include due process as well as the types of due process, namely, procedural due process and substantive due process. Other core concepts that relate to the learner disciplinary process include the hearing of evidence, deciding on an action, notice of a hearing, learner disciplinary hearings, adjourning and considering action, conveying the decision and appeal.

These concepts assisted in the analysis of the data that were collected. Jabareen (2009:51) defines a conceptual framework as the linking together of concepts to provide a “comprehensive understanding of a phenomenon or phenomena”. In terms of the conceptual framework there is a relationship between the concepts in order to “articulate their respective phenomena, and establish a framework-specific philosophy” (Jabareen, 2009:51). The conceptual framework used for the purposes of the study was identified from the literature review. In order to investigate the way in which education managers understand and implement due process when disciplining learners, it was essential to position a number of due process concepts within a conceptual framework. In view of the fact there is limited literature relating directly to due process in learner discipline, sources from the field of law were used.

Figure 1.1 presents a conceptual framework that summarises the aspects involved in the understanding and implementation of due process and also of the way in which these aspects interconnect. The framework depicts two main interrelated issues, namely, the due process and the learner disciplinary process. With regard to due

process, the conceptual framework focuses on the meaning and the implementation of due process while, as regards the learner disciplinary process, the conceptual framework focuses on aspects such as the hearing of evidence and deciding on action, notice of a hearing, learner disciplinary hearings, adjourning and considering the facts, conveying the decision and appeal. The concepts of due process and the learner disciplinary process are interrelated as it is not possible for a learner disciplinary process to be fair if education managers do not understand and are not able to implement due process in the correct way.

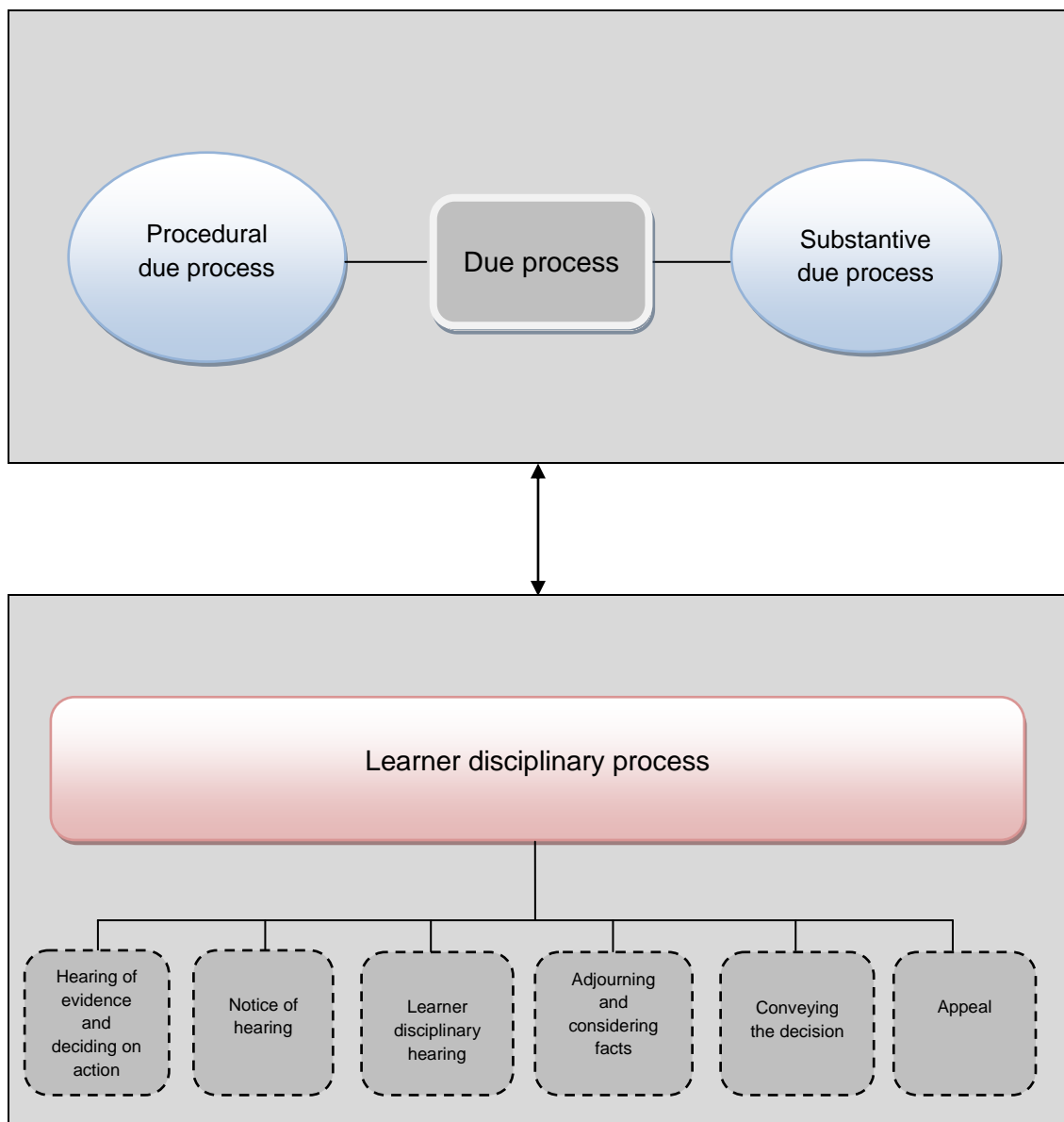


Figure 1.1: Conceptual framework of due process in learner discipline in South Africa

1.10 CONCEPT CLARIFICATION

1.10.1 Due process

Due process means fair treatment in accordance with the correct judicial system (*South African concise Oxford dictionary*, 2006:359). The due process of law is rooted in the history of Western civilisation and controls the power of the state and tribunals to ensure a comprehensible, rational and principled order. This ensures that people are not deprived of their right to be treated fairly during a disciplinary process and that they are provided with reasons for the decisions made (Sandefur, 2012: 285). According to Alexander and Alexander (2005:435) and Joubert (2008:130), there are two types of due process, namely, procedural due process and substantive due process. The concept of due process is discussed in detail in chapter 2 of this thesis. For the purposes of this study due process means the fairness of the disciplinary process.

1.10.2 Procedural due process

In light of the explanation of the concept of 'due process' above, the term 'procedural' will now be explained. Procedural is the adjective formed from the word 'procedure'. According to the *South African concise Oxford dictionary* (2006:359), procedure means the "established or official way" that is followed in order to do something. During this process, "series of actions [are] conducted in a certain order or manner". According to Rossow and Warner (2000:198), procedural due process in the educational context requires that steps are followed in a certain order to ensure that a learner is treated in a fair way before his or her rights are limited. The concept of procedural due process is explained in detail in chapter 2 of this study. However, for the purposes of the study procedural due process means a series of actions (steps) that are conducted in order to ensure that the process of disciplining learners is fair.

1.10.3 Substantive due process

Alexander and Alexander (2005:435) and Joubert (2008:45) state that "substantive due process refers to the appropriateness and fairness of rules". Thus, substantive due process requires that the people who are involved in disciplining others should

provide valid reasons and have sufficient evidence to enable them to make a decision during the disciplinary process. For the purposes of this study, substantive due process means that the SGB is able to provide clear reasons and sufficient evidence for any decision taken during learner discipline.

1.10.4 Learner discipline

According to the *South African concise Oxford dictionary* (2006:659), a learner is an individual who is attending school in order to acquire knowledge or skill by learning and being taught by educators. Section 1 of the SA Schools Act states that a learner is a person who is “receiving education or obliged to receive education” through the learning and teaching process.

Discipline refers to the process in terms of which people are trained to “obey rules or a code of behaviour” (*South African concise Oxford dictionary*, 2006:331). Thus, in the context of school discipline, discipline is the process whereby the steps that are taken to educate learners on how to behave in an orderly manner will be acceptable to everyone (Mbatha, 2008:9). According to Van der Bank (2000:305), discipline involves assisting learners to behave in an appropriate manner that will enable them to develop self-control and self-discipline and to accept responsibility for their actions. Discipline is proactive, constructive, educative and corrective. Thus, discipline enables learners to learn to control themselves, respect and accept each other and accept disciplinary actions (Joubert & Prinsloo, 2009:107). For the purposes of this study learner discipline refers to the practice of teaching learners to behave in an appropriate way by obeying school rules and/or a learner code of conduct.

1.10.5 Hearing of evidence

The hearing of evidence comprises two important concepts, namely, ‘hearing’ and ‘evidence’. ‘Hearing’ means to be given an “opportunity to state one’s case” (*South African concise Oxford dictionary*, 2006:534). There are two types of evidence, namely, direct evidence and circumstantial evidence. Direct evidence is evidence that is intended either to establish or resolve an issue in a case (Younger, Goldsmith & Sonenshein, 2011:4). An example of direct evidence would involve a witness who saw a learner opening a classroom window after school, entering the classroom, and

leaving the classroom carrying a projector. On the other hand, circumstantial evidence is evidence that helps the investigator to form a reasonable opinion about an issue that is being investigated (Younger et al., 2011:4). An example of circumstantial evidence would be footprints leading from the street up to the broken classroom window and a projector being missing.

The hearing of evidence in the context of a school disciplinary action refers to the process whereby the principal collects evidence in order to decide whether there is a need to organise a formal hearing. During this process, the principal will listen to the presentations of the accuser, accused, witnesses of the accuser and witnesses of the accused. At the same time, the principal will be collecting evidence. This process is also known as a preliminary investigation. Preliminary means a proceeding that is carried out prior to doing something more fully (*South African concise Oxford Dictionary*, 2006:921). An investigation refers to carrying out an inquiry in a formal way in order to establish the truth (*South African concise Oxford dictionary*, 2006:607). Squelch (2000:24) maintains that a preliminary investigation is conducted in order to gather evidence that will help to decide whether an allegation is true. For the purposes of this study, the hearing of evidence refers to a systematic or formal inquiry that is carried out by the principal in order to establish whether there are sufficient grounds for a formal disciplinary hearing.

1.10.6 Deciding on action

For the purposes of this study, deciding on action means that, after the principal has conducted a preliminary investigation, he/she will decide whether there are sufficient grounds for a formal disciplinary hearing. If there are sufficient grounds, the formal hearing will be organised and, if there are not sufficient grounds, a formal hearing will not take place.

1.10.7 Notice of disciplinary hearing

The term 'notice' means "advance notification" (*South African concise Oxford dictionary*, 2006:794). For the purposes of this study, a notice of disciplinary hearing refers to advance notification of a disciplinary hearing. Learners and their parents must be informed in advance about when a disciplinary hearing will take place.

1.10.8 Learner disciplinary hearing

A hearing is “an opportunity to state one’s case” (*South African concise Oxford dictionary*, 2006:534). For the purposes of this study a learner disciplinary hearing is an opportunity that is given to a learner to state his/her case during the disciplinary process.

1.10.9 Adjourning and considering facts

To adjourn means to take a break from a proceeding with the intention of resuming it at a later stage (*South African concise Oxford dictionary*, 2006:13). For the purposes of this study adjourning means to take a break after a disciplinary hearing with the intention of resuming it again later.

1.10.10 Conveying a decision

Convey means to “communicate” (*South African concise Oxford dictionary*, 2006:252). For the purposes of this study, to convey a decision means to communicate the decision to the learner and his/her parents.

1.10.11 Appeal

According to the *South African concise Oxford dictionary* (2006:50), to appeal means to apply for a reversal of a decision made by a court. For the purposes of this study to appeal means to apply to a higher authority for the reversal of the decision of a lower authority.

1.11 RESEARCH DESIGN AND METHODOLOGY

1.11.1 Research approach

This study adopted a qualitative research approach. Struwig and Stead (2001:19) maintain that, if a qualitative research process is to be successful, it is essential that the researcher understands what he/she will be studying. Qualitative research should generate hunches or hypothesis that may be tested through more formal research. The reason for adopting this approach in this study was because the aim of the study was to acquire knowledge about how education managers understand and implement due process when disciplining learners. According to Leedy and

Ormrod (2013:139), qualitative research focuses on phenomena that occur and are studied in the real world. A qualitative approach involves capturing and studying the state of such phenomena. Qualitative researchers recognise that what they are studying is characterised by several dimensions and layers and they try to describe these dimensions and layers in all their facets.

1.11.2 Research paradigm

The ontological and epistemological stance of this study had serious implications for the “development of the research paradigm” used in the study (Huff, 2009:109). As stated in the ontological and epistemology section, this study was based on an interpretative paradigm. The purpose of an interpretative paradigm is to understand the setting for social action from the perspective of the participants.

1.11.3 Research design

The research design is the plan that should be followed when a research study is conducted. Terre Blanche, Durrheim and Painter (2006:37) maintain that, “in making a research design, the researcher must make informed decisions along the four different dimensions”, namely, “(1) the purpose of the research, (2) the theoretical paradigm informing the research, (3) the context or situation within which the research is carried out, and (4) the research techniques employed to collect and analyse data”. These four dimensions were taken into account in this study.

This study adopted a case study design. A case study is also termed idiographic research and is an in-depth study of an “individual, programme, or event that is carried out within a specific time” (Leedy & Ormrod, 2013:141). The reason for using the case study method in this research investigation was because it uses multiple sources and techniques in the data gathering process. In addition, it allows the use of the tools that I deemed suitable for the purposes of this study, namely, interviews and document analysis.

1.11.4 Data collection methods

I ensured that I mentioned the methods that I would use to collect data (information) (Struwig & Stead, 2001:40). Numerous data collection methods may be used;

however, it is essential to choose the most suitable methods for the purposes of the envisaged study. These methods may include, but are not limited to, questionnaires, observations, experiments, interviews, documents and suchlike. The data collection in this study took place in two phases. The first phase involved interviews and the second document analysis. Documents such as the code of conduct for learners, notices of hearings and South African court cases related to due process and learner discipline were analysed.

1.11.4.1 Interviews

The participants in this study were education managers. In other words, the participants were individuals who were in management positions, such as the heads of department (HODs), deputy principals and principals, and who were responsible for learner discipline in their schools. In view of the fact that this study was mainly exploratory, interviews were deemed to be the most appropriate approach. In order to obtain the required data or information, semi-structured interviews were conducted. The choice of this method is supported by Leedy and Ormrod (2013:154) who explain that the interviews in a qualitative study are often not as structured as the interviews that are conducted in a quantitative study. Researchers who use qualitative research make use of either open-ended or semi-structured questions. Semi-structured interviews enable a researcher to collect several responses to the set questions, thus allowing the researcher to collect more detailed information than may otherwise have been the case (Struwig & Stead, 2001:98). Each interview session lasted approximately 45 minutes.

1.11.4.2 Document analysis

Document analysis was used to collect the data from the documents that schools use as a basis for disciplining learners. When a researcher makes use of documents as a data gathering method, he or she focuses on selected written documents that will provide information on the phenomenon being studied. Written data sources may include published documents such as books and articles, as well as unpublished documents such as memoranda, agendas, letters, email messages, faxes and any other documents that are relevant to the investigation (Nieuwenhuis, 2007a:82). For the purposes of this study, I analysed documents such as codes of conduct for learners, notices of hearings, minutes of disciplinary hearings and court cases. The

reason for analysing these documents was to establish whether they contained any indication of any considerations of the right to due process or reflections on how the education managers understood and implemented due process. I also analysed South African court cases using case briefings.

1.12 RESEARCH SITE AND SAMPLING

Purposive sampling was used to select the participants. Qualitative researchers select the participants or objects that will provide the most information about what is being investigated (Leedy & Ormrod, 2013:152). This study was conducted in eight secondary schools in the Nkangala region of Mpumalanga province, including four urban schools, two township schools and two rural schools. The eight schools selected had all experienced serious misconduct on the part of their learners and, thus, the participants would be talking from experience. The participants included principals, deputy principals and two heads of departments who were involved in learner discipline. In other words, the respondents had participated in learner disciplinary processes that required due process. Purposive sampling was used in order to select information-rich participants. I relied on the school principals to select the participants because I believed that they would know who would be informed about issues that concerned disciplinary hearings in their schools.

1.13 DATA ANALYSIS

Content analysis was used as a strategy to analyse the data that had been collected through the document analysis and interviews. Nieuwenhuis (2010c:101) maintains that content analysis refers to the process of analysing documents such as “books, brochures, written documents, transcripts, news reports and visual media”. He further states that content analysis is sometimes used when the researcher is working with diaries or journals as examples of narratives or when the researcher is analysing the responses from the open-ended questions that were posed in surveys, interviews and focus groups interviews. For the purposes of this study, content analysis was used to analyse the interview transcripts, documents such as the code of conduct for learners, notices of disciplinary hearings, minutes of disciplinary hearings and court cases. Case briefings were used in the analysis of South African court cases that involved due process and learner discipline.

In phase one of the data analysis, the semi-structured interview transcripts were analysed in order to uncover themes and the conceptual framework was used to guide the analysis of the data. In phase two of the data analysis, I conducted the content analysis in order to analyse data that had been collected from the documents.

The data analysis conducted in the two phases helped with triangulation and to ensure the reliability and validity of the data. Thus, these two phases of data analysis helped to ensure thick, rich data (Van Vollenhoven, 2006:42).

1.14 ENHANCING THE QUALITY AND CREDIBILITY OF THE STUDY

It is accepted that, in most cases, the use of multiple methods of data collection, such as observation, interviews and document analysis, results in the trustworthiness of the data collected (Nieuwenhuis, 2010b:80). In this study, data sources such as individual semi-structured interviews and document analysis were used to validate each other by comparing the findings that resulted from one method with the findings that had resulted from the other method (Cohen et al., 2000:121; Vithal & Jansen, 2010:33).

The raw data were verified during informal conversations with the participants. Nieuwenhuis (2010c:113) maintains that, during an informal conversation with participants, the researcher is able to express his/her initial understanding of the studied phenomenon to the participants. This is done in order to verify whether the researcher's interpretation of what was said to him/her (researcher) was correct. Follow-up interviews with the participants were conducted telephonically. During the follow-up process some changes and additions were made. These were informed by the responses that were elicited during the follow-up interviews.

I took notes in a journal during the research and the data collection process. (Nieuwenhuis, 2010c:114). These notes assisted during the data analysis.

The questions were phrased in simple language to ensure that the participants understood them. When they did not understand, the questions were rephrased.

1.15 ETHICAL CONSIDERATIONS

I applied for permission to conduct research in the eight public high schools from the Provincial Department of Education. Before commencing with the data collection, I applied for ethical clearance from the Ethical Committee of the University of Pretoria. Once this clearance from the Ethical Committee had been received, I met with the willing participants prior to the interviews to explain the purpose and the importance of the study to them.

The participants were made aware of the following:

- *Voluntary participation in the study.* This implies that participants who wish to withdraw from a study may do so at any given time.
- *Informed consent.* This implies that participants must give their consent to take part in a study.
- *Safety of participants.* This implies that participants should not be at risk or be harmed during the research process.
- *Privacy.* This implies that what is said by the participants is kept as *confidential* as possible, while the participants must remain *anonymous*.
- *Trust.* This implies that participants will not deceive or betray the researcher during the research process or the published outcomes of the process.

It was possible that the school principals may have perceived a risk in allowing me to scrutinise their documents and the outcomes of the disciplinary processes. However, I assured them that all the information would be kept private and confidential. In addition, all the documents that I received from the schools, including photocopies, were returned after the study. As stated above, the actual names of the schools and the participants were not used in the report and, instead, pseudonyms were used. In addition, no person other than me was allowed to read the documents that I collected from the schools.

The participants were given letters of informed consent as part of the procedure to give them the choice of whether or not to participate in the investigation. This

consent was intended as a safeguard should anything have gone wrong both during and after the research study.

1.16 SIGNIFICANCE OF THE STUDY

As stated in the limitation of the study discussed above, existing empirical studies such as those conducted by Ishak (2004), Mokhele (2006), Lekalakala (2007), Joubert (2008), Mncube (2008), Van der Westhuizen and Maree (2009), Mncube (2009) and Maphosa and Shumba (2010) give little information on the concept of due process and the content of the right to due process, merely discussing them briefly in either a statement or short paragraph.

The Schools Act states that due process must be included in the code of conduct. This study investigated how school managers understand and implement due process in safeguarding the interests of learners during the disciplinary process. It is anticipated that the study will contribute to existing literature in the field of education law, which is lacking in terms of information on due process. The findings of this study will add to the body of scholarly knowledge on the disciplinary process as it relates to learners who have committed misconduct and that require due process.

This research study is intended to assist officials from the Department of Education in terms of the way education managers understand and implement due process when disciplining learners in schools. It is also hoped that the study will provide education managers with insights into their roles when disciplining learners. In addition, the study will offer recommendations on the way in which due process may be implemented during disciplinary proceedings.

1.17 OUTLINE OF THE STUDY

In light of the fact that the study has been divided into different sections, the outline of the chapters is as follows:

1.17.1 Introduction and orientation

Chapter 1 contains an overview of the study, starting with an introduction. This is followed by a discussion on the rationale for the study, statement of purpose, working assumption, problem statement, research questions, limitation of the study,

epistemological and ontological stance, research design and methodology, research site and sampling, data analysis, enhancing the quality and credibility of the study, and the significance of the study.

1.17.2 Literature review

Chapter 2 contains a review of the literature related to due process and the learner disciplinary process.

1.17.3 Research design and methodology

Chapter 3 of the study outlines the research design and methodology used in the study. As such, the chapter discusses the research approach, research paradigm, research design, data collection methods and research site and sampling used in the study.

1.17.4 How do education managers conceptualise and implement due process when disciplining learners in schools? Analysis of interviews, documents and selected court cases

Chapter 4 contains the presentation and discussion of the data that were obtained during the interviews and the document analysis. A conceptual framework was used during the data analysis. In this chapter, the findings of the study are compared with the research findings reported in relevant literature.

1.17.5 Conclusion and recommendations

This is the final chapter, which contains the conclusion to the study. The possible contribution of the study and recommendations for further research are discussed in this chapter.

1.18 SUMMARY

Chapter 1 provided an introduction and orientation to the study as a whole. It also provided the background against which the entire thesis is set. This study intends to provide an answer to the main research question, namely, How do education managers conceptualise and implement due process when disciplining learners in schools? In addition, the study intends to answer the two sub-questions, namely,

How do education managers understand due process? and How does their understanding of due process influence the way in which they discipline learners?

The research design and research methodology that were selected to answer these questions were briefly discussed above, while chapter 4 discusses aspects of the research design. As has already been stated the data were collected in secondary schools in the District of Nkangala in Mpumalanga province.

This introductory chapter also indicated that I obtained ethical clearance from the University of Pretoria, which allowed me to collect the required data. These data were then analysed using content analysis and case briefings.

The following chapter, chapter 2, contains the literature review. This review is informed by the conceptual framework used in the study.

CHAPTER 2

DUE PROCESS AND THE LEARNER DISCIPLINARY PROCESS

2.1 INTRODUCTION

This chapter is informed by the conceptual framework that was introduced in the first chapter of the study. The conceptual framework was used to conduct a detailed review of the existing literature on how education managers understand and implement due process during learner disciplinary proceedings. Education managers must be able to follow correct procedure as required by law. However, the fairness of the procedure alone cannot guarantee the fairness of the disciplinary process. For this reason, substantive due process should also be applied in all the steps of the process.

The focus of the literature review is on the concepts of due process and the learner disciplinary process. The chapter discusses the origin and meaning of due process as well as the types of due process, namely, procedural due process and substantive due process. It further discusses concepts that are important with regard to due process, such as the rules of natural justice, the differentiation of misconduct and serious misconduct, the limitation of rights and just administrative action.

In terms of the learner disciplinary process, this chapter focuses on aspects of disciplinary hearings such as examining evidence and deciding on an action; giving notice of a disciplinary hearing; conducting the disciplinary hearing; adjourning the hearing and considering the facts; conveying the decision made and the appeal process. However, the learner disciplinary process should not only focus on these steps, but should also encompass substantive due process. The discussion on these matters that follows includes a study of international, regional, foreign and local legislation and policies. In addition, the discussion also focuses on common law principles, case law and other literature relating to the aspects mentioned here.

2.2 ORIGIN AND MEANING OF DUE PROCESS: HISTORICAL ANALYSIS

This study focused on the understanding and implementation of due process in three countries, namely, England, the United States (US) and South Africa. The reason

why these three countries were selected was that due process originated in England, while the US was the first country to adopt the principle of due process after England. Accordingly, there is a significant amount of literature in the US about due process. The meaning of due process may be found in the literature on the Magna Carta in England and in literature from the US. I have also selected South Africa in order to ascertain the way in which the concept of due process is understood and implemented during learner discipline in secondary schools.

The concept of due process is not used in the field of law in South Africa. South African law uses the principle of just administrative action which was adopted in section 33 of the 1996 Constitution (RSA, 1996a). However, the 1996 Constitution (RSA, 1996a) does not mention the term 'due process' although the concept of due process is found in section 8(5) of the Schools Act (RSA, 1996b). Section 8(5) of the Schools Act stipulates that schools must ensure that, when they formulate their codes of learner conduct, they include provisions of due process. The purpose of including these provisions of due process is to guarantee the fairness of disciplinary proceedings as regards both the offender and the person who has been offended (RSA, 1996b). In addition, it is not only the SGB and education managers who must guarantee due process but, as section 9(3)(c) of the Schools Act also states, the "Member of the Executive Council must provide for due process by determining the notice" in the *Provincial Gazette* (RSA, 1996b).

Thus, due process originated in England, was adopted in the US and has been included in the Schools Act in South Africa. The aim of this study is to explain how education managers in South Africa understand and implement due process during learner discipline.

2.2.1 Origin of due process in England

The origin of due process may be traced back to 1215. Orth (2003:7) maintains that "[t]he idea that the government cannot deprive people of life, liberty or property without following the due process originates from the Magna Carta in 1215". The Magna Carta is also referred to as the Magna Carta Libertatum or the Great Charter of the Liberties of England (Orth, 2003:7). The Magna Carta has been translated into different languages but was originally issued in Latin in 1215. In 1219 it was

translated into vernacular French. It was reissued later in the 13th century in a modified version of the original (Orth, 2003:7). This chapter now discusses the background to the Magna Carta from 1215 in order to explain how the Magna Carta came to existence.

The Magna Carta may be traced back to 1215 when King John was the ruler of England. According to McIlwain (1914:35), the barons pressurised King John, refusing to follow him to the Crusades unless he received their petition that he accept and sign the Magna Carta. Drew (2004:1) maintains that the Church – archbishops, bishops and abbots – played an important role in drawing up the Magna Carta.

Earlier, during 1213, King John resolved a conflict between himself and Pope Innocent III. This led to exiled bishops being recalled to England. King John also accepted Stephen Langton as the Archbishop of Canterbury and compensated the Church because of the amount of force he (King John) was receiving (McIlwain, 1914:35–37, Drew, 2004:10). The Archbishop of Canterbury continued to pressurise King John until the King agreed to allow the barons to appear before him (Drew, 2004:11; McIlwain, 1914:37).

Meanwhile, at a council at St. Albans, it was proclaimed at the King's instance, that the laws of Henry his ancestor were to be observed by all in the realm, all evil laws were to be wholly void. But there was a more direct reference made to the charter of Henry I about this time, if Roger of Wendover is to be believed. He mentioned a current rumour that in August, 1213, just before starting northern barons, Archbishop Langton, at a council of magnates held in St. Paul, called some of them aside, and began to address them secretly, as follows: "You have heard", said he, "how at Winchester I absolved the King and compelled him to swear that he would do away with the bad laws and would restore the good laws, to wit, the laws of Edward, and cause them to be observed in the realm by all. Now also a certain charter of Henry first, King of England, has been found, through which, if you are willing, you may restore the liberties long lost to their former condition" (McIlwain, 1914:37–38).

In 1214, the opposition of the barons came to a head at a meeting. It was clear that it would be of no use to avoid dealing with the situation that had arisen.

The charter of Henry was again produced, and the barons swore that, if the King refused to grant the liberties they sought, they would renounce their fealty to him until he confirmed their demands by a charter over his seal. They agreed to present these demands to the King after Christmas and, meantime, to prepare for an armed conflict if he refused them (McIlwain, 1914:38).

After the New Year, a meeting at which the barons were to present their demands was held at the Temple (McIlwain, 1914:38). At this meeting, the barons were able to present their statement formally for the first time to the King. The King requested that they should give him time to consider their demands and this request was accepted. During the time that he requested “he reissued his charter of freedom of election to the Church, directed the oath of allegiance and fealty to be taken to him throughout the realm, and took the vow of a crusader, in order to brand all attack on him a sacrilege” (McIlwain, 1914:38).

“The barons marched in arms to King John in Brackley in Northamptonshire, where they presented their demands made up for the most part of the ancient laws and customs of the realm” (McIlwain, 1914:39). King John was not prepared to accept their demands. However, within a short space of time he was able to devise something important which would avoid conflict between him and the barons. In May 1215, he issued a letter in which he stated:

Be it known that we have conceded to our barons who are against us that we will neither arrest nor disseize them or their men, and we will not go upon them by force or by arms, except according to the law of the realm or pursuant to the judgement of their peers in our court until consideration shall be had by four whom we shall choose from our side and by four whom they shall choose from their side and the lord Pope, who shall be superior over them (McIlwain, 1914:39).

Orth and Newby (2013:65) agree that, in 1215, King John made a promise to his barons that he would no longer delay in granting to his people their rights and justice.

However, rather than accepting the king's promise, the barons decided to reject the promise and they marched on London. They were fortunate to be accepted by the citizens of London. Negotiations continued until, after a few weeks, King John finally agreed to accede to their demands (McIlwain, 1914:40). A meeting was arranged at Runnymede on 15 June 1215. At this meeting the barons presented their demands, which were written up in the Articles of the Barons. The Charter was drawn up and sealed (Linebaugh, 2008:24; Dyer 2010:479). Pati (2009:9) states in this regard: "In 1215 King John signed the Magna Carta, and its Chapter 39, which is considered to be one of the most influential clauses, the trial by jury became an implied right." Chapter 39 of the Magna Carta represented a dream come true for the Church which had hoped that one day it would be treated fairly (Drew (2004:11).



Figure 2.1: King John signing Magna Carta on June 15, 1215, at Runnymede, England

Source: © *Photos.com/Thinkstock (Encyclopedia Britannica)*

McIlwain (1914:27) mentions that "[t]he famous thirty-ninth chapter of King John's Charter of Liberties, or twenty-ninth of Henry III's re-issue of 1225, through which it was mainly known to our ancestors, is now regarded by some eminent historians not as a document of popular liberty, but rather as one of feudal reaction". According to Lord Irvine of Lairg (2002:1), the Magna Carta has made a contribution both as a statute and through the common law. Article 39 of the Magna Carta provides for due

process. The purpose of Article 39 of Magna Carta was to ensure that people who were arrested and imprisoned received fair treatment following a lawful judgement (McGehee, 1906:3–5; Orth, 2003:7; Turner, 2003:231; Linebaugh, 2008:28–29). The introduction of the Magna Carta represented an achievement for the people of England because, for the first time, they were able to contribute to the drawing up of laws that were also binding on the ruler himself (Douglas (1977:1). In addition, the Magna Carta conferred on the people a freedom that meant that they could not be punished without a lawful procedure being followed (Davidson, 2003:10).

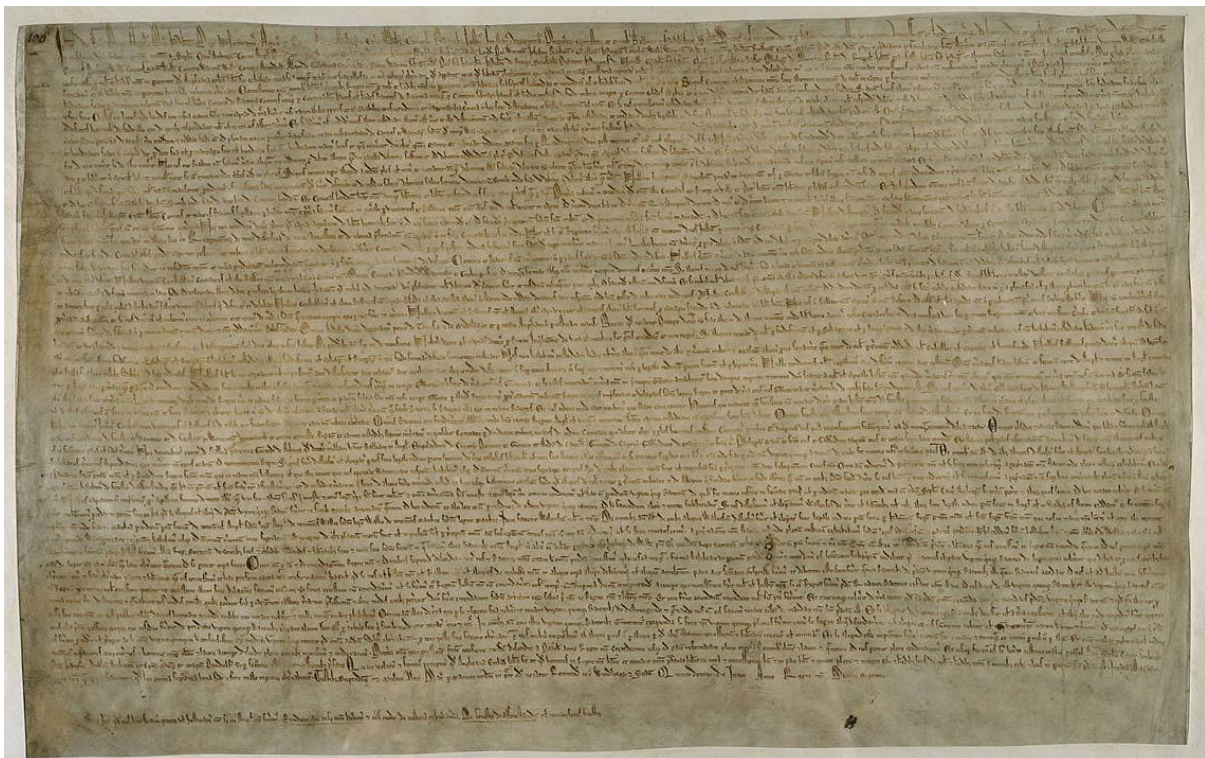


Figure 2.2: Magna Carta: Cotton MS Augustus ii.106, 1215.

The Magna Carta (originally known as the Charter of Liberties) of 1215, written in iron gall ink on parchment in medieval Latin, using standard abbreviations of the period, authenticated with the Great Seal of King John. The original wax seal was lost over the centuries. This document is held at the British Library and is identified as The British Library, Cotton MS. Augustus II. 106

In the Magna Carta, the phrase “law of the land” was used to guarantee the fairness of the disciplinary process. The phrase “due process of law” appeared in 1344 when parliament pressurised King Edward III to consider statutes that were intended to curb his excesses (Douglas, 1977:1). The statute provided that “no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor put to death without being brought to answer by due

process of law”. “The principles embodied in the Magna Charta were carried down through the centuries of English history” (Douglas, 1977:2).

During the seventeenth century, the Magna Carta was revived by Sir Edward Coke (Davidson, 2003:10). According to Sandefur (2011:287-288), Sir Edward Coke explained that the terms ‘law of the land’ and ‘due process of law’ were synonymous.

Common law principles of Roman origin such as *nemo iudex in propria causa* (no man should be a judge in his own cause), *res judicata* (a case decided should not be relitigated) and *audiatur et altera pars* (may the party also be heard) are key elements of due process (Pati, 2009:10).

2.2.2 Introduction of due process in the United States

This chapter examines the way in which statutes in countries other than England, especially the US Constitution, provide for due process. This chapter examines statutes that are passed by the US Government and the case law that has been decided in US courts. It further examines statutes and court cases of specific federal states in the US.

The reason for choosing the US is that the country has a long history of implementing due process. The reason for selecting specific federal states is that they have statutes and court cases that are relevant to due process, although this does not mean that other states do not have relevant statutes and court cases. These statutes and court cases provide rich information for the literature of this study. Kemerer and Walsh (1994:238), as cited by Joubert (2008:43), mention that the phrase ‘due process’ is found in American literature, that on the Fifth and Fourteenth Amendments to the US Constitution.

Scholars are in agreement that both federal due process and state due process were informed by the Magna Carta when the Fifth and Fourteenth Amendments were developed. The principle of due process in the Magna Carta has been used in several American laws and charters (Davidson, 2003:9) and due process is still applied in the US today. Davidson (2003:12) mentions that the concept of individuals’ right to due process of the law eventually found its way into the Bill of Rights in the US Constitution. The Fifth Amendment to the US Constitution states

that no person shall be “deprived of life, liberty, or property without due process of law (1791)” (Davidson, 2003:12), while the Fourteenth Amendment states that no state shall “make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any State deprive any person of life, liberty, or property, without due process of law (1869)” (Davidson, 2003:12).

In the US, the term ‘law of the land’ was used primarily in colonial charters and declarations of rights. The use of the term ‘due process’ then gained momentum although, in certain of the US Constitutions, both terms (law of the land and due process) are still used (Davidson, 2003:10–11). The purpose of introducing due process was to ensure that the government provide reasons for every disciplinary decision taken (Sandefur, 2012:285–286). The Fifth and the Fourteenth Amendments enshrine the most essential rights in the US, which ensure fair discipline.

2.2.3 Introduction of due process in South African schools

The concept of due process was introduced in schools in South Africa in 1996 when the Schools Act (RSA, 1996b) was passed by the South African parliament. Section 8(1) of the Schools Act provides that “every school must have a code of conduct that has been adopted by the SGB”, while section 8(1) of the Schools Act mentions that stakeholders such as learners (in high schools), parents and educators must participate in the process of “adopting a code of conduct for learners”. The most important phrase in the Schools Act stipulates that the code of conduct for learners must contain due process; this is provided for in section 8(5) of the Schools Act. In addition, according to section 9(3)(c) of the Schools Act (RSA 1996b), it is incumbent on the education authorities to consider due process when they are dealing with disciplinary matters.

2.2.4 Meaning of due process

The most common word that is used by many of the writers who suggest definitions for the term ‘due process’ is that of ‘fair’. Writers such Joubert (2008), Schimmel, Fischer and Stellman (2008) and Joubert and Prinsloo (2009) all use the word ‘fair’ in their meanings of due process. According to Joubert (2008:43), due process is not synonymous with our common law rules of natural justice although both ‘due

process' and 'the rule of natural justice' encompass the principle of procedural fairness. The law relating to rules of natural justice is explained in the paragraphs that follow. Due process refers to fair treatment following normal legal systems by ensuring reasonable and non-discriminatory disciplinary process (Joubert, 2008:43; *South African concise Oxford dictionary*, 2006:359; Schimmel et al., 2008:83; Joubert & Prinsloo, 2009:130).

In providing a clear meaning of due process, most writers go on to indicate that there are two types of due process. Alexander and Alexander (2005:435), Joubert (2008:130) and Dayton (2001), as cited by Davidson (2003:14), also indicate that there are two types of due process, namely, procedural due process and substantive due process. In order to gain a comprehensive understanding of the meaning of due process, it is important to understand the meanings of procedural due process and substantive due process. For the purpose of this study due process means fairness in the learner disciplinary process which should be procedural and substantive. The two types of due process are explained below.

Procedural due process

Procedural due process is the process whereby a fair method, steps and procedures are followed in deciding whether a person is guilty or not (Patterson, 1976:12; Rossow & Warner, 2000:198; Alexander & Alexander, 2005:435; Joubert & Prinsloo; 2009:130). The phrase 'due process', which is found in the Fifth and Fourteenth Amendments of the US Constitution, provides that procedures must be followed before a decision is made to take action that affects a person's life, liberty or property. Thus, this means that people who are suspected of misconduct must be given an opportunity to be heard before a decision or an action is taken. The US Supreme Court has assisted in defining the proceedings and processes that must be in place to ensure that the disciplinary process is fair (Gilg, 2010:21).

Procedural due process also requires that the institution that is intending to discipline an individual must provide notice for the hearing and that there must be a hearing conducted to protect the interests of the person concerned. In addition, an opportunity must be "given to an offender to respond" (Gilg, 2010:22).

Writers such as Purtle (1976:4), Russo (2001:19), Joubert and Prinsloo (2009:130–135) and Alexander and Alexander (2005:448) mention the basic elements of procedural due process. These elements include the hearing of evidence and deciding on action (preliminary investigation), notice of hearing (e.g. in the educational context, to learners and parents), opportunity to be heard and offer explanation, allowing witnesses to make presentations, impartial tribunals, right to information, right to representation, reasons for the decision, right to appeal and rule against bias (Oosthuizen & De Wet, 2011:58). Alexander and Alexander (2005:86) maintain that the due process of law assures fairness to a learner by listening to his/her side of the story before disciplinary sanctions are applied. A procedural due process that does not consider the above-mentioned basic elements will result in an unfair due process in term of procedure. This implies that it is essential that education managers understand these basic elements as this will ensure the proper implementation of due process. The above authors provide clear steps that should be followed during learner discipline in order to meet the requirements of procedural due process.

Substantive due process

According to Galligan (1996:172), substantive due process encompasses two main elements that should be taken into consideration. The first such element is substantive law, which means to serve the ends of justice; this should be maintained and correctly applied. Substantive law is closely linked to procedural law. The second element comprises limitations on what laws may be made, by whom they may be made and what content they may have.

With regard to what laws may be made, substantive due process requires that policies must be developed according to the legal requirements of the country concerned. For example, in the case of South African schools, section 8(1) of the Schools Act states that “following any applicable provincial law, the SGB must adopt a code of conduct for the learners. This process should allow the learners, parents and educators of the school to make contributions”. According to section 8(3), the Minister of Education may determine “guidelines for the consideration of governing bodies in adopting a code of conduct for learners (hereafter referred to as Guidelines)”. This should be done after he/she has consulted with the Council of

Education Ministers (RSA, 1996b). Section 8(5) of the Schools Act that stipulates a code of conduct must contain provisions of due process. The purpose of due process is to safeguard a learner by ensuring that his/her interests and the interests of the other party are protected by the SGB or tribunal. This implies that learners must be treated fairly during the disciplinary process. Section 9(3)(c) provides that Members of the Executive Council are required to draw up notices for their provinces that provide for “due process that safeguards the interest of a learner and any other party involved in disciplinary processes” (RSA, 1996b). Thus, the three documents mentioned by the Schools Act, i.e. the code of conduct for learners, the Guidelines (DoE, 1998), and the notice with provisions of due process, will be regarded as substantive documents if they are drawn up in accordance with the specified requirements.

In terms of the aspect of who may make laws, section 8(1) of the Schools Act, as stated above, comprises a good example. It states that the code of conduct should be adopted by the SGB and that “the learners, parents and educators of the school must be consulted”. Section 8(3) of the Schools Act provides that the Guidelines should be determined by the Minister and that he/she must consult with the Council of Education Ministers, while section 9(3)(c) stipulates that the notice with the provisions of due process should be determined by the Member of the Executive Council (MEC). This implies that these three documents (code of conduct for learners, the Guidelines [DoE, 1998], and the notice with provisions of due process) will not be regarded as substantive documents unless they are made by the people who have the authority to do so.

As regards the third aspect, namely, what content they may have, the “code of conduct for learners should be developed according to the Guidelines” (DoE, 1998). Thus, if the code of conduct for learners does not contain the content that is specified by the Guidelines (DoE, 1998), it will not be regarded as a substantive document. This was confirmed in the South African court case of *Antonie v governing body, the Settlers High School and Head, Western Cape Education Department*, 2002. It emerged from this court case that, when dealing with a code of conduct for learners, it is essential to consider the schedule issued by the ministry of education (DoE, 1998) in respect of the “guidelines for consideration by school

governing bodies in adopting a code of conduct for learners” (Joubert & Prinsloo, 2009:122).

Substantive due process requires that schools have clear rules and regulations. These are the rules and regulations that the school principal or SGB use to control learners in respect of the way in which they conduct themselves at school. Such rules and regulations may include regulating “fashion, for example, hair length, dress code or arm band” (Patterson, 1976:12). Substantive due process requires that the rules learners have to comply with must be fair and appropriate. In addition, disciplinary officials must provide a learner with clear reasons for the imposition of a certain sanction. Sufficient evidence must also be provided to convince the members of the disciplinary committee that the learner is guilty of misconduct so that appropriate disciplinary action may be taken (Alexander & Alexander, 2005:435, Joubert, 2008:45). In line with the opinions of the above authors, Paragraph 13.2 of the Guidelines states that collecting and providing evidence to the disciplinary committee is the responsibility of the principal or his/her delegate (DoE, 1998). According to Rossouw and Warner (2000:199), substantive due process involves meeting fair standards during the disciplinary process. It is essential that schools set clear standards so that everyone is aware of what is expected of them. These fair standards also assist the disciplinary committee in making decisions. If a school is to meet the standard of fundamental fairness schools have to have clear rules in place. The school rules for behaviour must be written in such a way that they describe those offences that may lead to suspension or expulsion. In addition, the rules must be reasonable.

The age of the learners also plays an important role in the disciplining of learners. For example, the disciplinary committee may not discipline a Grade 1 learner in the same way as it would discipline a Grade 12 learner. This is in accordance with Joubert’s (2008:45) statement that, when a school takes action against a learner who is allegedly guilty of misconduct, sanctions must be appropriate to both the misconduct itself and the age of the learner. I agree with Joubert (2008:45) with regard to considering age when disciplining learners. My argument or support is based on the general principle that guides all proceedings, actions and decisions by any state organ in a matter concerning a child. This general principle is found in

section 7(1)(g)(i) of the Children's Act which provides that when any action is taken against the child the best interests of the child standard should be considered based on factors such as age, maturity and stage of development (RSA, 2005).

In addition, it is essential that the type of punishment that the disciplinary committee decides to mete out is not too harsh for the misconduct. It is for this reason that a code of conduct for learners must clearly specify the various levels of misconduct and the applicable sanctions. Thus, substantive due process means that, if a school intends to limit the rights of learners, the school must have a valid reason for doing so.

In the educational context, substantive due process refers to the process whereby the rights of the learners are protected against certain actions schools may take, regardless of the fair procedures that are followed. Schools may also make use of two tests that are used by the courts to determine substantive due process claims. The first such test requires that an offender (learner) must demonstrate that he/she has violated specific rules. For example, the learner must demonstrate that he/she brought drugs into the school. As regards the second test, the offender (learner) must demonstrate that the school's conduct shocks the conscience.

The disciplinary action will be regarded as substantively fair if it meets the following requirements (adapted from Joubert & Prinsloo, 2009:213):

- the learner was aware of the rule broken by him or her
- there is a clear reason for the disciplinary action
- there is consistency in applying the rules to all learners who have committed
- the same misconduct
- there was a consideration of mitigation and aggravating factors
- there was sufficient proof of the misconduct
- the sanction imposed on the learner is appropriate and suitable for the
- misconduct that was committed.

The above-mentioned requirements are used in labour disputes but can also be used by education managers during learner discipline.

In summary, the literature discussed above provides that substantive due process must be based on clear policies, rules and regulations that have been correctly formulated and the learners must be aware of them. When learners are disciplined, they should be given valid reasons, sanctions must be appropriate, their rights must be protected and the limitation of rights must be done according to section 36 of the Constitution.

Relationship between procedural due process and substantive due process

It is not possible for the concepts of procedural due process and substantive due process to work in isolation, as they are related to each other. Education managers are required to use both of these two concepts simultaneously when learners are disciplined. Sandefur (2012:329) maintains that procedural due process involves substantive steps or rules that should be followed. This would mean that it would be impossible to assert that the procedural due process only was followed but that substantive due process was not applied. In a disciplinary hearing, the procedural due process must be integrated with substantive due process, which may, for example, include the right to cross-examine witnesses, the right to be represented by an attorney and the right not to be compelled to testify against oneself. The right to a fair trial is also a good example of the substantive component of the broader procedural right.

Rules of natural justice

The rule of natural justice is an important concept with regard to the understanding and implementation of due process. A rule of natural justice is about fair decision-making procedure. It not only ensures that the decision is fair, but also emphasises the fact that the decision-making process must be fair. Two rules, namely, the 'hearing rule' and the 'bias rule', are the primary rules of the principle of natural justice. The hearing rule guarantees that people who will be affected by a proposed decision must be given an opportunity to express their views to the decision maker. The bias rule provides that the decision maker must be impartial and must have no personal stake in the matter to be decided (Commonwealth, 2007:1).

The common law rules of natural justice have crystallised into two concepts, namely, *audi alteram partem* and *nemo iudex in propria causa* (Kleyn & Viljoen, 2011:180; Shauer, 1976:48).

Many authors such as Oosthuizen (1998:45), Burns (1999:169), O'Brien (1999:276), Roos and Oosthuizen (2003:52), Bray (2005:136), Joubert (2008:44), Prinsloo (2009:110), Sivagnanam (2009:4, 5), Kleyn and Viljoen (2011:180) and Oosthuizen and De Wet (2011:58) have provided a great deal of information about *audi alteram partem*. They state that *audi alteram partem* means that a person who is charged with misconduct and who is supposed to appear at a disciplinary hearing should be afforded a proper opportunity to state his/her side of the story before a decision may be taken. This means that an individual must be given adequate notice of the charge and that he must be given a proper hearing.

In addition to the above, Bray (2005:136), Burns (1999:169), Roos and Oosthuizen (2003:52) and Kleyn and Viljoen (2011:180) maintain that *audi alteram partem* means that the accused (learner) must be informed in detail about the allegation and the charges against him/her, so as to enable him/her to defend him/herself properly. Moreover, the administrator must provide reasons for any decision taken.

Sivagnanam (2009:4, 5) mentions that in *audi alteram partem*, the accused is entitled to dispute his/her opponent's case, to cross-examine his opponent's witnesses and to call his own witnesses and give his own evidence in front of the tribunal. The principle of *audi alteram partem* forms part of the substructure for statutes such as the PAJA.

In view of the above definitions and for the purposes of this study, *audi alteram partem* is taken to mean that no learner should be condemned without being given a chance to state his/her side of the story.

Another important aspect of the rule of natural justice is the impartiality of a tribunal. Both *nemo iudex in propria causa* and due process emphasise that nobody who has an interest in the case should participate in the hearing process because it might result in a biased decision (Oosthuizen & De Wet, 2011:58). The *nemo iudex in propria causa* principle will now be discussed in detail.

The principle of *nemo iudex in propria causa* was applied in the court case of *Michiel Josias de Kock v the Head of the Department of Education and other, Province of Western Cape* (1998). In this case, Judge Griesel found that a gross irregularity had taken place in that the said persons (head of the school, Mr Edwards and the deputy head, Mr Bester) had simultaneously acted as “witness, prosecutor and judge”. Judge Griesel also stated that one of the important requirements for any fair trial is that “the presiding officer of a tribunal should be impartial”. The Romans called this common law principle *nemo iudex in sua causa*. This implies that the said persons in the court case cited above should not have played the three roles simultaneously.

According to Burns (1999:172) and Oosthuizen and De Wet (2011:58), *nemo iudex in propria causa* is a common law principle that is related to the *audi alteram partem* rule. Moreover, these two concepts (*audi alteram partem* and *nemo iudex in propria causa*) should not be separated when disciplining learners.

O’Brien (1999: 27), section 6(2)(a)(iii) of the PAJA (2000a), Bray (2005:136) and Oosthuizen and De Wet (2011:58) state that *nemo iudex in propria causa* prevents bias or prejudice while guaranteeing fairness in disciplinary proceedings. In the context of school disciplinary hearings, *nemo iudex in propria causa* ensures that the administrative organ must be neutral, fair and unbiased with regard to learner discipline.

Joubert and Prinsloo (2009:110), Oosthuizen and De Wet (2011:58) and Tabone and Cassar (2012:21) all state that the *nemo iudex in propria causa* principle means that nobody can be a judge in his or her own case, while Roos and Oosthuizen (2003:56) express the opinion that this concept means that “nobody is fit to act as a judge in his own case”.

According to Oosthuizen and De Wet (2011:58), factors that may cause a hearing process to be unfair and that should be taken into account include financial factors, family or friendship ties and a history of conflict between the accused and a member(s) of the disciplinary committee. If these factors are not addressed they may influence the tribunal and result in an unfair decision.

Bray (2005:136) has the following to say with regard to this rule (*nemo iudex in sua causa*):

Basic questions may be asked to determine whether the administrator is biased: for example, who is the committee hearing the case, which is the presiding chair, does the committee or chair have any personal or pecuniary interest in the case? It is not enough to show there was, in fact, no bias or partiality in the process: the criterion is that no reasonable person would have had a perception or suspicion of bias, or, a reasonable person would have expected such a person to recuse himself/herself from the hearing. Finally, the case must not be prejudged, meaning, for example, that the principal cannot tell the committee before the hearing has commenced to suspend the learner.

Burns (1999:172) lists the following elements of the rule (*nemo iudex in sua causa*) that are worthy of mention here, namely, actual bias, apparent bias and personal interest. Actual bias means that justice must be seen to be done. The test which is applied in this regard is an objective test, and the administrative act will be declared invalid if a person involved is found to have an interest in the matter. Apparent bias has to do with persons who have been appointed to an administrative tribunal because of their professional or personal involvement. This kind of involvement does not, however, constitute bias. With regard to personal interest, decision-makers must not have a personal interest in the outcome of the decision of the disciplinary hearing (Albuquerque, Burke, Williams, Sorensen & Speers, 2012:3).

Kleyn and Viljoen (2011:180) are of the opinion that the *nemo iudex in sua causa* principle ensures fair hearings, as it implies that tribunals must be free from any discriminatory motives arising from race, religion and so on. This principle emphasises that no member of the tribunal may have either a personal or a financial interest in the disciplinary matter in question.

Nemo iudex in propria causa is related to due process, as both concepts require that anyone who has an interest in the case should not be involved in any decision regarding the incident that led to it. There are, however, no empirical studies have been conducted in South Africa into the way in which *nemo iudex in propria causa* relates to due process.

In summary, *nemo iudex in propria causa* provides that any person who is part of the disciplinary committee should have no interest in the case, must be neutral and fair and must not take sides. He/she should avoid being biased and should not be a judge in his/her own case. He/she cannot play the role of witness, prosecutor and judge simultaneously. In addition, he/she must be free from discriminatory motives arising from race, religion and so on.

Differentiation of misconduct and serious misconduct

In order for due process to take place, a learner must have committed misconduct. According to section 9(3) of the Schools Act (1996), for a hearing to take place and due process to be implemented the misconduct must be serious. It is therefore imperative for education managers to understand the difference between misconduct and serious misconduct. Education managers' have to understand the difference between misconduct and serious misconduct in order to prove substantively that a learner was aware of the rule and there is sufficient proof of misconduct. During the disciplinary process, procedural due process should be integrated with substantive due process by proving that the learner knows what constitutes serious misconduct (Joubert & Prinsloo, 2009:213).

Misconduct is unacceptable or improper behaviour (*South African concise Oxford Dictionary*, 2006:743). In terms of learner discipline, misconduct refers to unacceptable or improper behaviour of learners. In South Africa, and in most other countries, the Constitution does not make stipulate what constitutes misconduct and serious misconduct. However, this is indicated in some of the legislation, including sections 17 and 18 of the Educators Employment Act, 1998, which has nothing to do with learner discipline. On the other hand, the Schools Act does not state what behaviour constitutes misconduct and what constitutes serious misconduct. It merely provides for the way in which serious misconduct should be determined (RSA, 1996).

Misconduct that is not serious is dealt with in *Alternatives to corporal punishment, the learning experience: A practical guide for educators* that was published by the Department of Education in 2000. This document provides which behaviour constitutes misconduct and which constitutes serious misconduct. According to this

document, there are two levels of misconduct. Level 1 misconduct take place in a classroom, while level 2 misconduct comprises the breaking of school rules. Misconduct that falls under these two levels is not serious and cannot lead to suspension or expulsion, unless they are repeated.

As stated above, section 9(3)(a) of the Schools Act, 1996, states that the MEC in the province must determine by notice which behaviour by learners at public schools may constitute serious misconduct in his/her province. This should be published in the *Provincial Gazette*. This published notice will serve as a guideline for schools when developing their code of conduct for learners. Section 9(3)(b) of the Schools Act provides that disciplinary proceedings to be followed for learners who have committed serious misconduct should also be determined by the MEC. Section 9(3)(c) mentions that the MEC must also determined the provisions of due process that should be considered during the disciplinary proceedings. The above provisions provide that due process should be followed when learners commit serious misconduct, but they delegate responsibility for determining what constitutes serious misconduct to the MEC of each and every province. Some of the MECs for Education, including Gauteng, Western Cape, Eastern Cape, have developed provincial notices pertaining to learner discipline, as required by section 9(3) of the Schools Act 1996.

Another document that assists school to differentiate between misconduct and serious misconduct is the guidelines for the consideration of governing bodies in adopting a code of conduct for learners. Section 8(3) of the Schools Act states that the Minister of Education may work together with the Council of Education Ministers to determine this guideline. *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners* (Department of Education, 1998) have been developed and provide for fifteen offences (serious misconduct) that may lead to the suspension of learners from school. According Paragraph 11 of the Guidelines (1998), provincial regulations must be consulted in the compilation of a list of offences which may lead to suspension of a learner.

Limitation of rights

Learners' rights are not absolute and, thus, they can be restricted. This statement is supported by Meintjes-Van der Walt et al. (2011: 204), who state that it is not practically possible for human rights to be absolute; therefore the limitation of rights is a justiciable infringement (Currie & De Waal, 2005:164). The limitation of rights is part of due process because it has to be done in a fair way. During the disciplinary process where due process is applied, some of the rights may be limited, especially where learners have committed serious misconduct. This may happen where a learner is suspended from school. The limitation will not be unconstitutional if it takes place for a reason that is accepted as a justification for limiting rights based on values such as human dignity, equality and freedom (Joubert, 2009:42). Limitation of rights during a learner disciplinary process should be procedurally and substantively fair. This is why there are clear procedures to be following and factors that need to be considered to ensure substantive fairness when limiting a right. According to Bray (2005:30) and Oosthuizen and De Wet (2011:28–29), the limitation of rights may be done by declaring a state of emergency (s 37 of the Bill of Rights); the formulation of a right may itself imply limitations; and in terms of the law of general application in section 36 of the RSA Constitution. It is important for education managers to understand how the limitation of rights should be implemented during the disciplinary process. For instance, in terms of section 3 of the Misconduct of Learners at Public Schools and Disciplinary Proceedings for Gauteng (2000) (hereafter referred to as *Gauteng learner disciplinary regulations*), disciplinary action should be instituted against a learner who commits a serious misconduct that infringes other learners' and staff members' rights to a safe environment.

It should be noted that if the SGB decides to limit a learner's right to education by expelling them from school and the Head of Department (HoD) of the provincial department of education rejects this sanction, in terms of section 9 of the Schools Act the HoD is obliged to impose a suitable sanction or to remit the matter back to the SGB to impose an alternative sanction. In the case of *George Randell*, the Judge held that the decision of the SGB to limit the learner's rights by expelling him from school cannot take place without the approval of the HoD. The HoD must respond to the recommendations of the SGB as soon as possible (within 14 days) and provide

his/her decision based in section 9 of the Schools Act (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par. 9). This reiterated the fact that the HoD can alter the decision of the SGB to expel a learner. The judgment in the *George Randell* case is analysed in chapter 4 of this study.

Right to just administrative action

The right to just administrative action is related to due process. Section 33(1) of the Constitution requires administrative action to be lawful, fair, reasonable and procedurally fair. Both due process and just administrative action ensure that the learner disciplinary process is fair in terms of the procedure and that there is substance (valid reason) for any decision that is taken during learner discipline. Section 33(2) provides that learner should be provided with reasons for any decision that is taken by the disciplinary committee. These rights integrate procedural due process and substantial due process.

2.3 LEARNER DISCIPLINARY PROCESS

Due process is very important during the learner disciplinary process and, thus, a sound understanding of the learner disciplinary process is vital for all those who are involved in learner discipline. If the persons who do the disciplining do not understand both due process and the learner disciplinary process, the disciplinary proceedings will in all likelihood be unfair. In other words, it is essential that the educators, members of the SMT and the members of the SGB all understand both due process and the learner disciplinary process. The learner disciplinary process, which is the focus of this study, includes the hearing of evidence and deciding on action (preliminary investigation); notice of hearing; disciplinary hearing; adjourning and considering the facts; conveying the decision and appeal. Education managers should make sure that when implementing the disciplinary process, procedures are fair and that whatever they do is substantively fair. It does not help to follow a fair procedure without integrating it with facts, reasons and evidence.

With regard to each step (stage) of the learner disciplinary process, this study reviewed the universal and regional treaties and conventions; foreign (American) and local (South African) statutes; case law, common law, empirical studies and other

literature relating to due process. The main focus was on aspects that may affect learners during the disciplinary process.

The importance of due process in learner discipline becomes more evident when one realises that due process is protected internationally (universally), regionally, and locally. According to Fassbender (2006:6), due process has been recognised universally in order to protect individuals from unfair treatment by disciplinary tribunals, courts, and so forth, and thus universal and regional human rights instruments have been developed in order to guarantee the right to due process.

Schools, including schools in South Africa, may be regarded as organs of the state that promote the right to due process (Joubert & Prinsloo, 2009:29, Beckmann & Prinsloo, 2009:177). Beckmann and Prinsloo (2009:177) also highlight that, in terms of “section 239 of the Constitution, SGBs are organs of state”. These authors (Beckmann & Prinsloo 2009:172) also explain that, because the “public school is an organ of state”, it is incumbent on the SGB to perform its tasks in accordance with the requirements of the Schools Act.

The most common terms used in treaties and conventions to refer to disciplinary committees include courts, tribunals and forums. In addition, treaties and conventions use concepts such as crime or criminal offences for inappropriate behaviour, offences and misconduct, while the concept of criminal charges is used to refer to the charges brought against or punishment imposed on wrongdoers. This study used the terms ‘tribunal’ and ‘disciplinary committee’ (Schools Act, 1996 & Guidelines, Department of Education, 1998).

2.3.1 International and regional treaties, conventions and declarations providing for a fair disciplinary process

A “treaty is a formal agreement between different states” (*Concise Oxford dictionary of current English*, 1990). In this study the term ‘states’ is used to refer to different continents or countries which come together to make an agreement. In most cases, these countries have joined the United Nations in order to enter into either a regional or a worldwide treaty. A treaty is a binding instrument that includes laws and that has been concluded between “international entities which are states or organisations” (*The concise Oxford dictionary of current English*, 1990; United Nations Treaty

Collection, 1999). On the other hand, a convention is a formal agreement between different states. Thus, a convention is similar to a treaty. A convention enables participation by the universal community or by several states (*The concise Oxford dictionary of current English*, 1990, United Nations Treaty Collection, 1999). The term 'declaration' is used for various international instruments. The human rights that are included in various international declarations are not intended to be legally binding; with the term 'declaration' being used expressly to indicate that the parties wish to declare certain desires but not to bind each other (United Nations Treaty Collection, 1999). "However, while the 1948 Universal Declaration of Human Rights, for example, was not from the onset intended to be binding, its provisions started to gain binding character as customary law" (United Nations Treaty Collection, 1999).

There are several major universal and regional treaties and conventions (instruments) that mention the human rights that should be taken into account during the disciplinary process. This chapter discusses the instruments that discuss fair disciplinary processes. The major universal treaties on which this study focuses include the Universal Declaration of Human Rights (UDHR) (United Nations General Assembly (UNGA), 1948), the International Covenant on Civil and Political Rights (ICCPR) (UNGA, 1966), and the Convention on the Rights of the Child (CRC) (UNGA, 1989).

The major regional human rights covenants which are the focus of this study include the European Convention on Human Rights (ECHR), the Council of Europe (CE) (1950), the American Convention on Human Rights (ACHR), the Organization of American States (OAS), 1969, and the African Charter on Human and People's Rights (ACHPR) (OAU, 1981).

This study reviewed the universal and regional treaties and conventions, foreign (US) and local (South African) statutes and policies, case law, common law, empirical studies and other literature in order to highlight how they provide for due process during learner discipline. The study refers to international law because South Africa is a member of both the United Nations and of the African Union (AU) and, thus, it is essential that learner discipline in the country should meet international and AU standards. According to section 39(1)(b–c) of the South African Constitution, South Africans who are responsible for meting out discipline "must

consider international law and may consider foreign law when interpreting the Bill of Rights”.

2.3.2 Constitutions, statutes and policies that inform learner discipline

The constitutions, statutes and policies of various countries all inform the way in which schools should practise learner discipline. This section of the study examines how South Africa and the US are required to discipline their learners.

2.3.2.1 South African Constitution, Acts (statutes) and policies that provide for learner discipline

Constitution of the Republic of South Africa, 1996

In South Africa, issues relating to learner discipline are informed by the Constitution of the country. Section 2 of the 1996 Constitution states: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations are imposed by it must be fulfilled.” As explained before, one of the obligations that are relevant to this study and that should be fulfilled is expressed in section 33(1) of the Constitution, which stipulates that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”. This right emphasises the need for the learner disciplinary process to adhere to legal principles. In other words, there must be valid reasons for any decisions and the correct procedures must be followed.

South African Acts (statutes) that provide for learner discipline

Acts (statutes) such as the Schools Act, the Promotion of Administrative Justice Act (No. 3 of 2000) (hereinafter PAJA, 2000a) and the Promotion of Access of Information Act 2 of 2000 (hereafter PAIA, 2000b) also provide for due process during learner discipline.

The Schools Act is an essential piece of legislation that guarantees fairness. As already stated, section 8(5) of the Schools Act stipulates that SGBs must adopt codes of conduct for learners that contain provisions for due process (RSA, 1996b). Section 9(3)(c) of the Schools Act requires that the MEC for Education must determine by notice in the *Provincial Gazette* provisions of due process (RSA, 1996b). Section 3 of the PAJA stipulates administrative action that affects any

individual must be impartial (RSA 2000a). Section 39(1)(iii)(ee) of the PAIA states that the person who is responsible for safeguarding the information of an institution must not allow access to documents if the disclosure of the documents will affect the fairness of the disciplinary proceedings (RSA 2000b).

2.3.2.2 US Constitution, statutes and policies that inform learner discipline

US Constitution

The US is a federal republic. As such, it includes fifty states and the federal district known as Washington DC (US Constitution, 1787, Arnold 2004:21). According to Arnold (2004:3), the US is defined as a constitutional federal republic. He goes on to define the following three concepts, namely, constitution, federal and republic, explaining that in the context of the US, ‘constitutional’ means that the US government is based on a constitution, which is considered to be the supreme law in the US. ‘Federal’ in this context implies that the US is governed by both a national government and the governments of the fifty states, while the term ‘republic’ refers to a form of government in which the power is held by the people and representatives are elected to exercise that power. Arnold (2004:3) further mentions that the US Constitution provides for the structure of both the federal government and the state governments. The Constitution also explains how the federal and state governments are limited in terms of power, while it provides “guarantees of a republic form of government to each state. It guarantees a government that is run by popularly elected representatives of the people” (Arnold, 2004:22).

The fact that the US Constitution is the supreme law of the land means that the state constitutions and all the other laws that are promulgated in the US may not contradict what is contained in the US Constitution (Ashcroft & Ashcroft, 2008:5). The various states in the country all have their own constitutions. According to Mousin (2001:1), the state constitutions in the US have been used to govern both colonies and states of America for a period of more than three hundred years. As the preceding information on South Africa and the US shows, both countries recognise their Constitution as the supreme law of the country. The supremacy of the Constitution applies to most if not in all countries.

There is no education provision in the US Constitution. However, every state constitution safeguards the right to education (Russo & Mawdsley, 2002:4.3–4.4). Russo and Mawdsley (2002:4.28) further state that, even where students enjoy a right to education in terms of their state constitution, this may be limited when the right is outweighed by a school's interest in protecting its students, staff members and the property of the school. As mentioned previously, Russo and Mawdsley assert that the aim of this limitation is to guarantee the safety of people and to prevent disruptions in schools.

As explained earlier in this chapter, the US Constitution provides for due process. Both the Fifth Amendment (1791) and the Fourteenth Amendment (1866) to the US Constitution provide guidance to schools on the issue of due process when disciplining learners. According to the Jefferson County Board of Education (2013:32), as guaranteed by the US Constitution, a learner's right to an education will not be limited without due process (procedural and substantive due process) being followed.

Acts (statutes) providing for due process

According to Ashcroft and Ashcroft (2008:5), laws that have been already been enacted by the legislature are known as statutes. In this regard, the legislative bodies of states are given the power to enact state statutes. The Kentucky Revised Statutes (KRS) 158:150(5) are statutes that stipulates that a learner should not be suspended from the common schools (elementary or secondary school of the state supported in whole or in part by public taxation) without due process being followed. This means that due process should precede any suspension in the common schools. However, the statute provides that a student may be suspended if there is a need for immediate suspension in order to protect other students, staff members and property or to avoid disturbances in the smooth running of the school. In such cases, procedural and substantive due process should follow the suspension as soon as possible, that is, not later than three school days after a learner has been suspended. School districts are given the responsibility in states to directly deliver education to students within their geographical boundaries. In view of the fact that this study has focused on Kentucky, one of the districts on which the study will focus is the Jefferson County Public Schools District.

There is a similarity between Kentucky and South Africa with regard to the application of the limitation of rights in that in both Kentucky and South Africa a learner may be suspended if he or she is threatening the safety of other learners and staff members. In the case of South Africa, the disciplinary hearing must take place within seven school days after the suspension of the learner (s 9(1B) of the Schools Act) (RSA, 1996b).

Policies providing for due process

US school districts are given the power to develop their own codes of conduct for learners. The Jefferson County Public Schools (District) has developed a Code of Acceptable Behaviour and Discipline and a Student Bill of Rights for all the schools that fall under the District. These documents both provide for due process, indicating that a learner has the right to due process if he/she has been accused of committing a violation in terms of this Code. Due process that includes both procedural and substantive due process must be followed before a learner is suspended. If an immediate suspension is necessary in order to protect other learners, staff members and property and to prevent further disruptions in the smooth running of school activities, then due process should follow within three school days of the suspension (Jefferson County Board of Education, 2013:10).

2.3.3 Case law

Case law (also referred to as judicial precedent) comprises the “rulings handed down previously by various courts in specific cases” (Joubert & Prinsloo, 2009:21). According to Oosthuizen and De Wet (2011:59), case law refers to “court case rulings”. Courts are important institutions that interpret law for us, including cases based on due process. “The judiciary, which is made up of the constitutional courts, the supreme court of appeal, the high courts and magistrates’ courts, determines and resolves disputes by determining what the law is and how it should be applied to a particular dispute” (Joubert & Prinsloo, 2009:3). These courts are explained in detail in the coming sections of this chapter. When courts determine and resolve disputes, they provide a ruling. This ruling helps in the understanding of how to interpret and apply legal provisions. Case law is also important in education as it helps in the interpretation and application of legal provision in educational law,

especially as regards learner discipline. There are several pieces of case law that refer to due process, especially in the US. This case law offers guidance on the implementation of due process. The following sections discuss the doctrine of precedent and the development of case law.

2.3.3.1 The doctrine of precedents

The countries in this world all have different legal systems and, thus, the precedent system is applied differently in various countries. This section discusses the meaning of the doctrine of precedents and its application. In addition, the section explains how the meaning and application of the doctrine of precedents relate to the understanding and implementation of due process during learner discipline.

The doctrine of precedents (*stare decisis*) holds that decisions that have been taken by the court previously (previous judgements) may influence later judgments. This means that courts can stand by previous decisions (Oosthuizen et al., 2002:78; Oosthuizen & Roos, 2003:65). In other words, once a decision has been made by a higher court, such a decision will be binding on that court and must be followed by all lower courts until such time as it has been altered by a higher court.

Ratio decidendi (reason for the judgment) plays an important role in the creation of the principle of precedence and it is used and followed in informing future judgments. The hierarchical structure of a country's courts helps in understanding how the principle of precedents is applied (Oosthuizen & Roos, 2003:65). Not all the courts in the hierarchical structure of a particular country have the power to create precedents through their court cases and it is only the highest court in the hierarchy that can do that.

Thus, simply stated, a precedent is a decision that has been taken in the past and that informs how cases of the same nature should be handled in the future. In other words, it becomes the yardstick for resolving similar cases in the future. Landes and Posner (1976:2, 3) explain that a decision that was made before provides a reason for making the same decision in similar cases in the future. Thus, case law may constitute a rule that has the same power as a legislative rule. Legal precedents may be regarded as the rules of law which are made by judges and, thus, they are taken as inputs made by judges in the laws of a country.

Lower courts are bound by “their own decisions and by the decisions of the higher courts. Higher courts are bound by their own earlier decisions” (Ambrasiené & Cirtautiené, 2009:63). Higher courts are not bound by the decisions of lower courts. The current constitutional interpretation of the statutory law of civil law countries makes it possible to state that judicial precedents are sources of law for the purpose of ensuring the uniform and predictable practice of application and interpretation of law. Regardless of the fact that the principle of *stare decisis* in common law countries is still not an established law in civil law countries, these days court practices in these countries are unified in that lower courts defer to the interpretation and application of laws by higher courts. However, high courts are especially careful about the correction of court practice, changing it only on serious grounds and on the basis of detailed argumentation (Ambrasiené & Cirtautiené, 2009:63).

According to O’Connor (2012:11), legislation is the main source of law in civil law countries. This legislation includes various “codes, statutes and ancillary legislation”. The reason for developing common law principles was to resolve the disputes that were taking place rather than to create legal principles. Common law developed from judges and thus this development was from the bottomup. Civil law, on the other hand, has been developed top-down by parliament (O’Connor, 2012:13). Friedman (1985:127–133) explains that “legal historians suggest that justices in the 19th century responded to the crisis of legitimacy by strengthening the norm of *stare decisis*, a legal norm inherited from English common law that encourages judges to follow precedent by letting the past decision stand”.

O’Connor (2012:8) lists some of the countries that are civil law countries and those that are common law countries, mentioning that: “France and Germany share the same legal tradition (i.e. civil law), as do Canada and Sierra Leone (i.e. common law); however, France and Germany, and Canada and Sierra Leone, have variations in how their individual legal systems operate”. O’Connor (2012:10, 11) further explains that the civil law tradition extended beyond Europe. During the colonial era, European countries brought their legal systems with them to countries in South America, Africa, the Middle East and Asia. Thus, common law principles spread to countries such as Australia, Canada, South Africa, New Zealand, India, Zimbabwe, Ghana, Sierra Leone, Gambia, Nigeria, Somalia, Tanzania, Uganda, Kenya, Zambia,

Botswana, Malawi, and many Caribbean islands (O'Connor, 2012:11). On the other hand, in civil law countries uniformity and predictability of court practice is achieved based on the principle of *jurisprudence constant* and not by a legislative provision that demands that the courts should follow previous judicial decisions (Ambrasiené & Cirtautiené, 2009:63).

Maltz (1988:372) states that the decision in a certain case (the precedent case) controls the result in all future cases that are similar to the precedent case. Maltz (1988:386) further mentions that, when the court is interpreting a statute or act, it is expected to look for the “intent of the legislature, applying conventions entirely different from those which govern the doctrine of *stare decisis*”. Case law continuously influences the making of legal decision even when relevant statutes intervene in such decisions. Thus, precedent means that a higher court’s ruling which is directly applicable to education helps to form a basis for future case law in education-related matters.

2.3.3.2 The development of case law in the US and South Africa

Case law is developed by courts that have the power to do this. There are different types of court in South Africa. As mentioned before, not all court cases set precedent for future cases. This section of the literature review will focus on the development of case law in South Africa and the US. As stated before, the reason for choosing the US was the fact that there have been several court cases in the US that have provided for due process. Some of the court cases in the US that provide for due process are discussed in this chapter.

The development of case law in the US

The legal system in the US is organised hierarchically with the Supreme Court at the top and lower courts below the Supreme Court. In the US, there is a federal court system and a state court system. Laniewski, Martineau, Sims and Wheeler (2012:2) state that federal court system deals with the constitutionality of law under the US Constitution. These courts deal with cases involving the laws and US treaties, ambassadors and public ministers. They also handle disputes between individuals or entities in two or more states. They are also used to resolve admiralty law and bankruptcy.

The state court system deals with most criminal cases. It also handles most small claims and minor civil cases (landlord–tenant, debt, municipal matters), deals with probate (involving will and estates), resolves most contract cases, tort cases (personal injuries), handles family law (marriage, divorces, adoptions, etc) and deals with juvenile law, mental health cases and traffic cases (Laniewski et al., 2012:2).

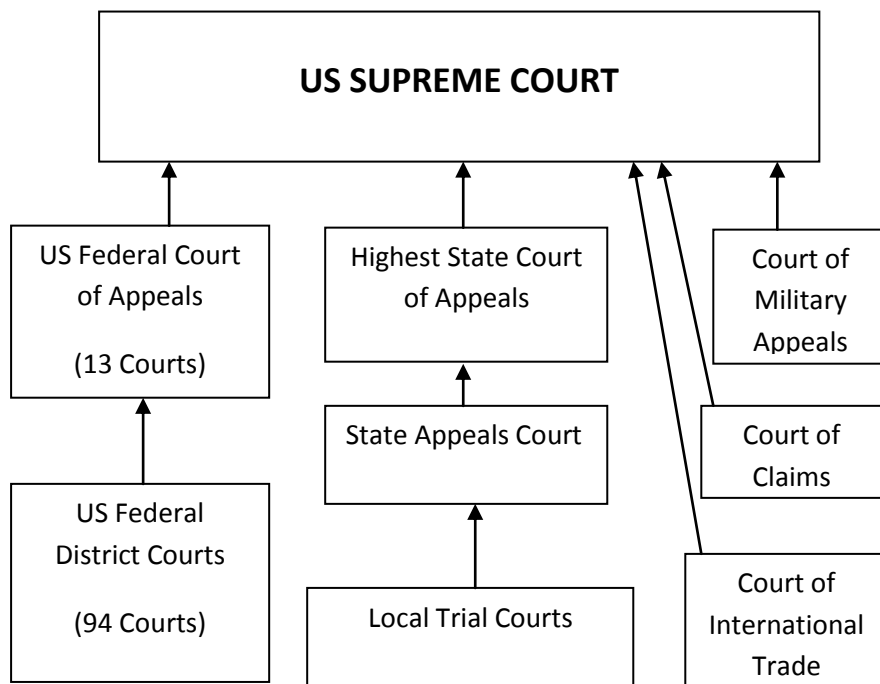


Figure 2.3: Diagram of the US court system

Source: adapted from: CELOP WIKI/050.

The US Supreme Court is the most influential and powerful judicial body in the world. It plays an important role because it is the institution that has the final authority on most of the issues that concern the constitutionality of governmental acts; this is the reason why it is said that the manifestation of the power of the US Supreme Court is the doctrine of judicial review (Baker, 2004:475). Komárek (2011:3) also maintains that the US Supreme Court is able to influence other courts to follow its precedents in the way in which it wants them to do.

Fowler and Jeon (2008:28) mention that it is the justices of the US Supreme Court who make the decisions on which court cases to cite in their legal arguments.

A simple analysis of the full network of majority opinions demonstrates quantitatively that the Court gradually adopted the norm of *stare decisis* during the 19th century. By the turn of the 20th century the norm had taken hold, though there is strong evidence that the activist Warren Court later deviated from it. Later courts also tended to skip over decisions made by Warren Court, reaching back in time to rulings that were more firmly rooted in precedent (Fowler & Jeon, 2008:28).

When the US Supreme Court has to take a decision there is usually more than one court case which has set the precedent which the court may select from (Baum, 1985:123; Spaeth, 1979:53). This also applies to the South African Supreme Court.

In the US, not all Supreme Court cases set precedents for the rest of time and precedent may sometimes be altered. Epstein, Landes and Posner (2012:703) “compare[d] the number of unanimous and non-unanimous Supreme Court decisions that formally alter a Supreme Court precedent”. Epstein et al. (2012:703) found that “between 1946–2009 only 1.6% of unanimous cases altered precedent and 98.4% of unanimous cases did not alter precedent. 2.4% of non-unanimous cases altered precedent and 97.6% of non-unanimous cases did not alter precedent”.

The development of case law in South Africa

Hahn and Luterek (2006:1) indicate that, in South Africa, the courts are bound by the previous decisions of those courts that rank higher in the hierarchical structure of the South African courts. Van Niekerk (2013:210) states that as case law is a source of law, legal decisions “stand central in any legal system that applies the doctrine of precedents”. South African law is one such system.

According to section 66 of the South African Constitution, the court system of South Africa comprises the Constitutional Court, the Supreme Court of Appeal, the High Courts, magistrate’s courts and other courts instituted in terms of an Act of Parliament (RSA, 1996a). Joubert and Prinsloo (2009:22), Meintjies-Van der Walt et al. (2011:74) and Kleyn and Viljoen (2011:59) all provide a brief overview of the South African court system. A brief overview of this court system follows:

The Constitutional Court

Oosthuizen (1998:52), Joubert and Prinsloo (2009:22) and Meintjies-Van der Walt et al. (2011:74) provide that the Constitutional Court is the highest court in matters that affect the Constitution. According to Oosthuizen (1998:52) and Joubert and Prinsloo (2009:22), the main task of the Constitutional Court is to resolve issues involving “the interpretation, protection and enforcement of the Constitution”.

The Supreme Court of Appeal

“The Supreme Court of Appeal is the highest court in the country, other than on the constitutional issues” (Joubert & Prinsloo, 2009:22). When the Supreme Court of Appeal delivers its judgment, it will be bound by all such previous judgments unless it is convinced that a previous judgement was incorrect. This means that the Supreme Court of Appeal can alter precedent as done by the US Supreme Court. Kleyn and Viljoen (2011:60) and Shaba, Campher, Du Preez, Grobler and Look (2002:79) mention that all other courts that are lower than the Supreme Court of Appeal in terms of the hierarchical structure are bound by a court decision of the Supreme Court of Appeal.

The High Courts

There are divisions of the High Court in the all the provinces of South Africa. The High Court does not possess a right to make decisions on matters that concern the Constitution unless these matters do not fall under the jurisdiction of the Constitutional Court or these matters have been allocated by parliament to another court that has the same status as the High Court (Joubert & Prinsloo, 2009:22). Shaba et al. (2002:79) indicate that the decision of the Appellate Division of the Supreme Court binds the Provincial Division of the High Court, while the decisions of the Provincial Division of the Supreme Court binds the decisions of the local division of the provincial division. “It should be noted that a provincial division of a province and local division thereof have a co-ordinated jurisdiction in that one binds the other depending on the number of judges giving the particular judgement” (Shaba et al., 2002:79).

The lower courts

Lower courts, such as the magistrate's courts, are bound by the judgments of all superior courts. This, therefore, means that, if conflict exists between the judgments of superior courts in different provinces, the magistrate must follow the judgment of his or her own provincial division (Shaba et al., 2002:79).

This chapter has not discussed the South African court cases that are related to learner discipline in high schools, as these court cases are analysed in the data analysis chapter. The following court cases are discussed in chapter 4.

- *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C)
- *Brink and Others v Diocesan School for Girls and Others* (1072/2012) [2012] ZAECHGHC 21 (1 May 2012)
- *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province*
- *SGB, Tafelberg School v Head, Western Cape Education Department* 2000 1 SA 1209 (C)
- *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* (CCT 103/12) [2013] ZACC 25
- *High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province* (CA 185/99)
- *MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1) SA 474 (CC)
- *Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape*, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division). Case No. 12533/98
- *Mose v Minister of Education in the Provincial Government of the Western Cape: Gabru* (13018/08) [2008] ZAWCHC 56; 2009 (2) SA 408 (C) (13 October 2008)
- *Maritzburg College v Dlamini NO* [2005] JOL 15075 (N)

- Pearson High School v Head of the Department Eastern Cape Province [1999] JOL 5517 (Ck)
- *Phillips v Manser* [1999] 1 All SA 198 (SE)
- Tshona v Principal, Victoria Girls High School 2007 5 SA 66 (E)
- Western Cape Residents' Association obo Williams v Parow High School 2006 (3) SA 542 (C)

2.3.3.3 Parties in a case

Plaintiff and defendant

A civil case refers to a case in which the parties are engaged in legal proceedings before a court in their private or personal capacity. In a civil case, the aggrieved party is referred to as the plaintiff while the party about whom a plaintiff is complaining and who is defending his/her side is referred to as the defendant (Joubert & Prinsloo, 2009:22; Meintjies-Van der Walt et al., 2011:89). Meintjies-Van der Walt et al. (2011:89) define the term 'defendant' as a "litigant against whom the plaintiff institutes an action". According to Grindle (2009:13), in court proceedings, the plaintiff is the one who complains and the defendant is the one who answers the complaint. In a criminal case, criminal charges must be proved beyond reasonable doubt. The plaintiff has a right to a lawyer if he/she is accused of having committed a serious criminal offence. In civil cases, the civil case charges must be proven on basis of the preponderance of the evidence. A criminal case is heard before a judge. In criminal cases, the criminal penalties may include a jail sentence and/or a fine while civil penalties may include the payment of a fine and money for damages.

Applicant and respondent

In cases involving a government body (i.e. police) against an individual (i.e. a learner) or another lower ranking state official body (i.e. SGB), these parties are referred to as the applicant(s) and respondent(s) (Joubert & Prinsloo 2009:23). Meintjies-Van der Walt, et al (2011:89) indicate that, where the complainant brings an application to court, the complainant is referred to as an applicant. Meintjies-Van der Walt et al. (2011:89) mention that in terms of law, the applicant must ensure that the other interested parties are aware that he/she is bringing his/her application to court.

The interested party may then decide whether or not to oppose such an application. Such a person is referred to as the respondent.

Appellant and respondent

The party lodging an appeal is called the appellant. The other party defending in the appeal court case is referred to as the respondent (Joubert & Prinsloo, 2009:23, Meintjes-Van de Walt et al., 2011:89).

2.3.4 Common law

This chapter reviews the existing literature on the common law providing for due process. Oosthuizen and De Wet (2011:56) indicate that subsections 39(2) and (3) of the Constitution acknowledge the importance of common law, emphasising the fact that common law must be taken into consideration when legislation is interpreted:

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (RSA 1996a).

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common, customary law or legislation, to the extent that they are consistent with the Bill (RSA 1996a).

The majority of common law principles are derived from previous court judgments. In terms of section 39(2) of the Constitution it is the courts that develops the common law. According to Kleyn and Viljoen (2011:81), the common law principles that are developed should promote the spirit and the objectives of the Bill of Rights as included in the Constitution.

Common law in South Africa does not derive from legislation but from Roman-Dutch law that has been built upon by judicial precedents (cases). Common law refers to law that does not derive from legislation (Meintjes-Van der Walt et al., 2011:105). Many of the legal principles to which we refer, which we use and according to which we live, are derived from common law. Meintjes-Van der Walt et al. (2011:105) and Klein and Viljoen (2011:80) state that South African common law is derived from

Roman-Dutch law. Kleyn and Viljoen (2011:80) adds that this Roman-Dutch law from which the common law is derived was adopted during the seventeenth and eighteenth century Roman-Dutch in the Cape and it forms the basis of the modern South African law with binding authority. However, Kleyn and Viljoen (2011:81) indicate that not all but “selected principles of Roman-Dutch law were translated to South Africa. Sometimes our common law has been influenced by English law”. This has been done by means of precedents and is the reason why some common law principles are no longer purely Roman-Dutch law.

Common law originates from court judgments. This is supported by Michelman (2009:3), who indicates that one feature common to the court case of *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC); 2007 8 BCLR 927 (CC) (*‘Masiya’*) and *NM v Smith* 2007 5 SA 250 (CC); 2007 7 BCLR 751 (CC) (*‘NM’*) was the “Constitutional Court’s seeming gravitation to its inherent power to develop the common law in terms of Constitution sections 173 and 39(2) – as opposed to its judicial review power in terms of sections 8 and 172(1) – when undertaking modification of common law rules under pressure from the Bill of Rights”.

There is a relationship between common law principles such as rules of natural justice, *ultra vires* and *in loco parentis* and due process. All three of the common law principles mentioned deal with ensuring that the disciplinary process is procedurally and substantively fair. The rules of natural justice have already been explained. The three common law principles are discussed in the next section on the learner disciplinary process.

Legal terms that derive from common law include reasonableness, fairness, negligence, powers, legal status and legal person (Roos & Oosthuizen, 2003:58; Joubert & Prinsloo, 2009:21). It is, thus, clear that the legal concepts such as reasonableness and fairness should be used by education managers as part of due process during learner discipline as due process requires that the disciplinary process be both reasonable and fair.

Education managers are required by law to know and implement the common law principles that are related to due process. According to Rosenzweig (2013:1), one of the legal principles contained in common law is that “ignorance of the law is no

excuse”. This, in turn, implies that education managers should have an understanding of the common law principles that are related to due process such as the rules of natural justice, *ultra vires* and *in loco parentis* as this will help to ensure that the disciplinary process is fair. Section 16A(2)(a)(v) of the Schools Act stipulates that the principal has a duty to keep all school records, including the SGB records, in a safe place. By so doing the principal will be fulfilling his/her duty of the professional management of a public school as contemplated in section 16(3) of the Schools Act. In addition, the principal’s knowledge will enable him/her to assist the SGB in dealing with learner disciplinary matters (s 16A(2)(d) of the Schools Act) (RSA, 1996b).

2.3.5 The learner disciplinary process

This section discusses the steps that education managers should follow when disciplining learners. As mentioned before, these steps (stages) include the hearing of evidence and deciding on action; notice of hearing; disciplinary hearing; adjourning and considering the facts; conveying the decision and appeal. By following these steps, procedural due process is implemented. Substantive due process should be integrated in all these steps. As regards each step (stage) of the disciplinary process, the study reviewed the international and regional treaties and conventions; foreign (US) and local (South African) statutes and policies; case law, common law, empirical studies and other literature relating to due process.

This chapter focuses on relevant foreign court cases, especially court cases in the US. The South African court cases that have set legal precedent are not discussed in this chapter and will be expanded upon in the case briefing in chapter 5.

2.3.5.1 Hearing of evidence and deciding on action

It is during this stage of the disciplinary process that a learner will be brought before the principal after he/she has allegedly committed misconduct, Paragraph 13.2 of the Guidelines (2008) stipulates that the principal should conduct a preliminary investigation of a case and decide whether there is any need for him/her to organise a hearing. The principal or delegate should follow correct preliminary procedures. There are several substantive issues that the principal must investigate and check before making a decision to organise a hearing. One of the principal’s tasks is to check whether the alleged misconduct is clearly defined in the disciplinary policy

(Code of Conduct for Learners). As explained previously, it is also important for an education manager to find out about the following: Was a learner aware of the rule broken (Joubert & Prinsloo, 2009:231)? Is the misconduct sufficiently serious to merit a hearing (DoE, 1998:40)? It is essential that the principal have knowledge of law to avoid infringing on the rights of a learner during this stage of the disciplinary process.

Universal and regional instruments providing for the hearing of evidence and deciding on action

The principals or a delegate of the principal should ensure that, when they are investigating and searching for evidence that may lead to a hearing, they treat the learner(s) in the correct way. Article 5 of UDHR (UNGA, 1948), Article 3 of ECHR (EC, 1950), Article 7 of the ICCPR (UNGA, 1966), Article 5(2) of ACHR (OAS, 1969), Article 37 of the CRC (UNGA, 1989) and Article 5 of ACHPR (OAU, 1981) provide that no one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. Even if it is suspected that a learner has committed serious misconduct, the learner must nevertheless be treated in a dignified way. While the principal or a delegate will be looking for evidence, they must be careful not to infringe learner's rights to human dignity. In addition, the learner must not be tortured or treated in a cruel or degrading manner. According to Article 10 of the ICCPR (UNGA, 1966), all persons who have been deprived of their liberty "shall be treated with humanity and with respect for the inherent dignity of the human person".

According to the Example of a Code of Conduct for a School that was drawn up by the National Department of Education (DoE, 2008:15), the SGB may confer the authority on either the principal or to the deputy principal to "suspend a learner, as a precautionary measure, with regard to a learner who is charged with serious misconduct offence as contemplated in Section 8 of the Schools Act". It is essential that principals always bear in mind that they must inform the chairperson of the SGB if a learner is threatening the safety of other persons. The chairperson of the SGB is the person who must authorise the suspension of such a learner as a precautionary measure. The principal or the deputy principal should ensure that, during the hearing of evidence, he/she does not find a learner guilty of certain misconduct before the learner has attended a hearing. Article 11(1) of UDHR (UNGA, 1948), Article 6(2) of ECHR (EC, 1950), Article 14(2) of the ICCPR (UNGA, 1966), Article 8(2) of ACHR

(OAS, 1969), Article 7(1)(b) of ACHPR (OAU, 1981) and Article 40(2)(b)(i) of CRC (UNGA, 1989) all state that, according to law, everyone charged with misconduct is innocent until proven guilty. At the school level, this means that a learner charged with misconduct is innocent until proven guilty according to both the law and the code of conduct for learners. This means that there must be substance to prove that the learner is guilty of serious misconduct.

According to Article 14(3)(a) of the ICCPR (UNGA, 1966), a learner must “be informed in detail in a language which he/she understands of the reason and charge against him/her”. Article 40(2)(b)(ii) of the CRC (UNGA, 1989) stipulates that “every child alleged as or accused of having infringed the rule of law has to be informed” as soon as possible and directly of the charges against him/her. In addition, the learner’s parents or legal guardians must also be informed while the learner must be permitted to have legal or other appropriate assistance during the preparation for and presentation during a hearing.

It is at this stage the principal must inform a learner about the allegation using language that the learner understands. Both Article 5(2) of ECHR (CE, 1950) and Article 14(3)(a) of the ICCPR (UNGA, 1966) stipulate that a learner who has allegedly committed misconduct must be informed of both the charges and the reasons for the charges. In addition, this should be done in detail using a language that the learner understands.

United States law providing for the hearing of evidence and deciding on action

According to Hammer (1979:626), “[t]he US Constitution does not guarantee the right to a preliminary hearing”, although this is guaranteed by the statutes of various states. According to Hammer (1979:626), the preliminary hearing was first introduced in the statutes of Virginia in 1804 although it did not appear in the Constitution of Virginia. The preliminary hearing may be said to be related to learner discipline because a principal or deputy principal may not organise a hearing without first conducting an investigation into the alleged misconduct. The findings of such an investigation will inform the principal whether or not to organise a hearing. If the factors of substantive fairness are not met, it will be a waste of time to organise a hearing. Hammer (1979:626) further states that the Virginia statute provides that no

person who is either arrested or charged for any misconduct or offence should be denied a preliminary hearing. This also applies to learner discipline, as no learner should be instructed to attend a hearing without the principal or deputy principal having conducted a preliminary hearing. A preliminary hearing in the school context should not be regarded as a formal hearing. Although the *Moore v. Commonwealth* 218 Va. 388 (Va. 1977) court case did not involve educational issues it does shed light on the difference between a preliminary hearing and a formal hearing in the school context. In *Moore*, the defendant was arrested on two charges of misconduct and was charged with the possession of marijuana with an intention to distribute hashish. At the preliminary hearing both the charges of misconduct and of possessing marijuana were dismissed by the judge of the District Court. Hammer (1979:628) maintains that

the Commonwealth's attorney obtained a formal accusation that the defendant is charged with misconduct and for possessing marijuana. After a motion to set aside the indictments was not accepted, the defendant was convicted in a trial where there was a judge only. There was no jury. This is called a bench trial. The defendant lodged an appeal. The Supreme Court stated clearly that there is nothing that forbids a defendant from being tried again on the same (or similar) charges. The court explained that jeopardy does not attach until the defendant is put to trial. A preliminary hearing should not be taken as a trial.

Amendment 6 to the US Constitution (1791) provides that everyone should be tried as quickly as possible and be allowed to confront witnesses during a hearing (US, 1791). Although schools do not necessarily deal with criminal cases and the disciplinary hearings in schools are not called trials, this amendment plays an important role in schools. Once a serious misconduct that may lead to a hearing has been referred to the principal, it is essential that the school hold a hearing as soon as possible. In addition, the hearing must be facilitated by an impartial tribunal, which is in accordance with the school policies and legislation of the country. A learner who has been charged with misconduct should be informed about the charges and the reasons for the charges; be given the opportunity to respond to what is said by witnesses against him/her during the hearing; be allowed to call witnesses in his/her

favour and be allowed to receive assistance from his/her parents or legal representatives or any other person.

While examining the evidence and deciding on action, the principal must investigate whether the type of an offence that was allegedly committed by the learner was included in the code of conduct for learners. Russo and Mawdsley (2002:4.29) state that “the right under the Fourteenth Amendment encompasses the right to, at least, some fair warning”. In order to satisfy part of the substantive fairness, Russo and Mawdsley (2002:4.29) further mention that students have the right to be disciplined under a policy that they know and which clearly defines the offence[s] and misconduct that are prohibited. This means that learners may appeal against a disciplinary decision that is not informed by a code of conduct.

South African statutes/acts and policies providing for the hearing of evidence and deciding on action

It is the responsibility of the principal to ascertain whether the misconduct that has been reported to him/her requires a formal hearing. The hearing of evidence and deciding on action in the school context are defined in the Guidelines (DoE, 1998:40), which stipulate that any learner who has “violated any rule that leads to suspension or expulsion, must be brought to the principal. The principal should conduct a preliminary investigation and then decide on the action to be taken”. In addition, the principal should be able to collect evidence that will inform his/her decision regarding further action.

The provincial education departments are also required to draw up provincial laws that address the issue of learner discipline. Section 9(1) of the Schools Act provides that: “Subject to this Act and any applicable provincial law, the SGB of a public school may, after a fair hearing, suspend a learner from attending the school”, while section 9(2) states that: “Subject to any applicable provincial law, a learner at a public school may be expelled only by the Head of Department and if found guilty of serious misconduct after a fair hearing.”

In South Africa, the provincial departments of education (PDoEs) have promulgated legislation and policies that provide for notice of a disciplinary hearing. For the purpose of this study I have referred to the regulations of three provinces only,

namely, *Gauteng learner disciplinary regulations* (2000), *Regulations relating to disciplining, suspension and expulsion of learners at public schools for the Western Cape* (2011) (hereafter referred to as *Western Cape learner disciplinary regulations*) and *Regulations relating to behaviour by learners in public schools which may constitute serious misconduct, the disciplinary proceedings to be followed and provisions of due process safeguarding the interests of learner and any other party involved in disciplinary proceedings for the Eastern Cape* (2003) (hereafter referred to as *Eastern Cape learner disciplinary regulations*).

Section 3(1–2) of the *Gauteng learner disciplinary regulations* states that it is only the principal who may take disciplinary action against a learner who has committed a serious misconduct. In addition, the principal may take disciplinary action against a learner who has committed a serious misconduct only if there is sufficient evidence and it is in the best interests of the school to take such steps (GDoE, 2000).

Section 2(1) of the *Western Cape learner disciplinary regulations* states that where there is an allegation that a learner has committed a misconduct which “constitutes serious misconduct in terms of regulation 3(1)”, the allegation must be brought to the attention of the principal who must conduct an investigation or delegate someone to conduct an investigation. The principal must decide whether the evidence is sufficient to merit the instituting of disciplinary action. Such evidence will ensure substantive fairness. The principal should also decide whether to report the matter to the SGB (WCDoe, 2011).

Section 3(1) of the *Eastern Cape learner disciplinary regulations* provides that “if a learner has been accused of serious misconduct an investigator may be appointed by the principal” to conduct an investigation into an allegation. Evidence must be collected to “enable the principal to determine whether there are grounds for a disciplinary hearing”. After an investigation a written report should be submitted to the principal. “The principal must decide whether there is a need for disciplinary hearing” (ECDoe, 2003).

There is very little difference between the three provincial learner disciplinary regulations mentioned above. The regulations all stipulate that the role of the principal in the first step of the disciplinary process is to conduct a preliminary

investigation and to decide whether there is a need for a hearing. Joubert and Prinsloo (2009:123) maintain that, in some disciplinary cases, especially those involving serious misconduct, it is necessary to conduct a preliminary investigation to collect evidence. As mentioned before, this is supported by Paragraph 13.2. of the Guidelines (1998) which provide that the principal shall hear the evidence and then decide on the action to be taken. The investigation will help in determining whether there is a need for a disciplinary hearing. If it is alleged that a learner has committed misconduct, that learner must be taken to the principal's office but he/she should not be forced to confess guilt.

Common law providing for the hearing of evidence and deciding on action

It is essential that the school principal not act *ultra vires* after he/she has conducted a hearing of evidence and deciding on action. This ensures procedural fairness during the disciplinary process. *Ultra vires* literally means to act beyond the legal powers (Bray, 2005:134). Bray (2005:136) further explains that “the principal acts *intra vires* when he/she acts within its legal powers”. An example of an *ultra vires* act would be where an education manager, in his/her capacity as an employee, exceeds his/her powers and/or competency as stipulated in the relevant legislation. In terms of the rule of law that applies to learner discipline, an education manager who expels a learner from school is acting *ultra vires* because it is not the responsibility of an education manager to expel a learner from school. This means that the education manager did not follow a fair disciplinary procedure. The expulsion of learners from school is the responsibility of the Head of Department (s 9(2)(a) of the Schools Act) (RSA, 1996b). The SGB may only recommend that a learner should be expelled (s 9(1C)(a) of the Schools Act) (RSA, 1996b).

Empirical studies providing for the hearing of evidence and deciding on action

I have not been able to find any empirical studies that focused on the way education managers understand and implement a hearing of evidence and deciding on action in South African schools. Accordingly, this study investigated the way education managers understand and implement the hearing of evidence and decisions on action in a sample of South African schools.

2.3.5.2 Notice of a disciplinary hearing

Providing a notice to learners is part of procedural fairness. This step is important because it give a learner enough opportunity to prepare himself/herself for the presentation of his/her side of the story. The learner must be given enough time to prepare his/her facts.

Universal and regional instruments providing for a notice of a disciplinary hearing

A learner who is alleged to have committed a serious misconduct should be informed in detail about the charge against him/her. This should be included in a notice of a hearing. According to Article 8(2)(b) of the ACHR (1969), everyone is entitled to a detailed notification prior to a disciplinary hearing and charges.

The learner should be given sufficient time to prepare for a hearing. Article 6(3) (c) of the ECHR (1950), Article 14(3) (b) of the ICCPR (1966) and Article 8(2) (c) of the ACHR (1969) state that during, the disciplinary proceedings, every person who has allegedly committed a misconduct is entitled to sufficient time to enable him/her to prepare him/herself for a hearing. In other words, time between notification and hearing should not be too long. Article 14(3) (c) of the ICCPR (1966) provides that, during the disciplinary proceedings, every person who is accused of misconduct is entitled to be tried without any delay.

Article 40(2)(b)(ii) of the Convention on the Rights of the Child provides that every child who is accused of committing a misconduct must be informed without delay of the charges against him/her. In addition, his/her parents or legal guardians must also be informed to enable them either to represent the child or to organise a legal or other appropriate assistance in the preparation and presentation of his or her defence.

US statutes and case law providing for a notice of a disciplinary hearing

In the US, learners who have committed a serious misconduct that may lead to suspension must be given a notice of the disciplinary hearing to be held. As mentioned above Amendment V of the US Constitution (1791) stipulates that:

No person shall ... be deprived of life, liberty, or property, without due process of law ... and amendment XIV of the US Constitution (1869) states ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Gilg (2010:22) indicates that procedural due process requires that a government institution should provide notice of a hearing whenever a liberty or property interest is at stake.

Boylan (2004:6–7) explains that

the due process clause of the 14th Amendment to the US Constitution has been interpreted to require the provision of the following procedural protections to a student facing short-term suspension:

Oral or written notice of what the student is accused of doing and the factual basis for the accusation.

An explanation of the evidence on which the charges are based if the student denies the charges.

The court case of *Dixon v. Alabama State Board of Education* (1961) provides that “due process requires a notice for a learner’s hearing should be given to parents in the required time”.

The court case of *Goss v Lopez*, 419 US 565 (1975), which was heard in the American state of Ohio, also refers to the giving notice for a hearing. This court case provided that the “Ohio law required that the student's parents be notified of the action within 24 hours and be given the reason”. The school in question was reprimanded by the District Court for its violation of the 14th Amendment.

The District Court stated that there were minimum requirements of notice and a hearing prior to suspension, except in emergency situations. The school made an appeal to the Supreme Court. Justice Powell, in his written dissent, argued that the safeguards provided by the Ohio statute were sufficient. The statute required that the student's parents and the

Board of Education be given written notice of the suspension and reasons therefore within 24 hours (*Goss v. Lopez*, 419 US 565 (1975)).

Rossow and Warner (2000:198) point out that, in the case *Goss*, the court held that there is no need for a delay between the issuing of notice and conducting a hearing. The court did refer to the issue of an emergency suspension which is permitted if a student's presence at a school poses a threat to other persons and/property and disturbs the smooth running of the school activities. In such cases the removal of a student from school may take place immediately, without notice or hearing. However, the notice and hearing must follow within a short space of time.

The period between the issuing of notice and hearing differs according to the legislation of the country concerned. In *Nash v Auburn University* (1987), the notice issued advised that, according to the Code of Conduct, plaintiffs were allowed 72 hours to prepare themselves for a defence. The notice stated that, on the 10 June 1985, there would be a hearing that would be conducted by the Student Board of Ethical Relations.

According to *Dixon v Alabama State Board of Education* (1961), the notice ought to specify the charges and grounds justifying expulsion. The hearing may vary according to the circumstances of the case.

In the court case of *Nash v Auburn University* (1987),

the plaintiffs raised an objection stating that the notice was inadequate and too vague. They meant that the notice was not advising them of the charges against them. The appellant required a specific notice. A one additional day to prepare for defence was also requested by the appellant. Appellants timely received the restated notice which charged them with giving or receiving assistance or communications ... during the anatomy examination on or about May 16, 1985 in violation of the Code. The notice also listed several classmates of plaintiffs and several members of the anatomy faculty who were expected to support the charges at the hearing. The student honour court hearing was conducted as scheduled on June 12 (*Nash v Auburn University* 1987).

South African statutes and policies providing for a notice of a disciplinary hearing

South African law stipulates that, if a principal decides that there is a need for disciplinary proceedings, the learner and parents must be informed (DoE, 1998). Thus, a notice should be sent to parents informing them about the intended action. Section 32 of the South African Constitution provides that everyone has the right of “access to any information held by the state; any information that is held by another person and that is required for the exercise or protection of any right” (RSA, 1996a).

This section has highlighted that learners have the right to information that concerns discipline actions.

According to section 3(2)(b) of the PAJA,

in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) of the Act, must give a person referred to in section 3(1) (RSA, 2000a) adequate notice of the nature and purpose of the proposed administrative action. The principal or SGB chair acts as the administrator in terms of PAJA.

Paragraph 13.2 of the Guidelines provides that such action must include that the principal take an action by informing the parents in writing about the hearing that will be conducted by a tribunal. In other words, the notice must be written and sent to parents (DoE, 1998). Paragraph 13.4(a) of the Guidelines provides that the learner must also be informed about the charges with a written notice being given to the learner and parents at least five days before the hearing. The notice should indicate the date, time and place of the hearing (DoE, 1998:13; GDoE, 2000; ECDoE, 2003; WCDoE, 2011).

The Example of the Code of Conduct (DoE, 2008:31) specifies that the following must be included in the content of a notice for disciplinary hearing:

name of the learner, learner ID number, subject, teacher, date of hearing, time of hearing, venue of hearing, time for hearing, date served, the charge against the learner, date of offence and nature of offence. If the

learner is suspended from class the notice must have a statement that advises a learner that he/she has been suspended from class from which date and time until which date and time. The notice must further state that, during the period of suspension, the learner will not be permitted on the school premises unless written permission has been given to the learner by a senior member of the management, or for attending the hearing. The learner must receive one copy and the signed copy must be kept and filed.

In addition, “[t]he complainant and learner must sign the disciplinary form. A copy must be handed to the learner. If the learner refuses to sign, a witness must sign in the presence of the learner. The signing of the document by the learner does not imply an acknowledgment of guilt” (DoE, 2008:18).

Common law proving for a notice of a disciplinary hearing

According to Joubert and Prinsloo (2009:133), “[i]n terms of common law, the *audi alteram partem* rule also requires that all relevant information be communicated to the person who may be affected by an administrative decision”. This means that the learner should be informed about the action to be taken. This is the responsibility of the principal after he/she has conducted an investigation and taken a decision. The right to prior notice before a hearing should be considered by the principal during this stage of the disciplinary process. According to Shauer (1976:48),

although it has been suggested that there are other fundamental components of natural justice of which the right to prior notice is one of them, the generally accepted view is that these rights, if they exist at all, must be found as parts of the two basic principles of rules of natural justice and do not exist as separate rights.

Empirical studies providing for a notice of a disciplinary hearing

There have been few studies that have investigated the issue of a notice of a disciplinary hearing. One such study was conducted by Stone in the US. Stone surveyed 35 school divisions, representing a student population of 1|382|562 from across the US. The study by Stone focused on disciplinary proceedings and

produced findings about a notice of a disciplinary hearing. Stone (1993:354) found that students in 94% of the school divisions had been issued with written notices, while a slightly lower percentage of 75% of students in the suburban school divisions had been issued with written notices. In South Africa, no studies have been conducted to find out how education managers understand and implement Paragraph 13.2. of the Guidelines, which mention that the principal must inform the parents in writing of the proposed action and arrangement for a fair hearing (DoE, 1998). This study will provide an empirical answer to fill this gap.

It is important that education managers be aware of the content to be included in the notice. Stone (1993:356) indicates that the notices sent to parents informing them of the school's recommendation to suspend should include the detailed reasons for the charges; names of the student; contact details of the school witnesses; a summarised testimony of the witness(es); the period of the student's removal from school recommended by the school; the right of the student to legal representatives; advice on how to secure legal services that are either free of charge or at minimum cost; date, time and place of disciplinary hearing; information about the admission of the student to an alternative educational programme; and the name of the officer conducting the hearing.

With regard to the above, Stone (1993:357–358) found that 94% of the school districts informed students about the length and specific reasons for the action after the proceedings. They also do a better job of informing the students about the results of the proceedings. This information (length and specific reasons) should be included in the written notice prior to the disciplinary hearing.

Other literature on a notice of a disciplinary hearing

Burns (1999:169) is of the opinion that it is essential that an individual be given adequate notice of a disciplinary hearing, whether or not this is specified in a statute. In addition, this notification must contain all the details necessary to assist the individual in his/her preparation for the hearing. Burns (1999:169) also mentions that, to enable the individual in question to prepare for the case, he/she must be given reasonable notice of the disciplinary hearing. The definition of reasonable depends on the case itself: the more involved the issue, the longer the period required.

According to Horner (2000:51), when the learner is reported to the principal, the principal may not immediately impose punishment. Horner (2000:51) maintains the following: “First, a notice should be sent to the student’s parents.” The notice should outline the charges against the student and the learner must be informed about his/her rights. Copies of policies that the learner will be referred to during disciplinary proceedings should be attached to the notice. If there is a need for a hearing, a notice informing the learner and parents of the hearing date, time and venue “should be hand delivered or sent by a certified mail to parents”. The learner and parents should be provided with “administration’s witnesses, and the nature of the witnesses’ testimony in sufficient detail to prepare a defence”. As stated before Paragraph 13.2 of the Guidelines and provincial notices provide that learners and parents must be issued with notices for a hearing (DoE, 1998). There is no South African law that mentions that copies of policies should be attached to the notice; however, the author provide a contribution that can be used by South African schools to prove that the decision made by the principal to call a learner and parents is based on policy.

2.3.5.3 Disciplinary hearing

During this step, the disciplinary committee/ tribunal should follow a fair hearing procedure. This is a stage where participants to a disciplinary hearing are dealing with substantive information. Factors that need to be considered during substantive due process as explained before need to be part of the process.

Universal and regional instruments providing for a fair disciplinary hearing

- Right to fair hearing

Article 10 of the UDHR (UNGA, 1948), Article 6(1) of the ECHR (EC, 1950), Article 14(1) of the ICCPR (UNGA, 1966), Article 8(1) of the ACHR (OAS, 1969), Article 7(1) of ACHPR (OAU, 1981) and Article 40(2)(b)(iii) of the CRC (UNGA, 1990) all indicate that every person has a right to a hearing, with due guarantees and within a reasonable time by a competent independent and impartial tribunal established by law.

- Opportunity to be heard

Article 12(2) of the CRC (UNGA, 1990) states that “for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. Article 40(2)(b)(v) of the CRC (UNGA, 1990) provides that “every child alleged as or accused of having infringed the penal law has at least the decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law”.

- The learner should be assisted with an interpreter

Article 6(3)(e) of the ECHR (EC, 1950), Article 14(3)(f) of the ICCPR (UNGA, 1966), Article 8(2)(a) of the ACHR (OAU, 1969) and Article 40(b) (vi) of the CRC (UNGA, 1990) all also indicate that the accused person has a right to be assisted free of charge by an interpreter if he does not understand or speak the language that is used by a tribunal.

- Right to equality during a disciplinary hearing

It is extremely important that the right to equality be taken into consideration during learner discipline. In other words, all learners should be treated equally during a hearing. Article 1 and 7 of the UDHR (UNGA, 1948), Article 14(1) of the ICCPR (UNGA, 1966), Article 24 of the ACHR (OAS, 1969) and Articles 3 and 19 of the ACHPR (OAU, 1981) all state that all persons are equal before the law and are entitled without any discrimination to equal protection. This means that everyone shall be equal before a court or tribunal or disciplinary committee. Article 2 of the UDHR (UNGA, 1948), Article 2 of the ACHPR (OAU, 1981) and Article 14 of the ECHR (EC, 1950) all provide that the enjoyment of the rights to fair discipline set forth in the instruments shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. In other words, in order to ensure that the process of due process is fair, as it is required to be, tribunals should provide that the above mentioned is in adhered to when learners

are disciplined. In view of the fact that the right to equality is emphasised by both international and regional law, all bodies should take this into account.

- The right to human dignity during disciplinary hearing

Article 1 of the UDHR (UNGA, 1948), Article 10(1) of the ICCPR (UNGA, 1966), Article 5(2) of the ACHR (OAS, 1969), Article 5 of the ACHPR (OAU, 1981) and Article 28(2) of the CRC (UNGA, 1990) all state that all persons should be treated with human dignity when they are disciplined. The people who are involved in learner discipline do sometimes forget to consider human dignity as an important human right. This viewpoint is supported by Malherbe and Beckmann (2003:37), who state that the violation of human dignity may occur during learner disciplinary action. However, it is not possible to implement due process successfully if human dignity is not considered.

- The right to liberty and security during disciplinary hearing

Article 3 of the UDHR (UNGA, 1948), Article 5 of the ECHR (EC, 1950), Article 9 of the ICCPR (UNGA, 1966), Article 7 of the ACHR (OAS, 1969), Article 6 of the ACHPR (OAU, 1981) and Article 37(b) of the CRC (UNGA, 1990) provide that every person has the right to liberty and security. This, in turn, implies that even learners in schools must be accorded these rights. However, both international and regional instruments provide that a person's rights to liberty and security may be limited if there are valid reasons to do so. In other words, legal rules sanction such limitations.

- A right to self-defence or assistance by legal counsel

Article 6(3)(c) of the ECHR (EC, 1950), Article 14(3)(d) of the ICCPR (UNGA, 1966), Article 8(2)(d) of the ACHR (OAS, 1969) and Article 7(1)(c) of the ACHPR (OAU, 1981) all indicate that everyone charged has a right to defend himself/ herself personally or to be assisted by legal counsel of his/her own choosing and to communicate freely and privately with his/her counsel.

- A right of the defence to examine witnesses present in the tribunal

Article 6(3)(d) of the ECHR (EC, 1950), Article 14(3)(e) of the ICCPR (UNGA, 1966), Article 8(2)(f) of the ACHR (OAS, 1969) and Article 40(2)(iv) of the CRC (UNGA,

1990) provide that every person who have been charged of misconduct has the right of the defence to examine witnesses who are present in the tribunal and to obtain the appearance of the witness of experts or other persons who may throw light on the facts.

- A right not to be compelled to confess guilt

Article 8(2)(g) of the ACHR (OAS, 1969) and Article 40(2)(b)(iv) of CRC (UNGA, 1990) state that everyone who has been charged with a misconduct has the right not to be forced give testimony or confess guilt.

- A right not to be held guilty of an offence which did not constitute misconduct at the time when it was committed”

Article 11(2) of the UDHR (UNGA, 1948), Article 7(1) of the ECHR (EC, 1950), Article 15(1) of the ICCPR (UNGA, 1966), Article 9 of the ACHR (OAS, 1969), Article 7(2) of the ACHPR (OAU, 1981) and Article 40(2)(a) of the CRC (UNGA, 1990) all mention that no one may be charged for an act that did not constitute a misconduct at the time it was committed. No punishment may be inflicted for a misconduct for which no provision was made at the time it was committed. For the purposes of this study this means that learners cannot be charged for an offence that is mentioned in the Code of Conduct for Learners at the time at which the offence was committed. In addition, learners cannot be given a heavier penalty than the penalty indicated in the Code of Conduct for Learners at the time the misconduct was committed.

- Right to privacy during disciplinary process

Article 12 of the UDHR (UNGA, 1948), Article 8 of the ECHR (EC, 1950), Article 17 of the ICCPR (UNGA, 1966), Article 11 of the ACHR (OAS, 1969) and Article 40(2)(b)(vii) the CRC (UNGA, 1990) all provide that every person has a right to privacy. This, in turn, means that every person has a right to privacy during the disciplinary process.

- Freedom of expression during disciplinary process

Article 19 of the UDHR (UNGA, 1948), Article 10(1) of the ECHR (EC, 1950), Article 19(2) of the ICCPR (UNGA, 1966), Article 13(1) of the ACHR (OAS, 1969), Article

9(2) of the ACHPR (OAU, 1981) and Article 13(1) of the CRC (UNGA, 1990) all mention that everyone has a right to freedom of expression. This right includes freedom to express himself or herself and to receive information.

- Consideration of age during a hearing

Article 5 of the ACHR (OAS, 1969) stipulates that, during the disciplinary process, minors should be treated as minors. Article 12(1) of the CRC (UNGA, 1990) provides that the state parties, which may include school authorities, should make sure that a child who is capable of forming his or her own views is given an opportunity to express those views freely in all matters affecting the child. Thus, the views of the child should be given due weight in accordance with the age and maturity of the child. In terms of learner discipline, this means that the education managers and SGB members should allow a learner to express his/her side of story. While a learner is presenting his/her side of story, the education managers and SGB members should listen and weigh what the learner is saying in accordance with the age and maturity of the learner. According to Article 1 of the CRC, “a child means every person below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier” (UNGA, 1990).

Article 40(1) of the CRC (UNGA, 1990) provides that state parties must recognise that every child who is alleged to have committed or is accused of misconduct has a right to be treated with dignity. Thus, the authorities must respect the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

The Committee on the Rights of the Child emphasises that Article 12 of the Convention on the Rights of the Child imposes no age limit on the right of the child to express her/his views while discouraging state parties from introducing age limits, either in law or in practice, which would restrict the child's right to be heard. According to Reyneke (2013:212), the General Comment 12 Paragraph 28 of United Nations Committee on the Rights (UNCRC) of the Child *General Comment 12 2009* means that, although a child is allowed to express a view, this view should still be evaluated by the decision maker with due regard to the age, maturity and stage of

development of a child (UNCRC, 2009). Thus, age, maturity and stage of development play an important in disciplinary hearings.

US statutes and policies providing for a disciplinary hearing

As mentioned before, the Fifth Amendment to the US Constitution provides that, [n]o person shall be deprived of life, liberty, or property, without due process of law (US, 1791). This means that no person in the US should be deprived of life, liberty, or property without being given an opportunity to appear in a hearing. The Fourteenth Amendment also stipulates that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any State deprive any person of life, liberty, or property, without due process of law (1869)”. These two amendments emphasise the right to due process which makes provision for a fair hearing.

South African statutes and policies providing for a disciplinary hearing

The disciplinary hearing must be conducted according to the law. Thus, the disciplinary committee (tribunal) appointed by the SGB should follow certain procedures when conducting a hearing. For example, participants in the hearing who are legally permitted to participate in a hearing should be given a chance to make presentations as required by law.

- Disciplinary committee (Tribunal)

According to the Guidelines, a hearing must be conducted by a tribunal consisting of SGB members who have been delegated as members of the tribunal (DoE, 1998:13). It is essential not to confuse the role of the principal as a professional manager of learner discipline and the role of the SGB in organising a hearing. According to paragraph 13(2) of the Guidelines, the principal should conduct a preliminary investigation and then decide on the action to be taken. If the principal finds that there is evidence that a child has committed serious misconduct, then he/she must inform the parents of the child by sending a written notice of the action to be taken and also arrange for a fair hearing that will be conducted by a small disciplinary committee termed a tribunal. The tribunal will consist of members designated by the SGB of the school (DoE, 1998:13).

In view of the fact that the disciplinary committee is a committee of the SGB, education managers should bear in mind that section 30(1)(b) of the Schools Act requires that when the SGB appoints a committee (disciplinary committee), it should appoint persons who are not members of the SGB to such committees on grounds of expertise, but a member of the SGB must chair each committee (disciplinary committee). It would appear from paragraphs 13.2. and 13.4(e) of the Guidelines that, only once it has been ascertained that the members of the SGB would not conduct a hearing in a fair way, then a neutral person who is not a member of the SGB may chair a hearing (DoE, 1998:13). Schools often co-opt individuals with a legal background to assist in a disciplinary hearing. One of the reasons for this is that learners often bring lawyers as their representatives to a hearing. With regard to the number of members who should serve on a disciplinary committee, the Guidelines stipulate that the committee must be small (DoE, 1998:13). The Western Cape Education Department requires that a disciplinary committee, consisting of at least two members of the SGB, acts as an impartial tribunal in the hearing of the charge brought against a learner. The person who conducted the investigation prior to the hearing may not form part of the tribunal (Western Cape Education Department, 2007).

Joubert and Prinsloo's (2009:135) statement that the disciplinary committee should include the chairperson and a parent member of the SGB is in agreement with the requirement of the Western Cape Education Department (2007) to the effect that two members of the SGB should form part of the disciplinary committee. In addition to the two members of the SGB, Joubert and Prinsloo (2009:135) add that the disciplinary committee should also include, at the least, the principal or deputy principal, an educator and, in the case of a high school, a learner. *The Eastern Cape learner disciplinary regulations*, which regulates the way in which disciplinary hearing should be conducted in the Eastern Cape schools, stipulates that the chairperson of the disciplinary committee should be a parent member of the SGB (ECDoE, 2003).

- Participants in a hearing

The participants in a disciplinary hearing include the disciplinary committee/tribunal (discussed above), the learner (offender) and the learner's representative(s) (legal counsel, the learner representative council (LRC), parent(s), guardian(s) and

educator(s). Section 8(6) of the Schools Act provides that the parents of learners who have been accused of committing serious misconduct should accompany their children (learners) to a disciplinary hearing, while section 8(7) of the Schools Act requires that, if the witness who is under 18 years will be exposed to undue mental stress or suffering during the process of testifying, the SGB must appoint an “intermediary”. Section 3(3)(e)(i) of the *Eastern Cape learner disciplinary regulations* states that, for the purposes of ensuring due process during the disciplinary hearing, any person who participated “in the investigation of the charge of misconduct, including the principal” should not be included in the disciplinary tribunal (ECDoE, 2003). In other words, the school principal should not serve on the disciplinary committee if he/she participated in the investigation into the alleged misconduct.

- Hearing procedures and presentation

There is a certain procedure that should be followed during a hearing. The procedure is explained below:

The chairperson of the disciplinary committee should lead the proceedings and introduce the members of the disciplinary committee, explain their functions and ensure that witnesses will be present only when they will be giving their evidence (DoE, 2008b: 17).

Learners must be informed of their rights by the chairperson (DoE, 2008b: 17).

The chairperson should explain in detail the “nature of the allegation or misconduct to those who are present at the hearing” (DoE, 2008b: 17).

The chairperson should explain the procedure that will be followed in the hearing (DoE, 2008b: 17).

The presentation of the evidence of the complainant and his/her witnesses will be heard first (DoE, 2008b: 17). Joubert and Prinsloo (2009:135–136) are in agreement with the stipulation of the DoE (2008b) to the effect that either the educator who reported the misconduct or the deputy principal in charge of discipline must be the first to make a

presentation about the case. Witnesses may then be called to give evidence to support the allegations.

The learner or learner's representative will be allowed to cross-examine the witness(es) if he/she so chooses.

The learner will be given the opportunity to present his/her side of the story. His/her representative may assist him/her. The learner may call his/her witnesses, who will be cross-examined by the representative of the school.

In short, the disciplinary hearing should be conducted according to law. The disciplinary committee (tribunal) appointed by the SGB must follow certain procedures when conducting a hearing. As required by law, participants who are legally permitted to participate in a hearing should be given a chance to make presentations.

- Representation

The learner may be represented by any of the following: parent, legal representative, LRC member or educator. Section 9 of the Schools Act requires that "if necessary, the accused learners must have an intermediary appointed". The *Gauteng learner disciplinary regulations* provide that at least one parent or guardian of the learner must accompany the learner to the disciplinary hearing. However, if the accused learner is twenty-one years or older he/she may attend a hearing without being represented by his/her parent(s)/guardian(s) (GDoE, 2000).

Paragraph 13.4(d) of the Guidelines states that the learner must be allowed to have a legal counsel. In such a case "written explanation of the charges of misconduct must be given". In cases involving "less serious" misconduct, the learner may be represented by a member of the LRC, parent, guardian or educator" (DoE, 1998:13).

General Comment No. 12 (2009) paragraph 35 provides that the child has a right to decide on how he/she wishes to be heard. In other words, the child may choose to be heard either directly or through a representative or appropriate body. The Committee on the Rights of the Child prefers that the child should be heard directly.

Paragraph 36 states that “[t]he representative can be the parent(s), a lawyer, or another person (inter alia, a social worker)” (UNCRC, 2009).

Paragraph 13.4 (e–f) of the Guidelines states that the learner must be heard by a neutral body and that the learner must be respected during the hearing process (DoE, 1998:13).

Section 3(2)(b) of the PAJA states that “in order to ensure that the disciplinary process is procedurally fair the chairperson must give a person referred to in section 3(1) (RSA, 2000a) a reasonable opportunity to make representation”.

According to the Western Cape Education Department (2007:3), “[f]actors that must be taken into consideration in considering the most appropriate punishment include the age and development of a learner. An eight year old learner and a fifteen year old learner cannot be dealt with in the same manner”. After considering the facts and after careful deliberation, the chairperson, assisted by the committee, must communicate the decision that has been taken by the committee. Conveying the decision taken by the committee means that the chairperson informs the parties concerned whether the learner is guilty of misconduct. The chairperson will also announce the punishment and provide reasons for the decision that was made. These two aspects (decision regarding the punishment and the reasons for the decision) must be presented in writing to the parties.

Considering age during a hearing

In addition to what has been mentioned before in the General Comment 12 Paragraph 28 of United Nations Committee on the Rights (UNCRC) of the Child *General Comment 12* 2009, section 7(1)(g)(i) of the Children’s Act provides that when any action is taken against the child the best interests of a child standard should be considered, based on factors such as age, maturity and stage of development (RSA, 2005). The Children’s Act and the United Nations guidelines are similar in terms of how to consider age when dealing with learners.

Foreign case law providing for a disciplinary hearing

The following case law deals with the importance of conducting a hearing before suspension and expulsion, the role of witnesses during a hearing and variations of hearings.

- No suspension without a hearing

Learners should not be suspended without a hearing. In *Goss v Lopez* 419 US 565 (1975), Justice White delivered the opinion of the Court. The Court, split five to four, held that the state had violated due process by suspending the students without a hearing.

- Role of witnesses during a hearing

In the case of *Dixon v. Alabama State Board of Education* (1961), the court held that learners who have committed misconduct should be provided with the names of the witnesses so that they are aware of whom they are. In addition, learners must be given a report of the facts of the allegations or charges. Accused learners should also be given the opportunity to defend themselves before the appropriate authorities.

- Variations of hearings

The circumstances of the case should be considered during the hearing. According to *Dixon v Alabama State Board of Education* (1961), the hearing may differ according to the seriousness of the case. This is supported by Joubert and Prinsloo (2009:132), who state that “the format of the hearing and tribunal will also depend on the nature of the case and the circumstances. As the severity of the charge and sanction imposed increase, additional safeguards are required”.

- Due process and equality are associated

Due process goes hand in hand with equality. Education managers cannot say that they discipline learners fairly if they do not treat all learners equally. In *Truax v Corrigan* (1921), Chief Justice Taft of the Supreme Court observed that it is not possible to divorce due process from the right of equal protection. These two

concepts are associated and it may even be that they overlap as a violation of one may at times involve the violation of the other. Due process protects the right to equality (Davidson, 2003:18). Fairness involves treating all people equally.

- Removal of students from school using arbitrary policies

It is imperative that learner discipline policies are legally correct and that education managers not either suspend or expel learners in terms of policies that are not correct. *Tinker v Des Moines Independent School District* (1969) was a landmark case on substantive due process protection. Although the case related directly to an incident which had occurred in the independent school setting, the implications of the case for public high school education managers are important. In the case the court forbade school administrators to remove students from school based on the implementation of arbitrary policies (Davidson, 2003:18). Arbitrary policies are those policies that are not based on either a plan or a system (*Collins South African school dictionary* 2002:42). According to the *New choice English dictionary* (1999:19), arbitrary means “not bound by rules. It also means unreasonable”. “Cases such as this (*Tinker v Des Moines Independent School District* 1969) secured substantive due process protection from laws or policies which would infringe students’ access to educational services, now seen as property and liberty interests” (Davidson, 2003:18).

Common law proving for a disciplinary hearing

The common law principle of natural justice and the fact that it has been crystallised into two concepts, namely, the *audi alteram partem* and *nemo iudex in propria causa* has already been explained earlier in this chapter. It is essential for education managers to understand and be able to implement the common law principles of *audi alteram partem* and *nemo iudex in propria causa* in order to ensure fairness when disciplining learners in schools. These two common law principles are essential in ensuring that the hearing is procedurally and substantively fair.

- Empirical studies reporting on disciplinary hearings

Shaba (2006:65) conducted a study on the implementation of the administrative principles of natural justice in school management. This study, which was conducted

in Ga-Rankuwa in South Africa's North-West province, focused on the use of two administrative principles of natural justice, namely, *nemo iudex in sua propria causa* and *audi alteram partem*, during educator discipline. Although the study did not focus on learner discipline, the study found that a lack of knowledge of the two administrative principles of natural justice caused "gross irregularities committed in contravention of the two rules when educators are disciplined". It is worth noting that the same applies when learners are disciplined.

- Other literature reporting on disciplinary hearings

According to Roos and Oosthuizen (2003:53), the education manager should, where necessary, give the learner's parent(s) an opportunity to make presentations on behalf of the child(ren), particularly in cases in which the learner is either too young or too immature to state his/her case personally. In such cases, a lack of assistance from the parents may have serious consequences for the learner, for example, suspension or expulsion from school. Burns (1999:169) states that

in the past, it was not essential (in terms of common law) that the applicant appear personally before the administrative body, unless, of course, the statute made personal attendance obligatory. The official had a discretion whether to allow personal appearance or not, and his discretion was generally exercised in accordance with the intricacy of the hearing. What was considered important was that the applicant be given the opportunity of presenting his case personally or in writing.

Roos and Oosthuizen (2003:54) also indicate that, according to common law, it is not necessary for the person to appear personally at a hearing. The case may, for example be presented in writing. Burns (1999:170) states that it may be argued that section 34 of the 1996 Constitution has changed the common law rule in that a person may now not only insist on a personal appearance but demand legal representation as well. Roos and Oosthuizen (2003:54) support this by stating that section 3(3)(a) of the PAJA now provides that a "decision-maker has a discretion to allow an affected party legal representation in complex cases".

Nevertheless, the response to the issue of personal appearance should be dealt with on a legal basis. In legally complex issues personal appearance is required even

though it may not be required in simple and uncomplicated cases (Burns, 1999:170). Burns (1999:170) suggests that “in view of the 1996 Constitution, a person be allowed to appear personally at the hearing, especially in complicated cases”. An example of a complicated case in the school context would be one in which a learner had to appear before a committee of the SGB for allegedly stealing computers from a school. Section 3(3)(b) of the PAJA provides that a decision-maker has to choose whether to allow somebody to appear in person before the disciplinary committee (RSA, 2000a). This discretion must be exercised fairly. It is advisable to permit a learner to appear personally in serious cases such as cases that may lead to the expulsion of the learner from school (Roos & Oosthuizen, 2003:54). According to Pati (2009:53), the notion of fairness in a hearing in all cases “encompasses a diversity of situations, and it has to be seen an umbrella for a number of guarantees. A fair hearing encompasses several elements, including *audiatur et altera pars* (*audi alteram partem*) (and the principle of equality of arms) as well as deference to the principle of adversarial proceedings and expeditious procedure”.

According to Burns (1999:170) and Roos and Oosthuizen (2003:54), the right to legal representation did not previously form part of the *audi alteram partem* rule. This right may be claimed only where it had been provided by statute. The nature of the hearing plays a role in the decision as to whether there is a need for representation in a case. “A purely factual hearing does not require legal representation, but a highly technical matter affecting the individual’s status, way of life, reputation, and so on, should entitle him (or her) to legal representation. What is important is whether the affected person has been given a fair chance to present his/case” (Burns, 1999:170).

According to Burns (1999:170) the “right of cross-examination did not traditionally form an inherent part of the rules of natural justice”. This has, however, been changed by section 34 of the 1996 Constitution, while section 3(3)(b) of the PAJA provides that a tribunal may allow the accused (such as a learner) to present and dispute “information and arguments at his/her discretion” (RSA, 2000).

Burns (1999:170) maintains that previously there was no “absolute right to a public hearing, despite the principle that justice must not only be done, it must be seen to be done”. According to Roos and Oosthuizen (2003:55), this means that it must be

accepted that the disciplinary hearings of learners of “minority age must always take place in camera”. However, this may be changed if legislation specifies something different. Roos and Oosthuizen (2003:54) further mention that, according to South African common law, the “right to a public hearing does not exist in the case of an administrative disciplinary hearing”.

Osborne and Russo (2009:17) state that in *Goss v Lopen* (Goss, 1975), the court feared that requiring hearings for relatively minor disciplinary infractions might have diverted school officials from more pressing concerns. Before learners can be suspended and expelled, they are entitled to procedural due process (Osborne & Russo, 2009:18).

2.3.5.4 Adjourning and considering the facts

This is an important step that follows the hearing proceedings. Education managers play an important role in insuring that a decision that is taken by the tribunal is a correct one and is based on facts. During this stage, the substance of the case is discussed fairly so that the decision that will be taken is substantially fair. Therefore, education managers must have knowledge of law. In addition, education managers must ensure that they do not “simultaneously act as witness, prosecutor and judge” (*Michiel De Kock v the HoD of Education and Others, Province of the Western Cape*). Education managers may be part of the decision-making process only if they have not been involved in the case (Joubert & Prinsloo, 2009:133).

Universal and regional instruments providing for adjourning and considering facts

After the disciplinary committees or tribunals have completed the hearing, they will be ready to take a decision. When considering the facts, they must ensure that learners are not condemned for an act or omission that did not constitute a legally punishable offence at the time it was committed. Article 11(2) of the UDHR (UNGA, 1948), Article 7(1) and 7(2) of the ECHR (EC, 1950), Article 15(1) of the ICCPR (UNGA, 1966), Article 9 of ACHR (OAS, 1969) and Article 40(2)(a) of CRC (UNGA, 1990) all mention that

no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the offence was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter penalty, the offender shall benefit thereby.

United States statutes and policies providing for adjourning and considering the facts

In the US, the process of adjourning and considering the facts takes place in terms of Amendment V of the US Constitution (1791) and Amendment XIV of the US Constitution (1868 which provide for due process of law). Due process requires that, after a hearing, tribunals should discuss and agree on the decision to be taken. During this stage, the tribunal will be informed about the findings of a hearing and, in the context of a school disciplinary hearing, the provisions contained in the student code of conduct as regards the misconduct. These two aspects should assist the tribunal to make the correct decision. It is important that the decisions taken by tribunals are in accordance with a student code of conduct that meet the standards set by the State Department of Education (US Constitution, 1869). For example, in the state of Texas, the Education Code guides schools on the drawing up of a student code of conduct (TEC, 2013). This student code of conduct will be used in decision-making. This process is known as substantive due process.

Title 2 Subtitle G of the Texas Education Code 2013 (hereafter TEC, 2013) deals with safe schools. Chapter 37 deals with discipline, law and order. Section 1 of the TEC, 2013 provides that the “student code of conduct must be posted and displayed where everyone can be able read it”. In addition to establishing standards for student conduct, the student code of conduct must

state what may cause a student “to be removed from a classroom, school or disciplinary alternative education programme”

mention the “conditions that a principal or other person in authority will use to transfer a student to a disciplinary alternative education programme”

specify what may cause students to be “suspended as provided by Section 37(5)” or “expelled as provided by Section 37(7)”

specify that “consideration will be given, as a factor in each decision concerning suspension, removal to a disciplinary alternative education programme, expulsion or placement in a juvenile justice alternative education programme, without looking at whether the decision concerns a mandatory or discretionary action to self-defence; intent or lack of intent at the time the student engaged in the conduct; a student's disciplinary history; or a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct; provide guidelines for setting the length of a term of a removal under Section 37(6); and an expulsion under Section 37(7)”.

It is essential that the tribunal be aware of the content of the student code of conduct so that the correct decision is taken. Each state in the US deals with learner discipline in its own way.

South African statute and policies providing for adjourning and considering the facts

It is important that, after a hearing, the committee led by the chairperson adjourns and considers the facts. “When all the evidence has been collected, the chairperson must close the investigation and dismiss the complainant, the accused, their representatives, the parent/guardian and all the witnesses” (DoE, 2008:18). The purpose of adjourning is to discuss the findings of the committee, as the information that has been collected should assist the committee to take a decision. Joubert and Prinsloo (2009:136) indicate that the committee adjourns to enable the chairperson to consider the facts of the case. He/she may consult other members of the disciplinary committee to help him/her to arrive at a fair and just decision. According to the DoE (1998:18), during the process of adjourning and considering the facts, the disciplinary committee must discuss about the findings from the presentations and

the evidence. The committee must then make a decision and provide the reasons behind the decision that was made.

It is essential that education managers act within the bounds of legal authority when they discipline learners. They must have an understanding of the principle of *ultra vires* while they should not be tempted to take decisions that they are not permitted to take nor play roles that they are not supposed to play. The common law principle of *ultra vires* is related to due process, as due process also does not allow education managers to act *ultra vires* when a decision is taken. In addition, education managers must ensure that they do not take decisions alone on matters that should be dealt with by the SGB. According to Woolman and Fleisch (2009:197),

the state has lost quite a number of battles with SGBs in which the issue is ultimately about identifying the party with the ultimate authority to take a decision. Whether these cases are simply evidence of a general disregard for the demands of due process, or whether they signify the conscious intent to challenge private power on all fronts, the following cases of administrative overreach certainly suggest the willingness of the state to push up against the limits of the law in order to achieve its objectives.

According to Bray (2005:138), codes of conduct that are not valid, disciplinary hearings that are not procedurally fair and decisions that are not lawful and that are not reasonable, create a negative image of school governance and result in a lack of trust in the school community. The school community that elected the SGB members to their positions of leadership and trust will not trust the SGB if it does not follow due process. SGBs acting outside their authority should expect their *ultra vires* conduct to be nullified by the courts. If a person carries out duties that are not legally his/hers, this signifies either ignorance of the law or outright disrespect or disregard for the law and the legal process. In addition, such conduct also reflects unprofessionalism and disrespect for good governance. Subsequently, the schools concerned may be taken to court and, if they lose the case, they may be obliged to pay out significant sums of money.

Baxter (1984:301) maintains that, in order to ensure that education managers and SGB members are not acting *ultra vires* the following requirements should be taken into consideration:

the members of the disciplinary committee must have legal authority

disciplinary proceedings should be executed only by the person who has legal authority

the action must comply with due process, appropriate legislation and policies

the members of the disciplinary committee must act fairly and reasonably at all times, and

the SGB members will be legally liable for all their actions that are *ultra vires*.

In terms of common law, only disciplinary actions that were grossly unreasonable are reviewable. Grossly unreasonable actions may be interpreted as a defect in the procedure or non-compliance with another validity requirement and, therefore, the court of law may review the procedure that was followed. “The substantive effect or consequences of the act” itself would not be reviewed (Burns, 1999:186–187). According to Bray (2005:137), a decision must be regarded as “reasonable (or justifiable) in relation to the offence that has been committed”. In simple terms, the punishment must be appropriate to the offence. In addition, a reasonable decision is taken objectively and is based on the correct facts and circumstances. For this reason the learner must be furnished with sufficient written reasons so that he/she knows on what facts and arguments the decision has been based. The reasons provided must correlate with the action taken.

When an education manager makes a decision as to the nature of the disciplinary measures to be taken, it is advisable that he/she discloses the reasons for the decision (Burns, 1999:59).

In terms of common law disciplinary authorities are not forced by any rule or principle to provide reasons for the decisions. When people were not

provided with reasons, that led to mistrust and they resorted to appeal which caused the authorities to incur substantial expenses. How can an aggrieved person substantiate his/her matter, or that there was an ulterior purpose or *mala fides*, if he/she has no concrete reasons for the decision (Burns, 1999:196).

Burns (1999:156) indicates that the common law requirements demand that the

form of the legislative, judiciary or administrative act (that is, the specific subordinate legislative provision, the decision of the administrative court, the administrative agreement or the unilateral disposition order, notice or decision) must not be vague, confusing or embarrassing. In essence this means that the administrative act in question must be clear and comprehensible (understandable).

Section 5 of the PAJA prescribes the procedure that should be followed by a person who has committed a misconduct and wishes to obtain the reasons. An accused person who has not been furnished with the reasons for a decision has a right to ask for reasons within 90 days of being informed of the punishment, while the authority that made the decision has 90 days to provide the reasons. Should the authorities not furnish adequate reasons, it will be “presumed that the decision was not taken for a good reason”, unless the authorities are able to prove otherwise (s 5 of the PAJA, 2000a).

Any consideration which may count against a party affected by a decision must be communicated to him/her, to enable him/her to answer the allegation. This communication need not be imparted in exactly the same form as it was received, but the essential facts must be conveyed to enable him/her to reply (Burns, 1999:171).

Section 9(1) of the Schools Act states that

subject to this Act and any applicable provincial law, the SGB of a public school may, after a fair hearing, suspend a learner from attending the school –

- as a correctional measure for a period not longer than one week; or
- pending a decision as to whether the learner is to be expelled from the school by the Head of Department (RSA, 1996b).

Section 9(2) of the Schools Act mentions that in terms of applicable provincial law, it is only the Head of Provincial Education Department who may expel a learner from a public school. This may happen if the “learner is found guilty of serious misconduct after a hearing”.

Section 9(3) of the Schools Act states that

the Member of the Executive Council must determine by notice in the Provincial Gazette the learner behaviour which may constitute serious misconduct; disciplinary proceedings to be followed when learner has committed a misconduct; and provisions of due process safeguarding the interests of the accused learner and any other persons involved in disciplinary proceedings.

According to section 16A of the Schools Act (RSA, 1996b), “[e]ducation managers (principals) must always advise the governing bodies to take section 9(1-3) of the Schools Act into consideration”. This is the reason why the principal is an ex-officio of the SGB of the school and must play his/her role as stipulated in the Schools Act.

Section 8(3) of the Schools Act provides that “the Minister may, after consultation with the Council of Education Ministers, determine guidelines” (RSA, 1996b). Section 11 of the Guidelines contains the list of offences that may result in suspension (DoE, 1998). According to the Guidelines (DoE, 1998),

offences that may lead to such suspension include, but are not limited to the following:

- conduct which endangers the safety and violates the rights of others;
- possession, threat or use of a dangerous weapon;
- possession, use, transmission or visible evidence of narcotic or

- unauthorised drugs, alcohol or intoxicants of any kind;
- fighting, assault or battery;
- immoral behaviour or profanity;
- falsely identifying oneself;
- harmful graffiti, hate speech, sexism, racism;
- theft or possession of stolen property, including test or examination papers prior to the writing of tests or examinations;
- unlawful action, vandalism, or destroying or defacing school property;
- disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees or learners;
- repeated violations of school rules or the Code of Conduct;
- criminal and oppressive behaviour such as rape and gender based harassment;
- victimisation, bullying and intimidation of other learners;
- infringement of examination rules; and
- knowingly and wilfully supplying false information or falsifying documentation to gain an unfair advantage at school.

It is important that these instances of misconduct be included in the code of conduct so the disciplinary committee is informed about the type of misconduct that may lead to suspension.

When the disciplinary committee members are deciding on a fitting punishment, the rights and procedures vary depending on whether the removal from school is a short-term suspension, a long-term suspension or an expulsion. In the American context, Boylan (2012:14) indicates

that a short-term suspension is removal of a learner from his or her regular education programme for up to 10 days. A suspension of more than 10 days is known as a long-term suspension. An expulsion occurs when a learner is discontinued altogether, either permanently or for a specified long-term period, such as one year.

In the South African context, a short-term suspension involves the learner being suspended for not more than seven days. There is no long-term suspension in South Africa.

The principals of schools must have clear grounds for suspension. There are various grounds for suspension and expulsion in the US This is confirmed by Alexander and Alexander (2005:3) when they state that the way in which the SGB governs the operation of public schools varies from “state to state and from subject to subject”. For example, according to Boylan (2004:12),

under New Jersey statute a student may be suspended or expelled for misconduct which includes, but is not limited to, any of the following conduct:

- continued and wilful disobedience;
- open defiance of authority;
- stealing;
- damaging school property;
- occupying or causing others to occupy the school building without permission;
- causing other students to skip school;
- possessing, using or being under the influence of illegal drugs or alcohol in the school building or on school grounds;
- harassment, intimidation, or bullying;

- trying to injure or injuring another student, a teacher, someone who works for the school, or a school board member;
- conviction or adjudication of delinquency for possession of a gun, or committing a crime while armed with a gun on school property, on a school bus, or at a school function;
- knowingly possessing a gun while on school property, on a school bus, or at a school function.

The right to be free from unjustified discipline and zero tolerance

Russo and Mawdsley (2002:4.35) are of the opinion that several disciplinary cases fall within the

first category, especially where schools, rather than providing for the application of mitigating circumstances in disciplinary matters, implement zero tolerance policies that decree consistency in the punishment of certain misbehaviour in all pupils. Students often attempt to circumvent the harsh consequences of these policies by asserting that the punishment does not fit the offence and that, therefore, they are being unfairly deprived of their property right to an education.

2.3.5.5 Conveying the decision

Education managers must advise the disciplinary committee members and SGB members in order to convey a decision that is substantively fair. A correct procedure of conveying the decision should be taken into consideration.

Universal and regional instruments providing for conveying the decision

A decision must be taken without delay. Article 40(2)(b)(iii) of the CRC (1990) provides that

every child who is accused of the misconduct must have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to the rule of law, in the presence of representative. A punishment may not be conveyed if it is

considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.

South African statute and policies providing for conveying the decision

After considering the facts and careful deliberation, the chairperson, assisted by the disciplinary committee, must communicate the decision that has been taken by the committee. According to Roos and Oosthuizen (2003:58), “when a decision-maker exercises his/her discretion, he/she must take into account all the facts that are relevant to the case, but should not be influenced by irrelevant issues”. Roos and Oosthuizen (2003:58–59) further state that the

PAJA confirms the common law position by providing that the following constitute grounds for review:

- a material error of law by the decision-maker – section 6(2)(b)
- action taken for an ulterior purpose or motive – section 6(2)(e)(ii)
- relevant considerations were not taken into account, or irrelevant considerations were taken into account – section 6(2)(e)(iii)
- an unauthorised person or body prescribed to the decision-maker what to do – section 6(2)(e)(iv)
- action taken in bad faith – section 6(2)(e)(v)
- action taken arbitrary or capriciously – section 6(2)(e)(vi)
- action not rationally connected to its purpose, the purpose of the empowering legislation or the information before the decision-maker – section 6(2)(f)(ii)
- failure to take a decision where a body is duty – bound to take a decision – section 6(2)(g) (RSA, 2000a).

Conveying the decision means that the chairperson informs the parties concerned or not the learner has been found guilty of misconduct. The chairperson will also

announce the punishment and provide reasons for the decision. These two aspects (decision as regards the punishment and the reasons for the decision) must be presented in writing to the parties. Burns (1999:197) states that “the furnishing of reasons facilitates fairness and proper administrative behaviour, accountability and openness: unsound reason may form the subject of an appeal on the merits or a review of the validity of the action”.

- Making use of required documents

When a disciplinary committee takes a decision, the committee must be informed by the applicable laws, policies, guidelines from the various provincial departments of education and subordinate legislation. Paragraph 12.4 of the Guidelines states that “[a]ll decisions leading to suspension or expulsion must take cognizance of applicable law” (DoE, 2008).

The Guidelines (DoE, 1998:40) state that “the SGB must keep a record of the proceedings of the hearing, and may inform, in writing, the Head of Department of its decision to suspend a learner; or must inform the Head of Department within twenty-four hours of its recommendation for expulsion of the learner”. For the purpose of this study the following records (documents) should be kept for each disciplinary proceeding as evidence in order to achieve the purpose of substantive due process:

notice (DoE, 2008:13)

minutes of the proceedings

attendance register

written decision of punishment and reasons for the decision (DoE, 2008a:13)

letter of recommendation to the HoD for the expulsion (DoE, 2008a:14)

a disciplinary form signed by a complainant and learner (DoE, 2008b:18).

Foreign case law providing for conveying the decision

- Standard of fair warning

In 1979, the Texas appeals court heard the case of *Galveston Independent School District v Boothe*. David Boothe, a public high school student, was caught just off the school grounds with a small amount of marijuana. Following a hearing, David was expelled by the board of education for one quarter of the school year. The court decided for the student and ordered that he be reinstated. In so doing, the court held: “Rules and regulations upon which the expulsion was based were not specific enough to apprise the student of the nature of conduct prescribed” (Rossow & Warner, 2000:200–201). In other words, it is essential that rules and regulations are specific enough to prescribe how learners should behave.

- Excessive student punishment may be set aside on the ground of due process

Woodard (1990), as cited by Davidson (2003:45), reported that

Cook v Edwards (1972) is a leading case for establishing that excessive student punishments can be set aside on the grounds of due process of law. In this case a fifteen year old high school student came to school intoxicated. There was no evidence that she created any disturbance, and it was clear that this was her first offence. The principal suspended the student indefinitely until some discovered psychological problem between the student and her parents could be remedied. The court reinstated the student holding that: It is fundamentally unfair to keep a student out of school indefinitely because of difficulties between the student and her parents, unless those difficulties manifest themselves in a real threat to school discipline. The punishment of indefinite expulsion raises a serious question as to substantive due process (*Cook v Edwards*, 1972:311).

It is, thus, clear from this court case that schools may not keep learners out of school because of problems between the learner and his/her parents. Learners may be kept out of the school only if such problems disturb the smooth running of the school.

- Importance of clearly written policy language and accurately followed procedures in applying policies

Darby v Schoo (1982) refers to a court case that was decided by the US District Court in the Western District of Michigan. This court case provides an example of the

importance of clearly written policy language as well as accurately followed procedures in applying the policies. In this court case two students were indefinitely suspended for vandalising the school over the weekend. This temporary suspension was then transmuted into expulsion without procedural due process being followed. The school policy was determined by the court to possess a semantic flaw because of the fact that it did not define the length of a temporary suspension (Davidson, 2003:62–63).

This emphasises that the code of conduct for learners should be written clearly and contain no ambiguities. In addition, it is essential that education managers advise the disciplinary committees to follow the correct procedures in applying the policy.

Russo and Mawdsley (2002:4.28) mention that

students may be denied the right to education in order to protect other students, teachers, and school property, and to prevent the disruption of the educational system. Thus, so long as they are supported by adequate due process, disciplinary rules enforceable by suspension and expulsion are given wide difference by the courts. In light of the comprehensive authority of schools to maintain order and safety, courts view such rules not as a denial of the right to an education, but rather as a denial of the right to engage in prohibited behaviour.

Russo and Mawdsley (2002:4.28) go on to state that

noting both the importance of creating, as well as the difficulty of maintaining, a safe and healthy learning environment, the Supreme Court has acknowledged that swift and informal disciplinary procedures [are] needed in order for educators to maintain order in the school. Consequently, students' codes of conduct need not describe in mind-numbing detail every possible infraction for which students may be disciplined, as well as the exact penalty to be assessed for each offence. In fact, given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanction.

2.3.6 Appeal

If a learner is not satisfied with the procedure that has been followed or he/ she has evidence that the disciplinary process was not substantively fair, he/ she can make an appeal. The literature that talks about the process of appeal is discussed below.

International and regional instruments providing for appeal

Article 2(1&2) of the ECHR (EC, 1950), Article 8(2)(h) of the ACHR (OAS, 1969) and Article 7(1)(a) of the ACHPR (OAU, 1981) all indicate that a person who has committed a misconduct has a right to appeal if he/she is not satisfied with the decision taken by the tribunal.

US statutes and policies providing for appeal

Both the Fifth Amendment (1791) and the Fourteenth Amendment (1866) to the US Constitution provides for appeal if the person is not satisfied with the disciplinary process.

According to Section 37(6)(i) of the TEC (2013):

The student or the student's parent or guardian may appeal the superintendent's decision under Subsection (h) to the board of trustees. While the learner is busy appealing, students should not be returned to the regular classroom pending the appeal. The board shall, at the next scheduled meeting, review the notice provided under Article 15.27(g), Code of Criminal Procedure, and receive information from the student, the student's parent or guardian, and the superintendent or superintendent's designee and confirm or reverse the decision under Subsection (h). The board shall make a record of the proceedings. If the board confirms the decision of the superintendent or superintendent's designee, the board shall inform the student and the student's parent or guardian of the right to appeal to the commissioner under Subsection (j).

Section 37(6)(j) of the TEC (2013) mentions that “[n]otwithstanding Section 7.057(e), the decision of the board of trustees under Subsection (i) may be appealed to the

commissioner as provided by Sections 7.057(b), (c), (d), and (f). The student may not be returned to the regular classroom pending the appeal”.

Section 37(2)(a) of the TEC (2013) provides that “[a]ny decision of the board of trustees or the board's designee under Section 37(81) is final and may not be appealed”.

Section 37(9)(a) of the TEC (2013) states that “[i]f school district policy allows a student to appeal to the board of trustees or the board's designee a decision of the principal or other appropriate administrator, other than an expulsion under Section 37(7), the decision of the board or the board's designee is final and may not be appealed”.

South African statutes and policies providing for appeal

Section 33 of the Constitution of 1996 provides that everyone has the right to “just administrative action” (RSA, 1996a). In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In the next subsection, 33(2), provision is made that “everyone whose rights have been adversely affected by administrative action has the right to be given written reasons” (Joubert & Prinsloo, 2009:70). Thus, this means that everyone has a right to ask to be given a written reason so that he/she may use this written reason when deciding to appeal. I am in agreement with Joubert & Prinsloo because what they mention is according to PAJA. Section 3(2)(b) of the PAJA states that “in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) of the Act, must give a person referred to in section 3(1) (RSA, 2000)–

adequate notice of any right of review or internal appeal, where applicable

adequate notice of the right to request reasons in terms of section 5.”

In the context of this study, section 3(1–3) of the PAJA provides that, in terms of learner discipline,

a learner who has been affected by a disciplinary action and who has not been given a reason for an action, may within 90 days of the date in which

the affected learner became aware of the action, request the Education Manager concerned to furnish written reasons for the action. The Education Manager concerned should respond in writing within 90 days. If the education manager fails to provide adequate reason for the disciplinary action and in the absence of proof, it will be stated that the disciplinary action was taken without good reason (RSA, 2000).

Thus, learners have the right to appeal if they are not satisfied with a disciplinary action. The Guidelines states the following: “The learner must have the right to appeal to the MEC if he/she is aggrieved by the decision of the SGB” (DoE, 1998:13). According to Joubert and Prinsloo (2009:136, “[t]he learner must be informed of this and told how to go about appealing”.

Section 9(4) of the Schools Act provides that “[a] learner or the parent of a learner who has been expelled from a public school may appeal against the decision of the Head of Department to the Member of the Executive Council”.

The right to appeal is not new and, in fact, originates from long ago. According to Marshall (2011:11–13):

The criminal appeal in continental Europe has its origins in the inquisitorial procedure. It emerged much earlier than in England and has remained a persistent feature of continental criminal procedure. Indeed appeals are now commonly regarded as a fundamental right. During the feudal period and middle ages, justice in France was patrimonial, with the right to administer justice dispersed among feudal lords. Judicial administration was the most important – and pervasive – function of government and means of control. Re-establishing a royal system of justice was, therefore, a fundamental component of a broader effort of the Crown to recapture powers of government that had been fragmented and dispersed. By the middle of the fourteenth century, Dawson observes, the private jurisdictions almost everywhere had come under the wide umbrella of royal appellate review. Over time, the royal courts eventually absorbed both the secular (i.e. seigniorial and municipal) and ecclesiastical courts. This expansion of royal jurisdiction was achieved through two interrelated

methods. The first was the creation of royal causes – certain proceedings over which crown officers had exclusive jurisdiction. The list of royal causes expanded rapidly, enlarging the judicial powers of inferior royal officers. By the end of the thirteenth century, all secular jurisdictions were seen as emanating from the king. The appeal was the second method associated with the growth of royal power.

Foreign case law providing for hearing an appeal

Marshall (2011:9) mentions that the

The Criminal Appeal Act was passed in 1907. The Act established the Court of Criminal Appeal, which absorbed the jurisdiction of the Court for Crown Cases Reserved, and it abolished both writs of error and the High Court's power to grant new trials. Unlike previous review mechanisms, appeals under the Act were broad in both scope and jurisdiction: appeals were available to all persons convicted on indictment, information or inquisition; review of one's conviction was permitted as of right on questions of law and with leave on questions of fact and mixed questions of law and fact; review was permitted, with leave, of the propriety of the sentence imposed; and, finally, trial judges retained the power to state cases for the opinion of the Court.

2.4 CONCLUSION

This chapter outlined the study within the conceptual framework used for the purposes of the study. The main focus of the literature review was on the concepts due process and the learner disciplinary process. It is essential that due process is part of all the above-mentioned steps (stages) of the disciplinary process. This means that education managers must integrate procedural and substantive due process in all steps. As regards the concept due process, the chapter discussed the origin and meaning of due process as well as the types of due process, namely, procedural due process and substantive due process.

As regards the learner disciplinary process, the chapter focused on aspects such as the hearing of evidence and deciding on action; notice of hearing; disciplinary

hearing; adjourning and considering the facts; conveying the decision and appeal. The discussion included relevant international, regional, foreign (US) and local (South African) laws and policies. In addition, the discussion focused on common law, case law and other literature relating to the above-mentioned aspects.

The next chapter discusses the research methodology used in the study.

CHAPTER 3

DESIGNING AND CONDUCTING THE EMPIRICAL RESEARCH

3.1 INTRODUCTION

Chapter 2 contained an extensive literature review on due process and the learner disciplinary process, thus providing a detailed background to these two concepts. The literature study assisted me to identify gaps in the existing literature and this, in turn, helped me to structure the research methodology and research design used in the study.

This chapter discusses the way in which the study was planned and designed. In other words, the chapter contains a comprehensive description of the way in which I conducted the research study (Van den Berg, 2008:99). The purpose of the study was to investigate how education managers conceptualise due process and how their understanding of due process influences the way in which they discipline learners.

The research approach and design used in the study are illustrated in the diagram on the following page.

3.2 KNOWLEDGE CLAIM

The knowledge claim of this study may be explained in terms of both an epistemological and an ontological stance. The Greek word ‘episteme’ means “truthful knowledge and relates to the concept’s epistemic” (Van den Berg, 2008:100). According to Guba and Lincoln (1994:108), the following epistemological question may be asked: “What is the nature of the relationship between the knower or would-be knower and what may be known?” Thus, from an epistemological point of view, the comprehensive goal of research is to search for “knowledge that is truthful” (Van den Berg, 2008:100).

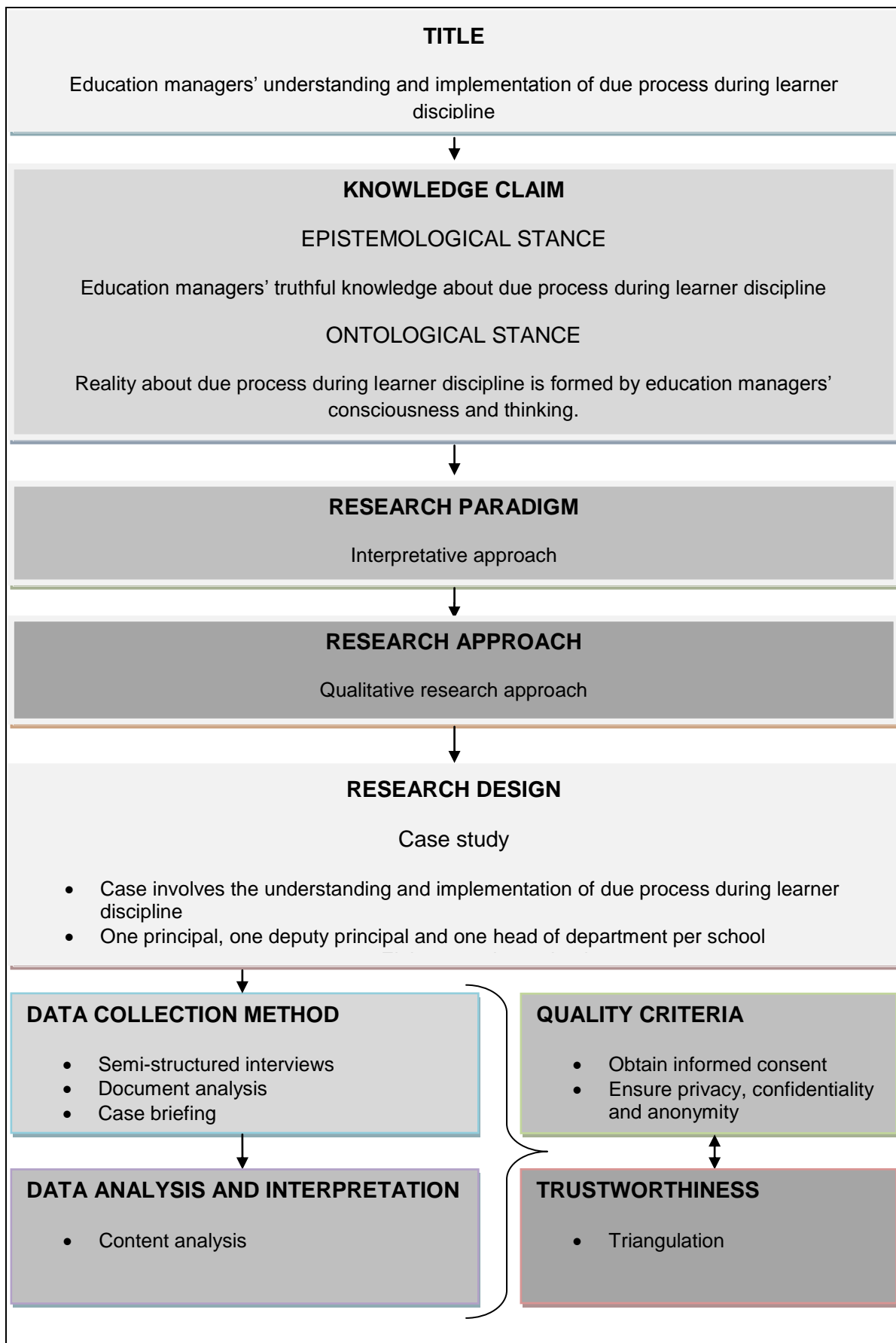


Figure 3.1: A schematic presentation of the design for conducting the empirical research

According to Cohen et al. (2000:6), epistemology concerns the “very bases of knowledge – its nature and forms, how it can be acquired, and how it can be communicated to other human beings”. Huff (2009:108) maintains that epistemology focuses on what “human beings can know about what exists”. According to Huff (2009:113), “all knowledge, including the most basic taken-for-granted common-sense knowledge of everyday reality, is derived from and maintained by social interactions”. Terre Blanche et al. (2006:275) are of the opinion that “epistemology means to make sense of people’s experiences by interacting with them and listening carefully to what they tell us”. Minnaar (2009:70) states that when developing a knowledge claim, “one needs to define what knowledge is”. Science is viewed as the research for knowledge and truth and the means for understanding phenomena within the world.

The search for complete knowledge and truth can never be achieved or perfected by any researcher, owing to the multiple meanings and interpretations applied to the concepts of knowledge and truth by different people. The epistemological stance of this research study involved investigating what education managers know and understand about due process. The required knowledge was obtained through interviews and document analysis. This approach is supported by Nieuwenhuis (2010a:55) when he states that the “stories, experiences and voices of the respondents are mediums through which we explore and understand (know) reality”. I believe that multiple realities exist with regard to the way education managers understand and implement due process when disciplining learners.

According to Guba and Lincoln (1994:108), the following ontological question may be asked: “What is the form and nature of reality and, therefore, what is there that can be known about it?” The ontological stance adopted by this research study was that reality is the product of individual consciousness and, thus, the product of the mind (Cohen et al., 2000:5, 6). Ontology means “taking people’s subjective experiences seriously as the essence of what is real for them” (Terre Blanche et al. 2006:275). Huff (2009:108, 113) is of the opinion that “ontology considers what exists. Individuals and groups participate in the creation of their perceived reality”. This, in turn, means that the reality about the understanding and implementing of the due

process in disciplining learners were formed by the education managers' consciousness and thinking. The research paradigm used in the study will now be explained.

3.3 RESEARCH PARADIGM

It is important for a researcher to know what the paradigm of his/her research is to enable him/her to discover and acquire relevant knowledge. "A paradigm may be viewed as a set of basic beliefs (or metaphysics) that deals with ultimates or first principles" (Guba & Lincoln, 1994:107). The research paradigm that was used for the purposes of this study was the interpretative paradigm. According to Peshkin (1993, as cited by Leedy & Ormrod, 2013:140), interpretation enables a researcher to gain new insights about a particular phenomenon; develop new concepts or theoretical perspective about the phenomenon; and discover problems that exist within the phenomenon. In other words, human activities must be investigated in terms of meanings – why people say this, do this or act like this or that way – and must be interpreted by linking them to other human events to enable greater understanding. In interpretative research the investigator "builds an extensive collection of thick description (detailed records concerning context, people, actions, and the perceptions of participants) as the basis for the inductive generation of an understanding of what is going on or how things work" (Locke et al., 2010:184).

The purpose of this interpretative research study was to "understand the setting for social action from the perspective of the participants" (Locke et al., 2010:184). Thus, the research paradigm was used to discover and acquire knowledge about how education managers understand and implement due process when disciplining learners. The interpretative paradigm "offered a perspective of a human situation and it helped analyse the situation under study [understanding and implementation of due process] to provide insight into the way in which a particular group of people [education managers] make sense of their situation or the phenomena they encounter" (Nieuwenhuis, 2010a:60). The reports from the study "contained richly detailed narratives that are grounded in data of the participants' own words, as selectively extracted from the transcriptions of interviews" (Locke et al., 2010:184).

The interpretative paradigm helped me to develop a conceptual framework, which guided the study during the interpretation of the data that had been collected about education managers' understanding and implementation of due process during learner discipline. When applying the interpretative paradigm, I explored, described and explained the understanding and implementation of due process during learner discipline of education managers. During the interviews, I interacted with the education managers who had participated in the study and I listened carefully to what they said. Their responses constituted the data for the study.

3.4 RESEARCH APPROACH

The study adopted a qualitative research approach. The term 'qualitative research' encompasses several approaches to research that are, in some respects, quite different from one another (Leedy & Ormrod, 2013:139). Leedy and Ormrod (2013:139) further state that "qualitative researchers rarely try to simplify what they observe. Instead, they recognise that the issue they are studying has many dimensions and layers, and they try to portray it in its multifaceted form". According to Flick, Von Kardorff and Steinke (2004:3), "qualitative research claims to describe life-worlds from the inside out, from the point of view of the people who participate". This approach was used for the purposes of the study in order to ascertain the views of education managers on how they understood and implemented due process when disciplining learners. The responses of the participants during the interviews and the data from the document analysis formed part of reality. Nieuwenhuis (2010a:54) maintains that the qualitative research approach focuses on people – "how and why they interact with each other, and their motives and relationships".

3.5 RESEARCH DESIGN

The study was informed by a research design which encompassed the philosophical assumptions which had guided me when I had selected my participants. The research design also specified the data collection methods used to collect the requisite data. According to Nieuwenhuis (2010b:70), a "research design is a plan or strategy which moves from the underlying philosophical assumptions to specifying the selection of respondents, the data gathering techniques to be used and the data to be done". The research design used in this study ensured that the evidence

obtained enabled me to answer the research questions as unambiguously as possible (Henning, Van Rensburg & Smit, 2004:146). Terre Blanche et al. (2006:34) maintain that a “research design is a strategic framework for action that serves as a bridge between research questions and the execution or implementation of the research”. Thus, I define the research design that I used as the plan that I executed in order to select the participants and data collection techniques which provided me with the data that enabled me to answer the research questions.

The study adopted a case study design. Leedy and Ormrod (2005:135) maintain that, in a case study, the researcher “collects extensive data on the individual(s), program(s) or event(s) on which the investigation is focused. These data often include observations, interviews, documents, past records and audiovisual materials”. This view is supported by Creswell (2007:73), who states that a case study involves “multiple sources of information such as observation, interviews, audiovisual material, documents and reports”. According to Gary (2011:3, 13), a case study involves a “set of circumstances in its completeness and the case is described – marked out – by those circumstances. A case study method is a type of research that concentrates on one phenomenon, looking at it in detail, not seeking to generalise from it. The phenomenon/ thing may be a person, group, an institution, a country, an event, and a period in time or whatever”. The reason why I used the case study method is because the case study uses multi sources and techniques in the data gathering process. Thus, it allowed the use of the data collection tools that I had identified for the purposes of the study, namely, interviews and a document analysis.

The aim of the case study was to improve understanding of the implementation of due process in education managers’ during learner discipline. The phenomenon studied in this investigation was due process. I collected extensive data on how education managers understand and implement due process during learner discipline. The case study method assisted me to learn more about the issue of due process which is little or poorly understood (Leedy & Ormrod, 2013:141). While conducting the study, I used ‘how’ and ‘what’ questions. Both Nieuwenhuis (2007a:74) and Gary (2011:247) maintain that the case study method is used to answer ‘how’ or ‘why’ questions. Moletsane (2004:111) is of the opinion that the case

study “process is divided into three sections, namely: data collection, data analysis, findings and interpretation”. The following section discusses data collection methods.

3.6 DATA COLLECTION

3.6.1 Data collection methods

Two data collection techniques assisted me to obtain the requisite data. McMillan and Schumacher (2001:39) state that one way in which to classify research is to “examine the technique used in the study to collect the data”. The data collection in this stage was divided into two phases. During phase 1 data were collected by means of semi-structured interviews while, during phase 2, the data were collected by means of a document analysis.

3.6.1.1 Interviews

In view of the fact that the study was “largely exploratory, interviews were the best approach” (Gray, 2009:370), I interacted with the education managers through the interviews that were conducted. The study used semi-structured interviews which were partially planned. The most important questions that I intended to ask were determined before the interviews. Education managers hold management positions in a school. I therefore interviewed members of the school management team (SMT) such as heads of departments (HODs), deputy principals and principals. The reason why I interviewed education managers is that I wished to find out how they understand due process and how their understanding of due process influenced the way in which they disciplined learners. Moletsane (2004:113) maintains that interviewing is one of the “most common and powerful ways in which we try to understand our fellow human beings during a research process”. According to Terre Blanche et al. (2006:297), “interpretative approaches see interviewing as a means to an end (namely, to try to find out how people really feel about or experience particular things), and they, therefore, try to create an environment of openness and trust within which the interviewee is able to express herself or himself authentically”.

The use of semi-structured interviews enabled me to probe for clarity and depth in the participants’ responses (Cohen et al., 2000:278; Gary, 2011:373; Nieuwenhuis, 2010b:87). The questions contained in the semi-structured interview schedule

covered aspects such as the meaning of due process, the meaning of procedural and substantive due process, the steps in due process, legislation about due process, important documentation in respect of due process, types of offence that require due process, conducting a preliminary investigation, notice of a hearing, conducting a disciplinary hearing, participants in the disciplinary hearings, impartial tribunal/disciplinary committee, right to information, right to representation, reason for decision, right to appeal and consideration of age during learner discipline.

Each interview lasted for approximately 45 minutes. The interviews were tape-recorded to ensure accuracy and I obtained the informed consent of the participants to record the interviews. According to Terre Blanche et al. (2006:298), “most people don’t mind if you tape-record or video an interview, but be sure to get their consent first”. The recordings ensured a complete record of the interviewee responses.

The interviews assisted me in finding out about how education managers understand and implement due process when disciplining learners in public secondary schools.

3.6.1.2 Document analysis

I conducted a document analysis in order to collect data from the policies and administrative documents that schools use in disciplining learners. According to McMillan and Schumacher (2001:42), a document is a “record of the past events that is written or printed; they may be anecdotal notes, letters, diaries, and documents”. Manyaka (2006:44) concurs by stating that a document study in education involves the “study of documents such as policy statements, hand books, annual reports, minutes of meetings, transcripts of students’ work and institutional data bases”. For the purposes of this study documents such as the code of conduct for learners, notices of disciplinary hearings and the minutes kept during disciplinary hearings were analysed. These represent the documents that schools use to ensure that due process is implemented correctly. Relevant court cases were also analysed. A detailed explanation of the way in which the data analysis of the above-mentioned documents was conducted is contained in the section on the data analysis and data interpretation.

- Analysis of code of conduct for learners

The analysis of the “code of conduct for learners established how SGBs include the provisions of the due process in the code of conduct for learners” as required by section 8 of the Schools Act.

- Analysis of notice of hearing

I analysed the notices that had been sent to the parents and the learners to attend disciplinary hearings in order to explore the schools’ understanding of the contents of such a notice.

- Analysis of the minutes of disciplinary hearings

The minutes of the disciplinary hearings were analysed. The reason why I analysed the minutes is because I wished to find out how the tribunal scribes recorded the minutes of the disciplinary hearings.

- Analysis of court cases

Case law enables a better understanding of the interpretations and applications of legal provisions. Case law is extremely important for education in that we may learn from it how legislation and common law are to be “interpreted and applied in educational practice” (Oosthuizen & De Wet, 2011:59). Judges interpret the law when they give out judgments. I analysed selected court cases in order to find out how education managers understand and implement due process when disciplining learners. I also analysed the judgments in such court cases to find answers as to how due process should be implemented when disciplining learners. I selected court cases that had been decided in the Constitutional Court, the South African Supreme Court of Appeal and the High Courts. I made use of case briefings in order to summarise the selected court cases. A case briefing is “a listing of essential elements of a case” (Grindle, 2009:42). The conceptual framework developed to guide the study was used to analyse the selected court cases.

I analysed fourteen court cases that dealt with learner discipline and aspects of due process – for a list see section 2.3.3.2.

A report on the analysis of these court cases is contained in chapter four.

3.6.2 Sampling

According to Tuckman (1994:237), the “first step in sampling is to define the population”. Terre Blanche et al. (2006:49) maintain “sampling is the selection of research participants from an entire population, and involves decisions about which people, setting, events, behaviours, and/or social processes to observe”. Purposive sampling was used for the purposes of this study. The rationale for using purposive sampling was its emphasis on “information-rich samples and not on generalising to the broader population” (Struwig & Stead, 2001:124).

The study was conducted in eight secondary schools in the Nkangala Region of Mpumalanga Province. It was important to ensure representation of schools from different socioeconomic backgrounds and, thus, I selected schools from towns, townships and rural areas in the Nkangala Region. I specifically chose this area because it was easy to access the schools. I selected four urban schools, two township schools and two farm schools. The aim of ensuring representation was not to compare secondary schools from different socioeconomic backgrounds but to obtain the various perceptions and practices of participants from different backgrounds and working in various socioeconomic areas. Accordingly, this study is not a comparative study.

Schools that had in the past taken disciplinary action against learners who had committed misconduct were sampled because the SMT members from these schools would be talking from experience. Eight of the twelve schools that I initially visited had conducted disciplinary hearings. Visiting these twelve different schools allowed me to select the information-rich schools. Through my discussions with the principals of the twelve schools about the experience of their SMT members as regards learner discipline, I identified eight schools as the most suitable schools that would be able provide me with rich information. After the principals of the eight sampled schools had permitted me to conduct my research at the schools, I purposely sampled three participants from each school (Van den Berg, 2008:112). I had selected secondary schools as the focus of my study because, in most cases, serious misconduct leading to disciplinary hearings occurs at secondary schools.

After I had received permission from the Mpumalanga Education Department to conduct the study, I contacted the school principals telephonically and arranged

appointments to meet with the individual principals. The aim of my meetings with the principals was to negotiate access to their schools. According to McMillan and Schumacher (2001:432), “choosing a site is a negotiation process to obtain freedom of access to a site that is suitable for the research problem and feasible for the researcher’s resources and time”. During the meetings, I explained the purpose of the study to the school principals and requested permission to conduct the study in their schools.

The participants in the study included the principal, deputy principal and one head of department per school. The sampled participants were all individuals who had participated in the learner disciplinary processes that required a due process. I relied on the school principals to select the other participants from their schools because I felt that the principals were aware of who would be knowledgeable about issues concerning learner discipline in their schools.

I met with all the participants to explain the purpose of this study and what I expected from them. The participants who agreed to participate were requested to sign consent forms. Terre Blanche et al. (2006:292) are of the opinion that “one has to establish informed consent with the participants themselves”.

3.7 DATA ANALYSIS AND INTERPRETATION

The study used a qualitative data analysis. According to Nieuwenhuis (2007b:99) “qualitative data analysis is usually based on an interpretative philosophy that is aimed at examining meaningful and symbolic content of qualitative data”. Thus, I used a qualitative data analysis to establish how education managers made meaning of due process by analysing their perceptions, attitudes, understanding, knowledge, values, feelings and experiences in an attempt to approximate their construction of the phenomenon (Nieuwenhuis, 2007b:99).

I analysed the interview transcripts and written documents such as codes of conduct for learners, notices of hearing, minutes of the hearings and selected court cases. I then conducted a content analysis or thematic analysis in order to analyse the data from the interviews and the documents obtained from the schools. Van den Berg (2008:122) maintains that “inductive thematic analysis is also referred to as content analysis or pattern analysis which is commonly linked to a case study design”.

According to Nieuwenhuis (2007b:101), content analysis is a “systematic approach to qualitative data analysis that identifies and summarises message content”. Thus, a content analysis is “a detailed and systematic examination of the contents of a particular body of material for the purpose of identifying patterns, themes, or biases” (Leedy & Ormrod, 2013:148).

Using the basic steps for data analysis, I transcribed the data as soon as I had collected it at the schools. I then immersed myself in it again and again, reading through the text several times over (Terre Blanche et al., 2006:323). After reading the text I coded it and established themes (Nieuwenhuis, 2007b:108). For the analysis of the interviews, I examined the data for themes that I could use to identify, explore, describe and explain how education managers understood and implemented due process during learner discipline (Van den Berg, 2008:122).

I examined the codes of conduct for learners to find out whether they contained “provisions of due process safe-guarding the interests of the learner and any other party involved in disciplinary proceedings” (s 8(5)(a) of the Schools Act, RSA, 1996b). The aim of the data analysis was also to find out how principals inform their governing bodies about policy and legislation in order to ensure that they adopt codes of conduct for learners that contain provisions of due process (s 16A(2)(f) of the Schools Act). I also examined the content of the notices of the disciplinary hearings. In terms of section 18(2)(c) of the Schools Act, the “recording and keeping of minutes” is the responsibility of the SGB (RSA, 1996b). In addition, it is incumbent on school principals to ensure the safekeeping of all records (s 16A(2)(v)). In addition, I analysed whether the schools kept detailed minutes to ensure that the disciplinary hearing processes met the basic standards of due process. In terms of section 16A(2)(d), the principal must “assist the SGB in handling disciplinary matters pertaining to learners” (RSA, 1996b). The document analysis also investigated how principals assist the SGBs with minute taking.

I then interpreted the analysed data using the information obtained from the literature review in order to draw a number of conclusions thus creating new knowledge. Based on the findings of the study I also made a number of recommendations about what can be done to improve the understanding and implementation of due process during learner discipline.

3.8 TRUSTWORTHINESS

Triangulation was used to ensure that there is trustworthiness of the study. Terre Blanche et al. (2006:287) state that “triangulation entails collecting material in as many different ways and from many diverse sources as possible”, while Struwig and Stead (2001:145) suggest that triangulation refers to the “extent to which independent measures confirm or contradict the findings. This can help researchers to ‘home in’ on a better understanding of a phenomenon by approaching it from several different angles”. According to Struwig and Stead (2001:19), “the triangulation of method may include various “methods such as interviews, Likert-type questions and focus groups”; that is, methodological triangulation. Terre Blanche et al. (2006:380) explain methodological triangulation as the “use of multiple methods to study a single problem, looking for convergent evidence from different sources, such as interviewing, participant observation, surveying and a review of documentary resources”. In order to ensure the trustworthiness of this study I took back the data to the participants for their comments on its accuracy (Struwig & Stead, 2001:146). Thus, the trustworthiness of this study was assured by using data from different sources”, namely, interviews and document analysis (Nieuwenhuis, 2007b:113).

The following section discusses the limitations of the study.

3.9 LIMITATIONS OF THE STUDY

The limitations of a study refer to what “constraints were imposed on the study, and to understand the context in which the research claims are set” (Vithal & Jansen, 2004:35). The limitations encountered in this study included access, time, resources, availability and credibility. This was a qualitative study and, thus, the findings and conclusions apply to the specific schools and participants in the study only and it is therefore impossible to generalise these findings and conclusions. In addition, the interpretation of the acts and court cases was from an educational perspective and not from the perspective of a legal expert.

3.10 ETHICAL CLEARANCE AND CONSIDERATIONS

In order to comply with the ethical requirements, I obtained ethical clearance from the Ethics Committee of the University of Pretoria to conduct the study. I also

obtained permission from the Mpumalanga Education Department to conduct the study in the sampled schools. After this permission had been granted, I met with the participants before commencing the study to explain to them both the purpose and the importance of the study. I explained to them that I subscribed to the principles as discussed in section 1.15 of this thesis.

The participants all signed letters of informed consent. Informed consent refers to the procedure in which the individual chooses whether to “participate in an investigation after being informed of facts that would be likely to influence their decision. Consent, thus, protects and respects the right of self-determination and places some of the responsibility on the participant should anything go wrong in the research (Cohen et al., 2000:51).

The participants were given the option to withdraw from the study at any time.

3.11 SUMMARY

This chapter explained that the study adopted a qualitative approach and was based on the interpretative paradigm. Interviews and document analysis were used to collect the requisite data. The study used a case study design to investigate how education managers conceptualised and implemented due process when disciplining learners. Twenty-four participants from eight schools were sampled by purposive sampling and they all participated in the interviews. The interview data were analysed using the content analysis method. Documents such as the codes of conduct for learners, notices of hearing and the minutes of the disciplinary hearings were also analysed using content analysis.

The next chapter reports on the findings obtained from the data analysis and explains how education managers understand and implement due process during learner discipline.

CHAPTER 4

HOW DO EDUCATION MANAGERS CONCEPTUALISE AND IMPLEMENT DUE PROCESS WHEN DISCIPLINING LEARNERS IN SCHOOLS? ANALYSIS OF INTERVIEWS, DOCUMENTS AND SELECTED COURT CASES

4.1 INTRODUCTION

This chapter analyses the information from the interviews, documents and selected court cases. Firstly, a table for analysing the interviews was drawn up. This table contained the themes and sub-themes that had been used during the analysis. The analysis of the interviews which were conducted with the principals, deputy principals and heads of departments (HODs) from eight schools was also tabulated. Secondly, documents including the codes of conduct, notices of learner disciplinary hearings and the minutes of learner disciplinary hearings were analysed. Lastly, case briefings were used to analyse selected court cases related to due process.

4.2 ANALYSIS OF INTERVIEWS

This section presents the themes and sub-themes that had emerged during the analysis of the interviews with the principals (Ps), deputy principals (DPs) and heads of departments (HODs) of selected farm, township and town schools. The section starts by analysing the biographical information of the participants and describing the schools and their environment.

Table 4.1: Biographical information of the participants

Gender						
Male:		Female:			Total	
16		8			24	
Age group						
25 or younger	26–30	31–40	41–50	51 and older		
0	0	0	7	17		
Training on due process						
No training on due process		Little training on due process			Proper training on due process	
8		16			0	
Qualifications						
Teaching Dip.	FDE/ACE	BA Ed	BEd	BEd (Hons)	MEd	PhD/DEd
0	5	0	1	15	3	0

The majority of the participants in this study were male. Most of the participants were in the age group of fifty-one years and older. The majority of the participants indicated that they had received little training on due process. Most of the participants were in possession of a BEd (Honours) qualification.

Table 4.2: Description of the schools and their environment

School	Type of school	Grade offered	Number of			Socio-economic status	Fee paying	Quintile
			learners	educators	non-educator staff			
A	Public high school	8–12	857	35	12	Average	Yes	5
B	Public combined school	1–12	787	24	17	Poor	No	1
C	Public high school	4–10	354	32	46	Average	Yes	5
D	Public high school	8–12	1089	60	10	Average	Yes	5
E	Public high school	8–12	1342	50	7	Poor	No	3
F	Public school	8–12	1105	34	8	Poor	No	3
G	Public combined school	1–12	487	25	6	Average	Yes	5
H	Public high school	8–12	463	14	1	Poor	No	1

4.3 EMERGING THEMES AND SUB-THEMES

The themes that emerged from the data analysis process were related to the conceptual framework, which included concepts such as due process, procedural due process and substantive due process. The themes were also related to the concepts of the learner disciplinary process, including the hearing of evidence and deciding on action, notice of hearing, learner disciplinary hearing, adjourning and considering the facts, conveying the decision and appeal. The purpose of interviewing the participants (principals, deputy principals and heads of departments) was to investigate how they understood and implemented due process during learner discipline. As stated in chapter 3, eight principals, eight deputy principals and eight HODs were interviewed – a total of twenty-four participants. All twenty-four participants were asked similar questions.

The following table presents the themes and sub-themes that were used to analyse the interview data.

Table 4.3: Emerging themes and sub-themes

THEME	SUB-THEME
Theme 1 Understanding due process	Meaning of due process Meaning of procedural due process Meaning of substantive due process
Theme 2 Understanding and implementing the learner disciplinary process	Mentioning the steps relating to due process Hearing of evidence and deciding on action Notice of hearing Disciplinary hearing Adjourning and considering the facts Conveying the decision Considering applicable legislation/laws/policies/subordinate legislation Making use of required documents Misconduct leading to a decision Appeal

4.3.1 Theme 1: Understanding due process

This theme is intended to investigate the education managers' understanding of the concept of due process and of the two types of due process, namely, procedural due process and substantive due process.

4.3.1.1 Education managers' views

Meaning of due process

The participants were asked to explain how they understood the concept of due process. They all offered different meanings of the concept. There were a few who regarded due process as the fairness of the process and, thus, they clearly understood what due process meant as they had used the word fair. DP4 mentioned: *"The hearing must be fair. There mustn't be any side taken. There mustn't be any bias."* Most of the participants regarded due process as a disciplinary process. They clearly had some notion of what due process is all about although they did not provide the appropriate meaning of the concept. In their responses they mentioned

that due process is used when learners are disciplined for have committed serious misconduct. DP3 stated: *“Due process is a measure in terms of discipline or a disciplinary measure that must be used to deal with learners who are problematic.”* Some of the education managers gave the incorrect meaning of due process. For example, P1 stated: *“I’m not sure if I am correct – due process is a process that is in place to assist in managing the school curriculum.”*

Meaning of procedural due process

The participants proffered various meanings of the concept of procedural due process according to their understanding. However, the majority of participants were not able to explain procedural due process as the process of following a fair procedure and they understood it merely as following a procedure. The word ‘procedural’ that is part of the concept itself enabled the majority of the participants to realise that this type of due process involves following a procedure. DP3 stated: *“Procedural due process could mean the procedure that must be followed, the term itself tell us about procedures that must be followed when you’ve got to discipline a learner.”*

A few of the participants did not understand the meaning of procedural due process with some giving a totally incorrect meaning of the term. P2 stated: *“I think the procedural is the one that you can do within the school premises”* while DP7 explained: *“In procedural due process we give parents notice. We give them seven days.”* These explanations had nothing to do with the meaning of the concept. Some of the participants did not even attempt to explain the meaning of procedural due process. HOD3 stated: *“I no longer remember them correctly, but what I think I heard about them before it is just that it is a long time ago while DP6 mentioned: I am not familiar with procedural due process.”*

Meaning of substantive due process

The participants were asked about their understanding of the meaning of substantive due process. The majority of the participants did not know the meaning of the term with some of these participants not even attempting to suggest the meaning. P1 stated: *“I am not sure about this one. I do not know substantive in which context.”* DP2 mentioned: *I also do not know the meaning of substantive due process. Some*

of the participants attempted to define the term but were incorrect. P2 stated: “*The substantive due process is where you will go beyond, like the lawyers and the departmental officials are involved.*”

Overview

Most of the participants understood due process as a disciplinary process. However, only a few understood due process as a fair process, with the majority believing that procedural due process simply meant following a procedure. Thus, it was clear that the majority of the participants did not understand the meaning of substantive due process. Data from interviews have proven that the majority of participants could not demonstrate an understanding of the relationship between procedural and substantive due process. They could not show that in order for the disciplinary process to be fair, these two types of due process should be integrated.

4.3.2 Theme 2: Understanding and implementing a learner disciplinary process

The participants were asked to express their understanding of the learner disciplinary process and their views on its implementation. The aspects of the learner disciplinary process that were analysed included the steps involved in due process; the hearing of evidence (preliminary investigation) and deciding on action; notice of hearing; learner disciplinary hearing; adjourning and considering the facts; conveying the decision; considering applicable legislation/laws/ policies/subordinate legislation during the learner disciplinary process; making use of the required documents; the misconduct leading to a decision; considering the age of the learner and appeal. The analysis and discussion of the learner disciplinary process are presented below.

The steps involved in due process

The participants provided information on their understanding of the steps involved in due process and the way in which they implemented the steps. They were not, however, able to cite all the steps that should be followed during learner discipline and which relate to due process. According to the conceptual framework, there are six steps that should be followed when disciplining learners to ensure due process. The responses of the participants revealed that they knew about and applied only a

few of the steps that are mentioned in the conceptual framework used in the study. P7 mentioned three steps: *“At the school the principal must investigate or will delegate this function; then you must write down to inform parents of the learner, notifying them about the disciplinary hearing; there must be a hearing and allow them to be represented.”* DP5 suggested three steps: *“We call other learners to give evidence; hold a hearing; and take a decision”* while HOD2 mentioned one step only: *“I call that child and ask him why he has done that offence.”*

Hearing of evidence (preliminary investigation) and deciding on action

Most of the participants understood that, before a learner may be called to a disciplinary hearing, the principal or his/her delegate should conduct a preliminary investigation. P7 stated: *“There must be an investigation to verify whether there is a case or not”*, while HOD2 said: *“We call that child and ask him why he has done that offence.”*

Notice of hearing

The participants were invited to explain how they understand and used the notice of a disciplinary hearing. They were also expected to explain their understanding of the learners' right to information, the content of a notice, the number of days before a hearing that a notice should be sent and the sending of a notice to the parents.

Most of the participants understood that learners have a right to information. They also mentioned that they upheld this right during learner discipline. DP2 stated: *“A right to information has got to do with the decision that has been taken in the disciplinary hearing that must be communicated to all other stakeholders so that people must be informed to know what is happening and what developments are ...”*

The participants were asked to comment on their understanding of the content of the hearing notice and how they compiled such a notice. According to the literature, there are approximately fifteen items that should be included in the notice of a hearing. However, it appeared that the majority of the participants had limited knowledge about the contents of the hearing notice. This lack of understanding also influenced the way in which they wrote their notices. DP7 explained: *“We issue a notice that indicates clearly the venue, time and date and where a disciplinary*

hearing will be taking place.” HOD4 stated: “The notice have misconduct, venue, date and time.”

With regard to the number of days required to issue a notice before a hearing, they had different views. According to the literature, a learner should be given a notice of hearing five days before the hearing. The majority of participants were not aware of the number of days required to issue a notice before a hearing. Most stated that notices should be issued seven days before the hearing. DP6 said: *“The hearing notice is sent seven days before the hearing.”* Few of the education managers indicated that notices should be given five days before the hearing and only P7 mentioned that: *“A notice should be given five days before a date of a hearing.”*

Most of the participants had a sound understanding of how to send such notices to the parents. They explained that they sent written notices to the parents via the learners. In addition to these written notices they also use electronic means such as sms, fax, e-mail and telephone to inform the learner and his/her parents of a hearing. DP6 explained: *“We do it in three different forms. In writing where parents receive a letter where he/she needs to sign, also text message and if they have internet, also by internet.”*

The participants were asked about how they ensured that the parents received the notices. A few of the participants stated that, after sending a notice, the parents are requested to sign in order to acknowledge receipt, tear off a slip and send it back for the principal. P5 said: *“The slip is kept in the school records.”* Most of the participants ensured that the parents had received the notices by telephoning them. P4 stated: *“Usually when they (learners) are here I take the phone number of the parent then I’ll phone the parents.”*

Learner disciplinary hearing

The participants were asked to comment on conducting a disciplinary hearing. They were also prompted to give details about the disciplinary committee/tribunal; the participants in a hearing; the hearing procedures and the listening to presentations.

The participants usually started by explaining the selection of the disciplinary committees/tribunals. Most of the participants knew who should be on the

disciplinary committee, although most of them mentioned a few members only. P8 stated: *“SMT member (deputy principal) who is a prosecutor and two parents from the SGB form a tribunal.”* DP3 said: *“Here at our school we have the team that deals with that, which is the principal, because the SGB chairperson is not here with us, but the principal is there, HOD for professional guidance, three post level one teachers.”* HOD5 maintained: *“Everybody on the SGB as well as the principal, the deputy principal and the management team will be part of the disciplinary committee as well.”* Several of the participants did not mention that they involved learner representatives in the disciplinary hearing. One of the participants understood a fair disciplinary committee as a committee that is chaired by a neutral person from the community. This understanding influenced the way the school appointed their learner disciplinary committees, as the committee was chaired by a pastor from one of the community churches. DP5 stated: *“We’ve got the chairperson who is the pastor in the church, principal who is the prosecutor, the chairperson of the SGB, parents of the learner, and the deputy principal, witnesses and anyone who represents the parents.”* Some of the education managers mentioned persons who, in terms of law, are not supposed to be part of the learner disciplinary committee. P2 stated that in their school a general worker was also on the learner disciplinary committee. DP4 mentioned that, in their school, members of the police force (adopt a cop) served on the disciplinary committee. Other education managers stated that their disciplinary committees were dysfunctional. DP3 added: *“But I’ll say the committee is non-functional, it is functional on record.”*

The participants were also invited to give their views on who should be involved in learner disciplinary hearings. All the participants were aware of who should be part of the disciplinary hearing although they mentioned various numbers of people to serve on the disciplinary committees. This revealed that they did not all involve the same number of individuals in their hearings and that their understandings of who should participate in a hearing were not the same. A few mentioned that witnesses should be part of the disciplinary hearing. P8 explained: *“After the accused has been given a chance to defend himself/herself and witnesses have given evidence, the committee will adjourn.”* DP6 indicated that the committee included *“Parent, learner, SGB chairperson, deputy principal, principal, teacher, prefect, lawyer (if parents decide), and witnesses.”*

The participants were asked to discuss the procedures that should be followed during a disciplinary hearing. The majority of them were not able to mention the steps/processes that should be followed, although they almost all indicated that the tribunal should listen to both sides of a story. P5 stated: *“We must give a child a chance to say what he wants to say and the chairperson will ask him a lot of questions.”* DP1 added: *“The child is given an opportunity to present himself. If he is unable to do that, the parent will tell us exactly what has happened.”* HOD6 mentioned: *“The offender will also be given a chance to give a version of the story of what happened.”*

Some of the participants indicated that they did not conduct formal hearings even when learners have committed a serious misconduct. They did however listen to the explanations of the learners. P2 stated: *“Though it is not a fully-fledged one. Most of our learners are staying with grandparents who are sick, they are staying with brothers who are at work full time. Our discipline is not so much perfect.”*

Some of the participants indicated that they sometimes avoided holding hearings. P8 mentioned: *“We don’t want learners to face a disciplinary committee. We try to avoid that at all costs.”* DP8 stated: *“Most disciplinary issues, to be honest with you, are dealt with informally. It’s my view. If you deal with a learner informally, sensibly, caringly, that will meet the requirement of Schools Act in any due process in a way. That is what we do. I’ve dealt with each case on its own merit, but we are aware of the legalities and of what is not legal. So we do try and follow due process. When I get a learner I don’t rule by the Acts.”*

Some of the principals conducted disciplinary hearings themselves while alone in their office with the offender. P1 explained: *“There are some issues that are in our code of conduct which I am not honest about. Sometimes I avoid calling parents who are on the SGB because they are working. We consider such factors. At some stage I feel tempted and hold a hearing myself.”*

The principals were requested to explain how they ensured that learners were represented during a hearing. The majority were of the opinion that learners should be represented by parents or guardians. P8 said: *“We prefer a parent to be present.”*

That is his/her right to know.” Most of the participants maintained that lawyers should be allowed to represent the learners.

Adjourning and considering the facts

The participants were asked to discuss how they adjourned and considered the facts. The majority of them were not able to explain how the process of adjourning and considering the facts should take place.

Conveying the decision

The participants were asked to comment on how they conveyed the decision of the disciplinary committee to learners who have been found guilty of misconduct. The minority stated that, when they conveyed such decisions, they referred to the code of conduct for learners. P7 explained: *“After careful deliberations, the chairperson will convey the decision or punishment and the reasons for the decision to the parties present.”* HOD3 mentioned: *“The first document to be used will be the school’s code of conduct. We are going to prove their guilt according to the school code of conduct and also the SASA.”* A few participants merely mentioned that they based their decisions on evidence. HOD7 stated: *“We usually ask that learners must take a drug test and bring the evidence afterwards.”*

Other participants indicated that they avoided taking any decisions to expel learners who have committed a serious misconduct that could lead to expulsion because the process was extremely lengthy and the Department of Basic Education seldom agreed to the expulsion of learners. HOD6 explained: *“We have never recommended the expulsion of a learner for serious misconduct because we know that the process is too long and sometimes time goes by and the learner loses school work. We know that the department does not prefer to have learners’ time being wasted.”*

Considering applicable legislation/laws/policies/subordinate legislation during the learner disciplinary process

The participants were asked to name the subordinate legislation that they used during learner discipline. Most of them understood the code of conduct for learners to be subordinate legislation that is used during learner discipline. Some mentioned

that, in their schools, they used a code of conduct for learners and a disciplinary policy when disciplining learners. There is, in fact, no need to use these two policies because they were the same.

Many of the participants mentioned the legislation used during learner discipline. P2 stated: “The question is difficult. The answer is not in my head now.” HOD2 said: “I’m not so good at laws; I know that there are some that I need to follow.” Some of the education managers mentioned irrelevant legislation while P8 explained: “Employment of Educators Act, that is what we normally use.”

Making use of required documents

When asked to discuss their understanding of the documents that should be used during learner discipline, most of the participants were not able to name the important documents that should be used and kept when disciplining learners. Some even mentioned the incorrect documents. HOD1 mentioned the LRC which is not a document, stating: “*We use the LRC, the one that we got from the department ...*” P5 stated that they used two documents, a notice to parents and the minutes of the disciplinary hearing.

Misconduct leading to a disciplinary decision

The participants were asked to explain their understanding of serious misconduct. It emerged that the majority of participants had a good understanding of the offences that constituted serious misconduct. P2 stated: “*Insulting other learners and educators, repeatedly not writing homework, fighting at school, carrying drugs and serious fighting lead to suspension of learners. We do suspension and, on top of that, we will call the police.*”

There was, nevertheless, some misunderstanding about the learner behaviours that constituted serious misconduct. A few participants did not consider stealing to constitute serious misconduct. DP2 stated: “*Otherwise other are just small misdemeanours ... where there is fighting amongst learners.*”

Some of the participants did not understand whether a disciplinary hearing should be organised for learners who have committed criminal offences in schools. They

mentioned that they did not deal with drug abuse and that they referred such misconduct to the police because they regarded it as a criminal offence. DP2 stated: *“We had cases of kids who were caught with dagga, but that one was reported to the police because it is a criminal offence.”*

Considering the age of the learners

The participants were asked to comment on their understanding of the issue of the learners' age being taken into account when disciplining learners. Half of the participants were of the opinion that the age of the learners should be considered during learner discipline. DP7 explained: *“All children who are under age are minors. That is why we need somebody to represent them. That is where we use a question of age. But in term of misconduct, we do not look at it.”* HOD5 indicated: *“Yes, we don't treat the Grade 8 learners the same as the Grade 12 learners because the Grade 8 learners still need to get used to the system and need to learn more about what is expected from them. But when they are in Grade 12, they've been here for four years, now they know what is expected from them.”*

The other fifty per cent of the participants indicated that, according to their understanding, the age of the learners should not be considered. P3 stated: *“All learners are equal before the school, it does not matter whether you are 18 or 14 years.”* HOD6 said: *“Basically learners are treated equally because, when you formulate a code of conduct, we don't say this kind of offence is for 15 years old learners and the punishment will not be the same as the one for 17 or 18 years old learners.”*

Appeal

Most of the participants were aware that learners were allowed to appeal the outcome of a disciplinary hearing. They were, however, unsure about the number of days that learners and parents had in which to appeal against the disciplinary committee's decision. Some of them had had no experience of learners appealing after a disciplinary hearing in their schools. One of the participants stated that parents sometimes do not appeal because they lack knowledge. DP4 explained: *“That one, I think I need to be honest. Although we inform the parents that, if you feel that the decision is not fair, you have a right to appeal. Normally, in our cases, they*

do not appeal. Maybe it is because of the fact that they lack knowledge.” Another participant did not understand the notion of appeal. DP1 stated: “I don’t have a clue on an appeal process. No, we do not allow an appeal. I am not aware about that. Maybe a learner might be allowed to appeal.”

Overview

None of participants mentioned all the steps that should be followed during learner discipline and which relate to due process. However, most of them understood that, before a learner may be called to a disciplinary hearing, the principal or his/her delegate should conduct a preliminary investigation. Data from interviews provide that many participants focus mostly on procedural fairness when they discipline learners. They provided little information to show that it is important to integrate procedural due process with substantive due process in all the steps of the process.

The majority of participants understood that learners have a right to information. Most of them ensured that the parents received notices of the disciplinary hearing by telephoning the parents. However, many of the participants were not familiar with the contents of the hearing notice. This shows that they lacked understanding on the substantive part of fairness. This lack of knowledge in turn influenced the way in which they phrased such notices. They also lacked an understanding of the number of days required for issuing a notice of hearing to the learners and their parents before a disciplinary hearing takes place. A few participants only indicated that, after sending a notice of a disciplinary hearing to the parents, the parents were asked to sign to acknowledge receipt of the notice by signing a tear-off slip and sending it back to the principal.

Most of the participants were aware of the number of members who should serve on a disciplinary committee. However, only a few mentioned that they involved learner representatives in disciplinary hearings. One of the participants understood an unbiased disciplinary committee as a committee that is chaired by a neutral person from the community. This understanding influenced the way in which the school constituted its learner disciplinary committee as the committee was chaired by a pastor from one of the community churches. Some of the education managers mentioned individuals who, in terms of the law, are not supposed to serve on a

learner disciplinary committee. Others mentioned that their disciplinary committees were dysfunctional. The majority of the participants were not able to name the four main steps/processes that should be followed during a formal disciplinary hearing and they mentioned a few steps/processes only. Some of the participants mentioned that witnesses should form part of the disciplinary hearing. Others indicated that they did not conduct formal hearings even when learners had committed serious misconduct. They also stated that they sometimes avoided conducting hearings. Some of the principals mentioned that they conducted disciplinary hearings themselves and on their own in their office. This is an indication of a lack of understanding of procedural and substantive due process.

The majority of the participants were not able to explain how the process of adjourning the meeting and considering the facts placed before the committee should take place. A minority stated that, when they conveyed a decision to learners and their parents, they referred to the code of conduct for learners. A few of the participants mentioned that they based their decisions on the evidence that they had heard. Others indicated that they avoided taking the decision to expel learners who had committed serious misconduct that may lead to expulsion, indicating that they avoided taking such decisions because the process was extremely lengthy and the Department of Basic Education seldom agreed to expel learners. The above indicates that knowledge of procedural and substantive due process is lacking to education managers.

The majority of the participants were not able to name important documents that should be used and kept during learner discipline. A few of the participants clearly misunderstood which learner behaviours constituted serious misconduct with some of them stating that they did not consider stealing to be serious misconduct. Lack of knowledge of the difference between misconduct and serious misconduct may lead to wrong decision-making. Others did not understand whether a disciplinary hearing should be conducted for learners who have committed criminal offences in schools. Half of the participants mentioned that, according to their understanding, age should not be considered during learner discipline. Moreover, the majority of the participants were not aware of the number of days that learners and their parents should be given in order to lodge an appeal.

4.4 ANALYSIS OF DOCUMENTS

Three documents at each of the school were analysed. These documents included the code of conduct for learners, the notices that were sent to parents and learners to attend disciplinary hearings and the minutes of the disciplinary hearings that the schools had conducted. One of the reasons why I analysed these three documents was because I wished to investigate how the participants' understanding of due process influenced the way in which they implemented due process during learner discipline. The other reason for conducting the document analysis was to ensure the triangulation of the data.

4.4.1 Analysis of the code of conduct for learners

As stated in the literature review, in terms of section 8(1) of the Schools Act, "it is the responsibility of the SGB to adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school". Section 16A(1)(a) of the Schools Act provides that the principal represent the head of department on the SGB when acting in an official capacity. Section 16A(2)(d) states that the "principal must help the SGB to handle learner disciplinary matters" while section 16A(2)(f) indicate that the principal must advise the SGB about policy and legislation. It is, thus, important that the principal understand policy and legislation if he/she is to advise the SGB correctly.

The next section analyses the way in which the principals' understanding of due process influences the way the code of conduct for learners is developed. Section 8(5)(a) of the Schools Act provides that a code of conduct for learners must contains provisions of due process. These provisions must "safeguard the interest of the learners that have committed misconduct and any other party that is involved in the disciplinary proceedings". The next analysis examined the way in which the principal assists the SGB in adopting a code of conduct that contains provisions of due process and how these provisions safeguard the "interests of the learner and any other party involved in the disciplinary proceedings" (s 8(5)(a) of the Schools Act, RSA 1996b).

Eight codes of conduct for learners from eight different schools in the Nkangala District were analysed. Two of the codes of conduct were for the two farm schools,

two for the two township schools and four for the four urban schools. For the purposes of the study, the first school was referred to as School A, the second as School B, the third as School C, the fourth as School D, the fifth as School E, the sixth as School F, the seventh as School G and the eighth as School H. The following analysis is based on the “Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners” (DoE, Notice 776 of 1998).

4.4.1.1 Relating codes of conduct to due process and the two types of due process

Due process

The aim of the analysis of the codes of conduct for learners was to ascertain how the principals’ understanding of due process influenced the way in which the codes of conduct for learners provided for due process. It emerged that only a few of the schools had codes of conduct for learners that contained provisions for due process. The code of conduct of School G states: “*SASA makes provision for due process including a fair hearing*”. The codes of conduct of a few of the schools included the concept of ‘fair’, which is related to the concept ‘due process’. The code of conduct of School E states: “*Any learner who is accused on account of misconduct will, unless the learner voluntarily pleads guilty, be considered not guilty until guilt is proved by means of a fair hearing on a balance of probabilities.*”

Procedural due process

As regards the way in which the principals ensured that their schools’ codes of conduct included provisions for procedural due process, it emerged that a few of the schools only had codes of conduct referred to procedural due process. The code of conduct of School B provided that: “*Rules and procedures must be consequently maintained.*”

Substantive due process

One of the aims of the analysis of the codes of conduct was to find out how principals ensured that their schools’ codes of conduct included an element of substantive fairness. It emerged that the code of conduct for learners of one school

only provided for substantive due process. The code of conduct of School H stated: *“Substantive due process refers to the appropriate and fairness of the rules.”*

4.4.1.2 Relating codes of conduct to aspects of the learner disciplinary process

As regards the learner disciplinary process, I analysed how the principals' understanding of due process influenced whether they included aspects that are related to due process in the code of conduct for learners and how these aspects safeguarded the “interests of the learner and any other party involved in disciplinary proceedings” (s 8(5)(a) of the Schools Act, RSA, 1996b).

Steps relating to due process

A minority of the schools had linked their codes of conduct for learners to the steps that should be followed by a school when disciplining a learner. In other words, their limited understanding of due process had prevented them from developing a code of conduct for learners that included the steps that relate to due process.

Hearing of evidence and deciding on action (preliminary investigation)

It emerged from the analysis of the codes of conduct that the majority of the schools had included an aspect of preliminary investigation in the codes of conduct. The code of conduct of School C stated: *“Any learner alleged to have violated any rule that may require suspension or expulsion must be brought to the principal. The principal shall hear the evidence and then decide on the action to be taken.”* The code of conduct of School G stated: *“In some disciplinary cases, it is necessary to conduct a preliminary investigation to collect evidence which will determine whether or not there sufficient grounds for a disciplinary enquiry (hearing).”*

A disciplinary hearing notice

It was clear from the analysis of the codes of conduct of the selected schools that a few of the schools had included the issuing of a notice to attend a disciplinary hearing in their codes of conduct. The code of conduct of School G stated: *“The notice must give full details of the charge, including date, place and time. It must be indicated which part of the Code of Conduct/school rules the alleged act of misconduct breaches. It must also state the learner’s right to a fair hearing: to be*

heard and to call witnesses, to question all witnesses, to be assisted by a lawyer, parents may be present (not whole family)." A few of the codes of conduct for learners only mentioned the number of days stipulated within which to issue a notice before a hearing. The code of conduct for School C stated: *"For the hearing the learner must be informed of and understand the charges of which written notice should be given at least 5 days before the time."* A few of the schools only had mentioned the sending of a notice to parents in their codes of conduct for learners, although those of Schools F and G did provide for such a notice.

Learner disciplinary hearing

A limited number of the codes of conduct for learners mentioned the procedures for a disciplinary hearing. The code of conduct for School G stated: *"If the learner has been suspended, the SGB (committee) has seven school days within which to convene the disciplinary hearing."* The code of conduct for learners at one school indicated how the disciplinary committee/tribunal would be constituted but this was the only school with a code of conduct that provided for a disciplinary committee/tribunal: The code of conduct of School G provided: *"A committee consisting of two parent members of the SGB, and a teacher (Chairperson of the Discipline Committee)."* The code of conduct for learners of one school only mentioned the right to information. Half of the participants related the code of conduct for learners to the right to representation. The code of School H stated: *"The learner may be represented or assisted by a legal adviser, parent, educator, RCL, other suitable person."*

Adjourning and considering the facts

The codes of conduct for learners of a few schools only provided for adjourning and considering the facts. The code of conduct of School H stated: *"After listening to both sides of the cases, the Disciplinary Committee must adjourn the hearing to a specified time and date."*

Reason for a decision

Only a limited number of the codes of conduct for learners referred to the reason to be given for a decision. The code of conduct of School C stated: *"Be informed in*

writing of the decision of the SGB on whether or not he/she is guilty of misconduct and the penalty to be imposed in the case of suspension or expulsion.”

Legislation/laws/policies/subordinate legislation

Most of the codes of conduct mentioned the legislation that should be considered during learner discipline, with a few citing the Educator Employment Act (hereafter referred to as EEA) as the legislation that should be considered during learner discipline. I am of the opinion that there is no need to include the EEA in the code of conduct for learners as the EEA refers to educators and not learners.

Administrative documents

The minority of the schools had codes of conduct that mentioned the administrative documents that should be used during learner discipline.

Misconduct leading to suspension and expulsion

The codes of conduct for learners of a few schools differentiate between misconduct and serious misconduct.

Considering the age of the learner

Just a few of the schools had codes of conduct that provided for the consideration of age during the disciplinary process. The code of conduct of School H stated: *“If the disciplinary proceedings will expose a witness who is under the age of 18 years to mental stress or suffering if he or she testifies, the SGB may appoint a competent person as an intermediary.”*

Appeal

The codes of conduct of a small number of schools indicated that the learners have a right to appeal. The code of conduct of School G provided: *“The learner has the right of appeal within five (5 days) against any penalty imposed by the Disciplinary Committee.”*

Overview

The document analysis indicated that the codes of conduct for learners of only a few schools referred to the concepts of due process, procedural due process and substantive due process. These codes of conduct focus mainly on explaining the procedures that should be followed during learner discipline. Little is included in the codes of conduct that is based on substantive due process. For example, most codes of conduct do not provide for a fair exemption procedure. The minority of the schools participating in the study mentioned the steps that should be followed during the learner disciplinary process, namely, preliminary hearing; notice of hearing; disciplinary hearing; adjourning and considering the facts; reason for a decision and right to appeal. However, the majority of the schools indicated the type of misconduct that may lead to suspension and expulsion, and the legislation relevant to learner discipline.

4.4.2 Analysis of notice for a hearing

Eight notices of a disciplinary hearing (hereafter referred to as notices) from the eight selected schools were analysed. According to the literature, such notices should include aspects such as the name of learner, identity document number, subject/grade, name of teacher/head of disciplinary committee, date of the disciplinary hearing, time of hearing, venue of hearing, date served, the charge against the learner, date of offence, nature of offence, time frame for suspension, right to representation, suspension from class and the signature of parents/guardians. The inclusion of these aspects would render a notice a substantively fair document.

It emerged from the analysis that the notices of the majority of schools included the name of the learner, name of teacher/head of disciplinary committee, date of hearing and date served, while the notices of a few of the schools specified information such as ID number, subject/grade, time of hearing, date of offence, nature of offence, suspension from class/school, time frame for suspension and signature. The notices of half of the schools mentioned the venue of the hearing and the accused learner's right to representation. Overall, this review found that the majority of schools serve notices of disciplinary hearings that contain insufficient information.

Overview

It emerged that most of the schools did not include sufficient information in their notices of disciplinary hearing and, thus, the notices that are issued to the learners and their parents do not meet the required standards as specified in the literature. The content analysis of the notices for a hearing shows that most schools issue a notice for compliance. They merely follow procedure and do not issue notices that have include information that meets a standard of substantive fairness. For example, a notice that meets the standard for substantive fairness includes a statement that indicates that a learner is allowed to be accompanied by a representative or legal representative.

4.4.3 Analysis of the minutes of disciplinary hearings

The minutes of the learner disciplinary hearings (hereafter referred to as minutes) from three of the eight selected schools were collected and analysed. Although all eight schools were requested to provide their minutes, three schools only made them available.

The analysis of the minutes did not focus on the format and structure of the minutes but focused on the availability of the minutes and on the four main aspects that relate to due process and that should be included in the minutes of any learner disciplinary hearings conducted. These aspects include listening to both sides, adjourning the meeting and considering the relevant facts, conveying the committee's decision and the lodging of appeal. Mistakes or deficiencies in the minutes of the disciplinary hearings conducted at schools means that these schools are not following due process.

Availability of minutes

It is expected that all schools that conduct disciplinary hearings should keep minutes of such hearings and this is the reason why I requested these minutes from all eight schools that participated in the study. However, three schools only were able to make their learner disciplinary hearing minutes available to me. Four of the schools did not keep minutes of their hearings safely while, according to the eighth school, the minutes had been kept by the principal who had subsequently left the school.

Listening to both sides

As stated in the literature review, due process requires that tribunals should listen to both sides of the story. It was therefore expected that the minutes would indicate how the requirement for listening to both sides was applied. It was clear from the minutes of the majority of schools that were collected and analysed that the tribunals did indeed listen to both sides. It is extremely important when listening to both sides that the minutes of the hearings are written in detail as this will assist in an informed decision being made. During the analysis, I discovered that one school only kept detailed minutes, thus ensuring that what each participant had said was reflected in the minutes.

Adjourning and considering the facts

It is vital that the minutes of hearings reflect that the tribunal adjourned and considered the facts of the case. The minutes of two of the schools revealed that their disciplinary tribunals did adjourn and consider the facts. The minutes of School G stated: *“At 7:10 CP adjourned the meeting so that the SGB members could discuss the matter at hand.”* However, the minutes of the other schools did not mention anything about adjourning and considering the facts.

Conveying a decision

Conveying the decision that has been made is one of the essential tasks of the tribunal. Accordingly, it is extremely important that both the decision itself and the reasons for the decision are properly minuted. The minutes of the three schools reflected how their tribunals conveyed a decision. The minutes of school G stated: *“A recommendation will be submitted to the Head of Department to exclude X from re-admittance at School G in 2013 (meaning expulsion from School G). We will await the decision of the Head of Department.”*

Appeal

It is imperative that a tribunal should inform a learner who has been found guilty of misconduct about his/her rights to appeal. The minutes of one school did not reflect anything about an appeal while the minutes of the other two schools mentioned that

learners could appeal if they were not satisfied with the decision of the Head of Department. The minutes of School G stated: *“If you are not satisfied with his/her (Head of Department) decision you may appeal to the Member of Executive Council within 7 days of his/her decision.”*

Overview

Section 16A(2)(a)(v) of the Schools Act states that “the principal must, in undertaking the professional management of a public school as contemplated in section 16(3), carry out duties which include, but are not limited to, the safekeeping of all school records”. However, the majority of principals of participating schools did not ensure the safekeeping of the minutes of their disciplinary hearings (RSA, 1996b). The document analysis of the minutes indicated that this lack of safekeeping of important records means that schools do not have substantive evidence to prove that they have followed due process. Section 16A(2)(d) provides that the principal should provide assistance to the SGB with regard to dealing with disciplinary matters that concern learners. For the purposes of this study, this assistance is deemed to include the way in which the minutes of a disciplinary hearing are kept. One school only kept detailed minutes, thus making sure that what each participant had said was reflected in the minutes. The minutes of the two schools showed that the disciplinary tribunals adjourned to consider both the facts and the evidence. All three of the schools had mentioned in their minutes how their tribunals went about conveying a decision, while the minutes of two schools only mentioned that learners had the right to appeal. Writing of minutes should not serve as a mere following of a procedure; they should be written in a manner that meets the standard of substantive fairness.

It would appear that the majority of principals lack sufficient understanding about their roles in terms of the minutes of disciplinary hearings and they do not offer sufficient advice on the writing of detailed minutes. Most of the principals were not playing the role required of them as regards the safekeeping of minutes.

4.5 ANALYSIS OF SELECTED COURT CASES THAT ARE RELATED TO DUE PROCESS

This section of chapter 4 discusses the case briefings that were used to summarise selected South African court cases that include/refer to elements of due process.

The conceptual framework used in the study guided the analysis of the selected court cases. Below is a discussion about the case briefings and the aspects related to due process that were used in the analysis of the selected court cases. The fourteen selected court cases that were analysed were mentioned in chapter 1.

4.5.1 Case briefing

A case briefing is a listing of the essential elements of a case (Grindle, 2009:42). Thus, a case briefing helps in the understanding of the findings of the court. According to Statsky and Wernet (1995:42–112), the outline for a case briefing is as follows:

Citation: This is descriptive information that consists of the names of the parties who are involved in a court case, the volume and page numbers of the book that contains the opinion of the judges, the name of the court that has written the opinion, and the date of which a decision was made (Statsky & Wernet, 1995:42).

Facts: Information that describes what happened (occurrence or event) (Statsky & Wernet, 1995:73). The facts briefly indicate the reasons for the lawsuit; the identity of the plaintiff(s) and defendant(s); the arguments of the plaintiff(s) and defendant(s); and the decisions of the lower courts.

Issue: This refers the manner in which the applicable law applies to the facts of the court case in question (Statsky & Wernet, 1995:95).

Holding: The court provides answers to the issue that has been brought before the court and which is the result of the court's application of law to the facts of the case (Statsky & Wernet, 1995:109).

Reasoning: The court explains how it reached a particular decision (holding) regarding a particular issue (Statsky & Wernet, 1995:112).

4.5.2 Analysis of elements of due process in court cases

4.5.2.1 Case briefing of Court Case 1

Citation:

Antonie v SGB, the Settlers High School and Head, Western Cape Education Department 2002 (4) SA 738 (C)

Name of judge who delivered judgment in the case:

Judge Van Zyl

Facts:

The applicant in this case was Danielle, who was a fifteen-year-old Grade 10 learner at the time. Danielle had “embraced the principle of Rastafarian religion” (par.2) and, accordingly, she had grown “dreadlocks” and covered them with a cap (par.3 & 4). She had asked for permission to wear the dreadlocks several times but had been refused permission to do so by the principal (*Antonie v SGB, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) par. 4). The SGB had charged her with serious misconduct and she had been suspended for five days for defying a “school code of conduct for learners and disrupting the school” (*Antonie v SGB, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) par.6).

Issue:

Is the prohibition with regard to wearing dreadlocks and covering them with a cap aimed at promoting positive discipline and does it justify suspension? (*Antonie v SGB, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) par.17 & 18).

Holding:

Judge DH Van Zyl of the High Court made an order that the application succeed. The decision of the first respondent (SGB, Settlers High School) in finding the applicant (Danielle Antonie) “guilty of serious misconduct and suspending her was

set aside” (*Antonie v SGB, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) par.21).

Reasoning:

The judge indicated that he had

sought in vain to find these principles clearly enunciated in the code of conduct to which the applicant was subject. That does not, of course, mean that they do not have a role to play in the interpretation and application of the code of conduct. Even if, hypothetically, the growing of dreadlocks and the wearing of headgear were prohibited by the code of conduct, the failure to comply with this prohibition should not be assessed in a rigid manner. This would make nonsense of the values and principles set forth in the schedule and would bring it into conflict with the justice, fairness and reasonableness which underpin our new Constitution and centuries of common law (*Antonie v SGB, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) par.16).

The Court found that this requires a spirit of mutual respect, reconciliation and tolerance. The mutual respect, in turn, must be directed at understanding and protecting, rather than rejecting and infringing upon, the inherent dignity, convictions and traditions of the offender. Most importantly, adequate recognition must be given to the offender's need to indulge in freedom of expression, which may or may not relate to clothing selection and hairstyles, as provided in section 4.5.1 of the schedule (par.17). The Court mentioned that it has been clearly established that this conduct was not in conflict with the provisions of the code of conduct. But, even if it were, could it constitute serious misconduct in terms of section 2(1) of the regulations relating to serious misconduct of learners and published as Provincial Notice (PN) 372/1997 on 31 October 1997 (*Antonie v SGB, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) par.18).

Elements of due process in this case

- Excessive learner punishment may be set aside on the ground of due process.

Due process requires that the punishment should be fair. In addition, the punishment should be relevant to the offence committed by a learner. It is clear from this case that schools should be careful when deciding to suspend a learner for an offence that does not constitute serious misconduct. The wearing of dreadlocks cannot be regarded as serious misconduct.

- Decision-making should be based on the Code of Conduct for Learners that has been formulated in accordance with legal requirements.

According to due process, a person must be punished using existing law. Thus, when dealing with a Code of Conduct for Learners, it is important to consider the schedule issued by the Ministry of Education (DoE, 1998) that gives guidelines for consideration by school governing bodies in adopting a code of conduct for learners. In this case, the Code of Conduct for Learners had not addressed the issue of dreadlocks, thus making it difficult for the school to take a decision on dreadlocks as this issue had not been addressed in the school's Code of Conduct for Learners.

4.5.2.2 Case briefing of Court Case 2

Citation:

Brink and Others v Diocesan School for Girls and Others (1072/2012) [2012] ZAECGHC 21 (1 May 2012)

Name of judge who delivered judgment in the case:

Judge Roberson.

Facts:

Catherine Brink was enrolled as a Grade 12 final-year pupil and was a boarder at the Diocesan School for Girls (DSG) in 2007. In applying to enrol Catherine, her parents had agreed, on behalf of both themselves and Catherine, to comply with the rules, regulations, policies and procedures of DSG. DSG has a discipline policy that

applies to serious misconduct and which provides, inter alia, for a formal disciplinary hearing and an internal appeal procedure (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):2). On the 18/19 February 2012, at approximately 23:30, Catherine had left the school premises to go to the campus of a neighbouring school, St. Andrew's College (SAC). She went to the room of a SAC boarder, Matthew Alexandre (*Brink and Others v Diocesan School for Girls and Others* (1072/2012): 3). Catherine was required to appear at a disciplinary hearing and was charged with serious misconduct. Catherine was initially assisted by her father at the hearing. After acknowledging that she had understood the charge, she had pleaded guilty. Her father had agreed that this plea was in accordance with his understanding. The second respondent then addressed the Chairperson of the Disciplinary Committee in aggravation and referred to facts given to her by Catherine. In addition to the facts of the event as mentioned above, she said that Catherine had begged Matthew to allow her go to him as she was distressed and worried about her workload and her future. Matthew was merely a friend (*Brink and Others v Diocesan School for Girls and Others* (1072/2012): 3, 4).

After the mitigation and aggravation hearing, the chairperson of the disciplinary hearing gave his judgment. The sanction he recommended was expulsion from DSG (*Brink and Others v Diocesan School for Girls and Others* (1072/2012): 6).

At the hearing of the appeal, an application was made to lead the evidence of Ms Mavro, Dr Murray Gainsford, Catherine's physician, and SAC's letter recording Matthew's sanction – he had been suspended from the boarding house and given a final written warning. The affidavit of Catherine's mother was used to support this application. In her affidavit she referred to the agreement not to hand in the psychologists' reports, the need to complete the disciplinary hearing and the unavailability of Ms Mavro to testify (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):6).

Issue:

Could the tribunal hear new evidence and should the application to hear new evidence by a reconvened disciplinary committee be allowed? (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):7).

Holding:

Judge Roberson agreed with the interpretation of the tribunal that they could not hear new evidence. He also agreed with the tribunal's refusal that a reconvened disciplinary committee hear new evidence after the decision about the sanction had been made (*Brink and Others v Diocesan School for Girls and Others* (1072/2012): 7, 8).

Reasoning:

Judge JM Roberson of the High Court dealt with the tribunal's refusal of the application to lead new evidence. It was submitted that the interpretation of new evidence in the discipline policy should be restricted to evidence which was not led at the initial hearing, whether it had been available or not. The judge agreed with the interpretation of the tribunal as contained in the reasons. It is not possible to consider the words "new evidence" in isolation as, if so, this would render meaningless the requirement of an explanation of the nature of the evidence and why it was not previously led (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):19).

The judge again agreed with the tribunal's reasoning that the requirement of an explanation of the nature of the evidence indicates that the tribunal should be satisfied that the evidence is material. A different interpretation would render the requirement of an explanation of the nature of the evidence meaningless. This is also a logical interpretation. If the tribunal were not to consider the materiality of the evidence, this could result in a situation where the disciplinary hearing would be reconvened for no purposeful reason (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):19).

The judge also mentioned that he did not think that the tribunal's reasons for dismissing the application to lead further evidence could be faulted. All the indications were that there had been a deliberate and considered decision not to lead the evidence of Ms Mavro at the hearing. The explanation for not leading the evidence at the hearing was, therefore, correctly found not to be sufficient. He also agreed that Sue Brink's affidavit did not indicate the nature of the evidence sought to

be led or how it would materially affect the sanction (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):20).

The report of Ms Mavro had not been before the tribunal. However, even if it had been, the judge was not of the opinion that that would have taken the matter further. The applicants are required to demonstrate a clear right, namely, that the decision of the tribunal would on the balance of probabilities be successfully reviewed. In his view, the prospects of success were poor. There was no question that the principles of natural justice, as referred to in *Turner (supra)*, had not been observed (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):20, 21).

At both the disciplinary hearing and on appeal the applicants had had the opportunity to be heard and both proceedings had been conducted impartially, honestly and *bona fide* (*Brink and Others v Diocesan School for Girls and Others* (1072/2012):21).

Elements of due process in this case:

- Hearing of evidence

The hearing of evidence is part of a due process and falls under substantive due process. This case deals with the hearing of new evidence after a hearing has been conducted. This case provides that the hearing of new evidence may be allowed if the tribunal is satisfied that the evidence is material. If the tribunal does not consider the materiality of the evidence, this could result in a situation where the disciplinary hearing would be reconvened for no purposeful reason.

4.5.2.3 Case briefing of Court Case 3

Citation:

George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province [2010] JOL 26363 (ECB)

Name of Judge who delivered the case judgment

Judge Nhlangulela

Facts:

During November 2008, the Disciplinary Committee of the school charged Chumulanco Dalasile for gross/serious misconduct relating to behavioural infractions spanning approximately twelve months and for which the learner had received warnings that he would be expelled from the school unless he changed his behaviour. He was summoned to appear before the Disciplinary Committee on 4 December 2008 to answer to the charge. The particulars of the charge were that the learner had regularly assaulted children (boys and girls) while in school uniform in class and after school; sexually molested the children in class and after school while in school uniform; threatened boys and girls if they exposed his misbehaviour and used bad language to both learners and teachers. Accordingly, the learner, in the presence of his parents, appeared before the Disciplinary Committee. At the conclusion of the hearing, the third respondent [Chulumanco Dalasile] was found guilty of gross/serious misconduct and sentenced to expulsion from the school (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.4).

On 8 December 2008 the SGB sent the recommendation to the Head of Department of the Eastern Cape Department of Education. The District Director of the East London Education District informed the George Randell Primary School that the expulsion of the learner was not acceptable if a reason was not provided (par.5). The George Randell Primary School demanded reasons for the decision of the HoD and, after many protracted delays, eventually indicated that the decision of the SGB had been procedurally flawed and, was therefore, a nullity (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.4). George Randell Primary School approached the court for an order reviewing and setting aside the decision of the HoD on the grounds that it was unreasonable (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.5).

Issue:

Can a recommendation of an SGB to expel a learner not be upheld by the HoD if it has been proven that a disciplinary process was procedurally and substantially fair (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.4)?
Can a decision of the HoD not to uphold the SGB recommendation to expel a learner be set aside (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.5)?

Holding:

The Judge held that the HoD breached the Schools Act as stated by the applicant. It was not open to the HoD to ignore the disciplinary process by taking an inordinately long time to respond to the recommendation, avoid effective consultations with the SGB on the decision he took not to expel the third respondent and refuse to impose a suitable sanction on the learner. The HoD was obliged to impose a suitable sanction or to remit the matter back to the SGB to impose an alternative sanction immediately upon rejecting the recommendation of the SGB. The HoD failed to do so. The judge held that for these reasons it cannot be said that the HoD complied with the provisions of section 9 of the Schools Act read with the Code of Conduct and the regulations framed in terms of section 8 of the Schools Act (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.9).

Reasoning:

The judge argued that, in accordance with “section 28(2) of the Constitution Act, 1996, which provides that a child’s best interest is of paramount importance in every matter concerning the child right and 29 of the Constitution Act, 1996 which states that everyone has the right to education”, these two rights ought to be applied in favour of Chumulanco Dalasile. It may well be so that in opposing the relief sought the HoD had good intentions of giving protection to a 13-year-old child at the time. The HoD, as the public administrator, derived authority to do his business in terms of the Constitution and the law. In this regard the Constitutional Court in

Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa and Others [2000] ZACC 1; 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC), in par. [85] stated:

It is a requirement of the rule of law that the exercise of public power by the Executive and the other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are, in effect, arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action” (par.10).

Elements of due process in this case:

Due process requires that the HoD should not ignore the disciplinary process by taking a long time to respond to the disciplinary recommendations of the SGB, but must respond within 14 days. Moreover, he/she must not avoid effective consultation with the SGB on the decision he/she took not to expel a learner or refuse to impose a suitable sanction on the learner. Immediately on rejecting the recommendation of the SGB, the HoD is obliged to impose a suitable sanction or to remit the matter back to the SGB to impose an alternative sanction. If the HoD complies with the provisions of section 9 of the Schools Act, read with the Code of Conduct and the regulations framed in terms of section 8 of the Schools Act, the decision will be taken as procedurally and substantively fair (*George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB) par.9).

4.5.2.4 Case briefing of Court Case 4

Citation:

SGB, Tafelberg School v Head, Western Cape Education Department 2000 1 SA 1209 (C)

Name of judge who delivered judgment in the case:

Judge Thring

Facts:

The learner was a 14-year-old boy who had admitted to being guilty and had been duly found guilty by the school of stealing a computer hard drive from the school (*Governing Body of the Tafelberg School v Head of Western Cape Education Department*, [1999] JOL 5733 (C):2). The SGB had recommended to the HoD that the learner should be permanently removed from the school. The HoD had not agreed with the decision of the SGB (*Governing Body of the Tafelberg School v Head of Western Cape Education Department*, [1999] JOL 5733 (C):7). It appears that the reason why the HoD did not agree was based on several written submissions for readmitting the learner that the parents of the learner had submitted to the school. It was found that the SGB had not attended to the submissions and had not given any answers to the parents (*Governing Body of the Tafelberg School v Head of Western Cape Education Department*, [1999] JOL 5733 (C):8). Consequently, the school took the matter to court so that a court could set aside the decision of the HoD (*Governing Body of the Tafelberg School v Head of Western Cape Education Department*, [1999] JOL 5733 (C):21).

Issue:

Can the HoD uphold the recommendation of the SGB to expel a learner where a learner has admitted that he/she is guilty and the SGB takes a decision that the recommendations of the tribunal are appropriate and fair? (*Governing Body of the Tafelberg School v Head of Western Cape Education Department*, [1999] JOL 5733 (C)).

Holding:

The court held that it is important that those who are in authority, such as SGBs, maintain proper discipline among a school's learners as this would ensure a disciplined school environment (*Governing Body of the Tafelberg School v Head of Western Cape Education Department* [1999] JOL 5733 (C):11). The decision of the

HoD was set aside and the HoD was then requested to review the recommendation of the SGB (*Governing Body of the Tafelberg School v Head of Western Cape Education Department* [1999] JOL 5733 (C):21).

Reasoning:

Thring J found that the decision of the HoD would have a negative effect on the ability of the SGB to maintain proper discipline in the school. “Section 9(1) of the Schools Act enables the SGB to enforce school discipline” (*Governing Body of the Tafelberg School v Head of Western Cape Education Department*, [1999] JOL 5733 (C):12).

Elements of due process in this case:

This court judgment shows that the maintenance of proper discipline among the learners of a school is of fundamental importance to those in authority at any decent school and, in particular, to the SGB. This is reflected in section 9(1) of the Schools Act, which bestows the SGB of a school with powers calculated to enable it to enforce school discipline. Due process is not about discouraging discipline in schools but rather encouraging it, especially in terms of following correct procedures and ensuring that substantive fairness is considered.

Citation:

High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province (CA 185/99) and *S v Babeile* (CA&R35/01) [2001] ZANHC 10 (11 May 2001)

Name of judge who delivered judgment in the case:

Judge Khumalo delivered the *High School Vryburg* court judgment.

Judge Majiedt delivered *S v Babeile* court judgment

Facts:

On 17 February 1999 there was a racial altercation between a number of white schoolboys and their black counterparts at the Vryburg High School (*S v Babeile* (CA&R35/01):par.3.1). Babeile, a Grade 9 learner, appeared before the SGB on a charge of assault with intent to do grievous bodily harm. It was alleged that he had stabbed another learner with a pair of scissors (*S v Babeile* (CA&R35/01):par.3.2). It was also alleged that the learner whom he had stabbed had done nothing to provoke him. Babeile appeared in court and was granted bail. Babeile's case was then moved to a criminal court where he was sentenced to five years imprisonment for attempted murder, of which two years were suspended (*S v Babeile* (CA&R35/01):par.2).

Issue:

Was Babeile's suspension and the application to expel him in accordance with the due process principle contained in section 8(5) of the Schools Act (*High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province* (CA 185/99))?

Holding:

The proceedings of the disciplinary hearing against Babeile were examined by a judge of the High Court and were declared "null and void as there had been no fair hearing". The hearing was, thus, ordered *de novo*. The application of Vryburg High School and its SGB was dismissed by the judge (*High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province* (CA 185/99)).

Reasoning:

According to the judgment of the High Court, the implication "was that Babeile could be expelled as requested by the school (s 9 of the Schools Act). The judgment was based mainly on the fact that Babeile's parents had not been notified, and the disciplinary committee had not applied the rules of natural justice" (*High School*

Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province (CA 185/99).

Babeile's disciplinary hearing was conducted according to the due process principle mentioned in section 8(5) of the Schools Act. However, Vryburg High School and its SGB had not followed fair administrative procedures when investigating the offence. In addition, the decision that was taken after the investigation was considered to be unfair (*High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province (CA 185/99)*).

Elements of due process in the case:

According to *High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province (CA 185/99)*, "the four typical problems that limit access to equal educational opportunities come to the fore when examining the Babeile case". These problems include the elements of due process that are important in ensuring that the disciplinary process is fair. The four typical problems as mentioned by *High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province (CA 185/99)* are discussed below:

- A lack of setting clear expectations for all

If educators and learners understand both their responsibilities and their rights, access to equal educational opportunities becomes possible. These rights include the right to human dignity, equality and freedom.

- A lack of establishing the levels of acceptable behaviour

It is not clear from the Babeile case whether Vryburg High School's Code of Conduct addressed the issue of unacceptable behaviour such as bullying, carrying or using dangerous objects, or the issue of diversity.

- A lack of communication of the consequences of unacceptable behaviour

The rules of the school related to acceptable learner conduct and the consequences if learners do not respect such rules should be clearly specified and communicated

to staff, learners and parents by means of a copy of the Code of Conduct, newsletters, and discussions during assemblies and in classes. If the learners know the rules, it becomes easy to discipline them.

- A lack of knowledge when implementing due process

Judge Khumalo of the High Court dismissed the application of Vryburg High School and its SGB because Babeile's disciplinary hearing had not been conducted according to the due process principle contained in section 8(5) of the Schools Act.

4.5.2.5 Case briefing of Court Case 6

Citation:

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (CCT 103/12) [2013] ZACC 25

Name of judge who delivered judgment in the case:

Judge Khampepe

Facts:

In “October 2009, a 16-year-old learner in Grade 10 at Harmony High School (the Harmony learner) fell pregnant. She then returned to school for the third and part of the fourth school terms of 2010 after giving birth. During the same year her mother and she were instructed that she would not be admitted to school for the remainder of 2010 and should return only in January 2011” (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.8).

The mother approached the Provincial Department of Education which then wrote to the principal of the school requesting that the “Harmony learner’s case be reviewed” (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.9). However, despite several meetings between the Provincial Department of Education and the SGB of the school the case was not reviewed (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.10). The principal then received a letter from the HoD of the Free State instructing him to allow the learner

back to school with immediate effect and to put in place measures to help the learner to catch up with any work she might have missed while at home (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.11). “The Harmony SGB did not agree (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.12). The Federation of Governing Bodies of South African Schools (FEDSAS), a national organisation representing school governing bodies, attempted to organise a meeting between the Harmony SGB and the Free State HoD. The meeting never took place” (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.13).

After the Free State HoD had refused to repeal his instruction to the Harmony principal, the school approached the High Court for interdictory relief, as the Harmony respondents were and remain of the opinion that the Free State HoD had no power to issue the abovementioned instruction. This notwithstanding, the school decided to readmit the Harmony learner during 2010, pending the outcome of the High Court proceedings. The Harmony learner completed her Grade 11 examinations successfully and the case was heard by the High Court (*HoD, DoE, Free State Province v Harmony High School*, 2013(9) BCLR, par.14).

In 2010 a learner in Grade 9 at Welkom High School, aged approximately 15 or 16 years old at the time (the Welkom learner), fell pregnant. The principal, in accordance with the school’s pregnancy policy, instructed the learner’s mother that the learner had to leave school on 16 September 2010 and remain at home until the end of the first term of 2011. Her uncle sent a written request to the Minister of Basic Education (Minister), asking that she intervene immediately prior to this issue becoming a legal battle (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par. 15 & 16).

The SGB elected to uphold its decision to enforce the school’s pregnancy policy in relation to the Welkom learner. On 28 October 2010, three days after the Welkom learner had given birth, the principal of Welkom received a letter from the Free State HoD regarding the Welkom learner’s exclusion from the school, reflecting almost the exact contents of the letter received by the Harmony principal on the same date. The Welkom principal was,

thus, also instructed to allow the Welkom learner back at school with immediate effect (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par. 18 & 19).

The Welkom respondents were and remain of the opinion that the Free State HoD had no power to instruct the principal in the manner in which he did. The school accordingly instituted the application for urgent interdictory relief in the High Court. The school, nevertheless, decided to readmit the Welkom learner pending the outcome of the High Court proceedings. The learner returned to school on 1 November 2010 and completed her Grade 9 examinations successfully (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par.21).

The High Court granted the interdict, which was confirmed by the Supreme Court of Appeal. The High Court and Supreme Court of Appeal reasoned that the HoD did not have authority to instruct the principal to contravene existing policies (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par.25).

Issue:

The Constitutional Court brought up the following issues (questions): Does the HoD of the Free State Department of Education have the power to instruct the principal of a school not to implement a learner pregnancy policy that has been adopted by the SGB of the school, where the school's implementation of the policy is inconsistent with an Act or the Constitution? (par.28) Does the SGB of a public school have the power to make a policy in respect of a school and which is inconsistent with the provisions of an Act of Parliament or the Constitution? In a case in which the SGB has made a policy that is inconsistent with an Act or the Constitution, is it the policy of the SGB or the Act or the Constitution that prevails in the absence of or pending the obtaining of any order of court (par.29)? (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR par. 28-29)

Holding:

Zondo J wrote a dissenting judgment, in which Mogoeng CJ, Jafta J and Nkabinde J concurred, and would have upheld the appeal. He held that the governing bodies' learner pregnancy policies were unconstitutional. Zondo J also held that the

exclusions were unlawful because they constituted a suspension or expulsion of the learner from school by the SGB (par.258). This is in breach to the Schools Act (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par.80 & 81).

Froneman J and Skweyiya J held that, where a crisis requiring immediate redress arises, the duty to engage, cooperate and communicate in good faith remains. However, any short-term remedial action taken to secure learners' rights must be lawfully taken (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par.166).

Reasoning:

Zondo J provided that the exclusion of a pregnant learner from school, as envisaged in the policies of the two schools, unjustifiably infringes the right to a basic education and equality. The HoD was, therefore, not only entitled but obliged to take steps to prevent the principals, who are his employees and representatives in the school, from enforcing the policies. He noted that, although this is a matter between SGBs and the HoD, their respective functions are to serve the needs of children. An approach which places the learners' best interests as the starting point must contextualise the present dispute within the parties' duties to engage and cooperate (*HoD, DoE, Free State Province v Welkom High School*, 2013(9) BCLR, par.97, 129 & 134).

Elements of due process in this case:

- Fair policies

Due process requires that school policies should not be inconsistent with the Constitution and relevant legislation. Accordingly, substantive due process should be followed when disciplining learners.

4.5.2.6 Case briefing of Court Case 7

Citation:

MEC for Education, KwaZulu-Natal v Navaneethum Pillay 2008 (1) SA 474 (CC)

Name of judge who delivered judgment in the case:

Judge Langa

Facts:

The respondent was Navaneethum Pillay who appeared on behalf of her minor daughter, Sunali Pillay, who was, until the end of 2006, a learner at Durban Girl's High School (DGHS). During the school holidays in September 2004, Ms Pillay gave Sunali permission to pierce her nose and insert a small gold stud. Ms Pillay was informed by the school that her daughter was not allowed to wear the nose stud as it was in contravention of the code of conduct of the school (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par. 3 & 5).

Before taking a decision, the SGB consulted with recognised experts in the field of human rights and Hindu tradition in order to determine the school's position (par.8). On the 8 March 2005, Ms Pillay wrote a letter to the Department of Education seeking clarity on its position, since she believed that the SGB's decision violated her daughter's constitutional right to practise her religious and cultural traditions. In May 2005, however, Ms Pillay was informed that the MEC supported the school's approach (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par.8 & b9).

Ms Pillay took the matter to the Equality Court on 14 July 2005 and obtained an interim order restraining the school from interfering, intimidating, harassing, demeaning, humiliating or discriminating against Sunali (par.10). The Equality Court held that, although a *prima facie* case of discrimination had been made, the discrimination was not unfair (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par.14).

This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court. In its judgment, the High Court (Kondile, J. With Tshabalala JP concurring) held that the conduct of the school was "discriminatory against Sunali and was unfair in terms of the Equality Act" (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par.14 & 15).

The Court decided that the “nose stud had religious and/or cultural significance to Sunali, and the failure to treat her differently from her peers amounted to withholding from her the benefit, opportunity and advantage of enjoying fully (her) culture and/or of practising (her) religion and, therefore, constituted indirect discrimination” (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par.15).

The High Court accordingly set aside the decision and order of the Equality Court and replaced it with an order declaring null and void the school’s “decision prohibiting the wearing of a nose stud in school by Hindu/Indian learners. The School then applied for leave to appeal to the Constitutional Court against the decision of the Pietermaritzburg High Court” (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par.18).

Issue:

The first question is whether the discrimination complained of by Ms Pillay emanated from the Code of Conduct or from the decision of the school to refuse an exemption. This matter raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. Ms Pillay specifically identified the decision of the school as the problem, but the major part of the arguments addressed to the Court by all the other parties focused on the discriminatory nature of the Code of Conduct. There are two problems with the Code of Conduct and which operate together. The first problem is that the Code of Conduct does not set out a process or standard according to which exemptions should be granted for the guidance of learners, parents and the SGB. The school had itself developed a tradition of granting exemption in certain circumstances. The second problem is the fact that the jewellery provision in the Code of Conduct did not permit learners to wear a nose stud and, accordingly, had required Sunali to seek an exemption in the first place (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par. 36 & 37).

Holding:

The Constitutional Court held that the school had not discriminated against Sunali’s culture. The Constitutional Court also held that schools must add an exemption clause to its Code of Conduct for Learners. This would allow parents to apply for

exemption by providing reasons why their child(ren) should be allowed to follow a certain cultural practice in the school (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par. 110).

Reasoning:

A code of conduct is entitled to establish neutral rules in terms of which to govern school uniform. Uniforms, by definition, require such rules. The only cogent complaint to be directed at the code of conduct of this school was its failure to provide expressly for a fair exemption procedure. The principle of reasonable accommodation requires that schools establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is that they think their desire to follow a cultural practice warrants the granting of an exemption. Such a process would promote respect for those who are seeking an exemption as well as afford appropriate respect for the school rules. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and that it, in a significant way, constructs their identity. The school authorities would, in this way, gain a greater understanding of and empathy for the cultural practices of learners at the school (*MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par. 165 & 176).

Elements of due process in this case:

This court case highlighted elements of due process, namely, procedural due process and substantial due process. With regard to the aspect of procedural due process in this court case, the only clear “complaint to be directed at the code of conduct of this school was its failure to provide expressly for a fair exemption procedure. That is why the Chief Justice ordered that the school, in consultation with learners, parents and staff, should amend the Code to provide for a procedure to reasonably accommodate religious and cultural practices” *MEC for Education, KwaZulu-Natal v Navaneethum Pillay* 2008 (1), par. 165) .

The fact that the school’s Code of Conduct for Learners did not include the rule for fair exemption also proves that substantive due process was affected. As discussed in the literature review, substantive due process refers to the appropriate and

fairness of the rules. Thus, this Code of Conduct for Learners did not include a fair rule with regard to the exemption of learners.

4.5.2.7 Case briefing of Court Case 8

Citation:

Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) Case No. 12533/98

Name of judge who delivered judgment in the case:

Judge Griesel

Facts:

Floris was a learner at the Overberg High School at Caledon. On 16 July 1998, the head of the school, Mr Edwards, and the deputy head, Mr Bester, found in Floris's possession a small plastic bank pouch containing a substance resembling tobacco. Floris was on the school grounds at the time. The presumption was that the substance was dagga. A disciplinary investigation against Floris was conducted. On the basis of the disciplinary investigation the SGB made a recommendation to the HoD that Floris be expelled from the school because of the allegation of serious misconduct involving the possession of dagga on the school grounds (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):2, 3*).

The disciplinary meeting took place on 30 July 1998. Edwards placed evidence consisting of a written statement before the SGB. He [Edwards] orally confirmed before the SGB by himself as well as by Bester (the deputy principal) that Floris was found in possession of dagga. Oral evidence was given by Floris regarding his version of the events on 16 July 1998. Questions were also put to Floris and answered by him (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):2*).

After the proceedings, the SGB discussed the matter and arrived at the conclusion that Floris had had dagga in his possession on the school grounds during school hours on the day in question (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division)* (12533/98):3).

The SGB also found that Floris was not a credible witness and that both the head and the deputy head of the school had acted correctly and to the satisfaction of the SGB. The members of the SGB then, by secret ballot, voted unanimously in favour of the permanent expulsion of Floris from the school. Copies of the minutes of the meeting of the SGB as well as certain other documentation were sent to the respondent on 5 August 1998. A report regarding this particular matter was subsequently prepared by a senior administrative officer in the employment of the Province of Western Cape and submitted to certain senior officials, including the Head of Department (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division)* (12533/98):3).

Issue:

Should Floris be expelled from school?

Holding:

The Supreme Court held that the decision to expel Floris should be set aside and that there was nothing preventing the learner concerned from being readmitted to the Overberg High School (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division)* (12533/98):9,10).

Reasoning:

Judge Griesel found that a gross irregularity had taken place in that both the head of the school and the deputy head of the school had simultaneously acted as witness, prosecutor and judge (*Michiel Josias de Kock v the Head of Education and Other,*

Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):4).

Judge Griesel mentioned that one of the cardinal requirements for any fair trial has always been that the presiding officer of a tribunal should be impartial. The Romans had expressed this fundamental truth in the legal principle of *maxim nemo iudex in sua causa* (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):5*). The principal of the school had not only acted as the prosecutor and the judge but had also been the most important witness for the prosecution. He had actively taken part in the examination of Floris and had, thereafter, been a member of the tribunal that had come to a conclusion and made the findings, including the finding that Floris had not been a credible witness. Thus, it cannot be said that Floris had had a fair trial before the SGB as required by section 9 of the Schools Act (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):5*).

Elements of due process in this case:

- Impartial tribunal

“Fairness requires that decision-making in disputes must be done by an impartial body”. In the court case of *De Kock v the HoD and Other, Province of Western Cape*, Judge Griesel found that a gross irregularity had taken place in that the head and the deputy head had simultaneously acted as witness, prosecutor and judge. The Judge mentioned that one of the cardinal requirements for any fair trial has always been that the presiding officer of a tribunal should be impartial.

- Reasons for the decision

The documents submitted to the HoD to enable him/her to make a decision should include a complete report of the circumstances leading to the decision taken; the minutes of the meeting during which the decision was taken; and any written representations by the learner/parents/representative (*Michiel Josias de Kock v the*

Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):8).

In this case the school had only submitted a statement by the members of the SGB present at the hearing, together with a chronological record of the various stages of the process in broad outline, without in any way referring to the contents of evidence and arguments submitted to the SGB (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):8).*

The Procedural Manual of the Province provides that sufficient evidence, whether oral or written, must be included in the minutes and must be submitted in order to convince the SGB of the learner's misconduct. In this case, the minutes had not complied with this basic requirement. Apart from the question of whether or not sufficient evidence had been placed before the SGB, it is clear that no such evidence, with the exception of the written statement by the head of the school, had been included in the minutes. Accordingly, the HoD had been in a position to form a considered opinion on the facts regarding the question of whether or not the learner concerned should be expelled from the school (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):8).*

- Fair roles of disciplinary committee members

Due process requires that the members of the disciplinary committee members should not simultaneously act as witness, prosecutor and judge during a hearing because, under such circumstances, the decision made would be unfair (*Michiel Josias de Kock v the Head of Education and Other, Province of Western Cape, heard in the Supreme Court of South Africa (Cape of Good Hope Provincial Division) (12533/98):4).*

4.5.2.8 Case briefing of Court Case 9

Citation:

Mose v Minister of Education in the Provincial Government of the Western Cape: Gabru (13018/08) [2008] ZAWCHC 56; 2009 (2) SA 408 (C) (13 October 2008)

Name of judge who delivered judgment in the case:

Judge Le Grange

Facts:

Luzoko Mose (LM) was a learner at Fairbairn College, Goodwood. He was represented by his legal guardian, Nomgqibelo Cynthia Mose (par.1). Parties to the case ordered that LM continue attending Fairbairn College (the School) pending the determination of the main application (par.3). The relief essentially sought by Nomgqibelo Cynthia Mose was aimed at preventing the expulsion of her son, LM, from the School (par.4). The SGB had charged LM on allegations that he had sold dagga to fellow learners at the school. He had also allegedly smoked dagga and provided dagga to learners while in his school uniform at a nearby public park in Goodwood. LM had been suspended on 22 May 2008. After a fact-finding hearing it was recommended to the Head of Western Cape Education (HoD) that he should be expelled – this subsequently happened. An appeal was then lodged against the decision of the HoD. However, the appeal was dismissed by the Western Cape Minister of Education (*Mose NO v Minister of Education, Western Cape, and Others* 2009 (2) SA, par.5).

Issue:

Should “*rule nisi* be issued calling upon respondents and all interested parties to appear and show cause on a date to be determined why an order should not be granted in the following terms”? (*Mose NO v Minister of Education, Western Cape, and Others* 2009 (2) SA, par.2):

- reviewing and setting aside the findings of Fairbairn College’s SGB that LM had sold dagga and its recommendation to expel LM from Fairbairn College
- reviewing and setting aside the Head of the Western Cape Education Department’s decision to expel LM from Fairbairn College
- reviewing and setting aside the Minister of Education in the Provincial Government of the Western Cape’s decision to uphold the Head of the

Western Cape Education department's decision to expel LM from Fairbairn College.

The *South African concise Oxford dictionary* (2006:1022) defines *rule nisi* as an order made by a court that is valid for a fixed period. At the end of the proceedings, arguments may be presented against the order being made final.

Holding:

“Rule nisi cannot be confirmed and it follows that the application cannot succeed. The rule nisi was discharged” (*Mose NO v Minister of Education, Western Cape, and Others* 2009 (2) SA, par.22).

Reasoning:

Judge Le Grange stated that Advocate Kantor (applicant's counsel) had “correctly conceded that the Applicant's son has been found guilty of a serious misconduct. It appears from the facts of this matter that the ills of our society have spilled over onto the grounds of our schools, which ordinarily should be safe havens for education and training”. Learners in schools have a right to education and they must be safe. No learner should be allowed to disturb the smooth running of school through his/her misconduct. The judge provided: “In my view, a learner and, in particular, learners at high school institutions cannot place in jeopardy his or her fellow learner's equally important right to proper basic education in a safe environment by indulging in serious misconduct, like selling and abusing illegal drugs at school premises”. Learners should be taught that they do not have rights to do wrong things. When they commit misconduct, they must get appropriate sanctions. The Judge stated: “Learners and, more importantly, at high school institutions, must appreciate and understand that misconduct, like in open society, attracts sanctions and in appropriate circumstances, may include expulsion.” Parents expect that their children should be safe in school. The Judge said: “The overwhelming majority of parents in South Africa, at great cost and personal sacrifice, only want the best education for their children. LM's misconduct is very serious. It threatens the safety of other learners. The Judge mentioned that his further presence at the school compromised the safe environment of his fellow learners, and the sanction of

expulsion was not disturbingly inappropriate in the circumstances of this case (*Mose NO v Minister of Education, Western Cape, and Others* 2009 (2) SA, par.21).

Elements of due process in this case:

- Appropriate decision

Due process requires that schools (SGBs) should take appropriate decisions when disciplining learners. In addition, they should not compromise the safety of other learners and, thus, learners who are threatening the safety of other learners should be expelled from school.

4.5.2.9 Case briefing of Court Case 10

Citation:

Maritzburg College v Dlamini NO [2005] JOL 15075 (N)

Name of judge who delivered judgment in the case:

Judge Combrinck

Facts:

“During October 2003, three learners at Maritzburg College were involved in an incident in which the window of a hired bus was smashed. Two learners were found to be smelling of alcohol and a bottle of brandy was discovered in one learner’s kitbag” (*Maritzburg College v Dlamini NO* [2005], par.1). It was not the first time that these three learners had been found guilty of misconduct. The Disciplinary Committee was constituted and held a proper and fair hearing.

After a hearing, these three learners were found guilty and the disciplinary committee recommended to the SGB that they be expelled from school. The SGB resolved that the Disciplinary Committee’s recommendation with regard to expulsion and interim suspension should be endorsed to two ill-disciplined learners (*Maritzburg College v Dlamini NO* [2005], par.3). After a recommendation, the SGB sent numerous letters to the HoD, made

several telephone calls and held a meeting with the Head of Department expecting the HoD to take a decision.

The HoD failed to make a decision on the expulsion of the learners for a long period. The SGB then decided to approach the High Court for a declaratory order (*Maritzburg College v Dlamini NO* [2005], par. 8 & 17).

Issue:

“Is it necessary for the SGB to consult with the Head of Department, Department of Education before implementing the interim suspension of a learner pending a decision as to whether the learner is to be expelled from the school by the Head of Department” (*Maritzburg College v Dlamini NO* [2005], par.17).

Holding:

The Court held that the applicant's actions were lawful. It is not necessary for the SGB to consult with the Head of Department if they want to apply the interim suspension of a learner while they are waiting for his/her decision to expel a learner from the school. The court upheld the decision of the SGB (*Maritzburg College v Dlamini NO* [2005], par. 19, 20 & 22).

Reasoning:

The Court blamed the departmental official for taking a long time to respond to the SGB. The judge advised that, in future, it must be considered that, if public servants are brought to court in order to be forced to carry out their responsibilities, such public servant should be ordered to pay personally the costs incurred (*Maritzburg College v Dlamini NO* [2005], par.17).

Element of due process in this court case:

- Interim suspension of learners

In terms of the Schools Act, procedural due process does not require that SGBs consult with the HoD if they wish to suspend a learner while they are awaiting the decision of the HoD to expel that learner from the school (RSA, 1996b).

- Reasonable time to respond

Due process requires that, where public officials are required to take decisions on learner discipline, this should be done within a reasonable time as specified by the rule of law.

4.5.2.10 Case briefing of Court Case 11

Citation:

Pearson High School v Head of the Department Eastern Cape Province [1999] JOL 5517 (Ck)

Name of judge who delivered judgment in the case

Judge White

Facts:

At the beginning of 1999, the learner was a student at Grey High School, Port Elizabeth. He was accused of stabbing four fellow learners with the needle of a medical syringe (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):2, 3). On the 22 February 1999, the deputy principal wrote a letter to the father of the learner informing him that if he [learner] had not been unconditionally removed from the school by the end of school on Wednesday, 24 February 1999, disciplinary proceedings would be instituted. Instead of the parent removing the child, they decided to approach the principal and request that the learner be readmitted to the school. Approximately three weeks after the learner had been readmitted to the school, the deputy principal received information that two learners had sold dagga to other learners on the school premises. The learner in question admitted that he had purchased and smoked dagga on the school premises. He also informed the deputy principal that he had hidden the remainder of the dagga on the school premises. He fetched the dagga and handed it to the deputy principal and then voluntarily wrote out a statement in which he stated that he had purchased and sold dagga (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):3).

The learner appeared before a disciplinary hearing on a charge of being involved in the purchase of dagga on school grounds. He pleaded not guilty. After a hearing had been conducted, the learner was found guilty of the charge. The hearing was reopened on 31 March 1999 where it was decided that the learner be suspended pending the implementation by the HoD of the SGB's recommendation that he be expelled from the school. On 7 April 1999, the school informed the HoD of its recommendation and requested that the HoD make his decision (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):4).

On 22 June 1999, the HoD refused to expel the learner, stating that in his view the charge and the findings may have warranted expulsion if the boys had been found guilty of either the smoking of dagga on the school premises or the possession of dagga on the school premises. The SGB was invited to impose an alternative sentence (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):7).

Issue:

The issue in this case was that the school wanted “to expel a learner from school due to misconduct. The HoD did not approve the school recommendation. The school decided to apply to the court for the review and setting aside of the HoD’s decision” (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):1).

Holding:

The Court held that the decision by the HoD to refuse to expel the learner be set aside. Thus, the recommendation of the SGB to expel the learner was confirmed by the court as correct. The HoD was ordered that, if the learner were subject to compulsory school attendance, alternative arrangements for his placement at another public school should be made (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):11).

Reasoning:

The Court was in agreement with the reasons provided by the disciplinary committee of the school for expelling the learner, namely, the seriousness of the misconduct of buying, possessing, smoking and secreting dagga on the school premises; the learner had committed two serious acts of misconduct within a period of three months; the learner's failure to comply with his undertaking of good conduct; the contemptuous attitude of the learner after the first hearing; the learner's lack of remorse and/or his unwillingness to subject himself to authority; the need for good discipline at schools and the inadequacy of the alternative punishment – suspension of seven days – for the misconduct in question.

The Court added to the submissions made stating that it appeared that the HoD had confused the issues at stake. This is evident from the extract relating to the HoD where he stated that he was satisfied that the staff of the applicant's school had the necessary skills to assist the learners with their problem of dagga addiction. The applicant did not wish to allow dagga onto the school premises and then be forced to take steps to cure the learners of their addiction, but rather to prohibit dagga, or for that matter any other drugs, on the premises and, thereby, to avoid having to address the problems associated with drugs. The court was satisfied that, if the first respondent [HoD] had recognised and considered, the real problem, he would have come to a different decision (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):9).

Elements of due process in this court case:

Due process requires that decisions be based on the facts (reasons)

The HoD had not applied his mind to the matter because he had not taken into account the facts (reasons) provided by the school. The HoD had accordingly refused to expel “a learner who is guilty of serious misconduct even when the SGB has provided enough evidence” (*Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck):11).

4.5.2.11 Case briefing of Court Case 12

Citation:

Phillips v Manser [1999] 1 All SA 198 (SE)

Name of judge who delivered judgment in the case:

Judge Kroon

Facts:

The applicant, Bradley Phillips, was a learner at a public school. The first respondent was the principal of the school (Mr Manser) and the second respondent the SGB. The SGB had resolved that the applicant be suspended from attending the school, pending a decision by the HoD as to whether or not he should be expelled from the school. The applicant, assisted by his father, sought an order declaring that (i) the hearing of the SGB was unfair and not in compliance with section 9 of the Schools Act, (ii) that the conduct of the principal and the SGB in suspending him was unfair and not in compliance with section 9 of the Schools Act, (iii) that such conduct was an infringement of his constitutional right to basic education and, (iv) that the principal allow him to attend school (*Phillips v Manser* [1999] 1 All SA 198 (SE):198).

Issue:

There are three main issues in this case: (i) Was the hearing of the SGB fair or unfair and was it or was it not in compliance with section 9 of the Schools Act (*Phillips v Manser* [1999] 1 All SA 198 (SE):198)? (ii) Was the conduct of the principal and the SGB in suspending the boy fair or unfair and was it or was it not compliance with section 9 of the Schools Act (*Phillips v Manser* [1999] 1 All SA 198 (SE):198)? (iii) Was such conduct an infringement of his constitutional right to basic education? (*Phillips v Manser* [1999] 1 All SA 198 (SE):198)

Holding:

The court held that the hearing of the SGB had been fair and in compliance with section 9 of the Schools Act. The conduct of the principal and the SGB in suspending the boy had been fair and in compliance with section 9 of the Schools

Act. The conduct had not infringed on his constitutional right to basic education (*Phillips v Manser* [1999] 1 All SA 198 (SE):198).

Reasoning:

The applicant contended that he had been suspended under both sections 9(1)(a) and 9(1)(b) of the Act. He contended further that, as the paragraphs were separated by the word or, only one or other action could be taken against him. The Court accepted this argument as correct without deciding the issue but held that the decision of the principal that the applicant be suspended for five days did not constitute a decision of the SGB in terms of section 9(1)(a). Action in terms of section 9(1)(b) was, therefore, not precluded. The Court also found on the facts that the suspension had been consensual. On the question of proceedings at the inquiry held by a disciplinary committee of the SGB, the Court found that there had been no partiality on the part of the principal and the Court found that the hearing had been, in all respects, proper and fair. The Court held that the decision to suspend the applicant had been made by the SGB and not by the disciplinary committee. This decision had been fairly made, despite the fact that the SGB itself had not held the hearing. The Court found that the disciplinary committee constituted in terms of section 30 of the Act could legitimately undertake a hearing and that the SGB was entitled to thereafter act on what occurred at the hearing and reach its decision in light thereof. The Court was not persuaded that the applicant had established that the SGB had not had before it for consideration all the material facts to enable it to reach a proper and valid decision. The Court rejected the argument that the applicant's right to education was being violated, as the Constitution provides for education up to the age of 15 years or Grade 9 and the applicant was 17 years old and in Grade 11. The Court concluded that there had been compliance with the principles of natural justice (*Phillips v Manser* [1999] 1 All SA 198 (SE):199).

Element of due process in this court case:

- Powers of a principal to suspend a learner as a precautionary measure

It is clear from this court case that the principal has the power to suspend a learner from school if he/she has reasonable proof that the learner has committed a serious misconduct and as a precautionary measure.

- Powers of the disciplinary committee to take a decision

In terms of section 30 of the Schools Act, the disciplinary committee is delegated by the SGB to recommend that a learner should be expelled after a fair hearing.

- Considering age or grade when disciplining learners

The HoD has limited powers to refuse a recommendation to expel learner who has committed a serious misconduct. Learners may claim the right to basic education until they reach the age of 15 years or attain Grade 9, whichever comes first. However, the right to basic education is limited if learners commit serious misconduct that disturbs normal teaching and learning in a school.

4.5.2.12 Case briefing of Court Case 13

Citation:

Tshona v Principal, Victoria Girls High School 2007 5 SA 66 (E)

Name of judge who delivered judgment in the case

Judge Pickering

Facts:

The applicant was a 16-year-old female learner in Grade 9 at Victoria Girls High School (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):1). The learner had a previous record of misconduct and had previously received a suspended expulsion. After a disciplinary hearing, the applicant had been found guilty of serious misconduct as charged (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):4). The applicant was subsequently again accused of further disciplinary infractions and was expelled from the hostel because of an alleged misbehaviour. On the same day, the principal had addressed a letter to the applicant's parents advising them of the events. Yolanda, furthermore, admitted that she had breached the conditions of her suspended expulsion. The expulsion from hostel therefore came into force. Yolanda's parents then consulted with a firm of attorneys (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):4). The matter proceeded to court after negotiations between the attorneys of the

respondents and the applicant had failed (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):7). Further charges relating to alleged breaches of discipline by the applicant were laid against her and a disciplinary enquiry was conducted (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):8). Neither the applicant nor her parents attended the disciplinary enquiry and the enquiry proceeded in their absence (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):9). The applicant was found guilty on both charges against her. On each charge, the sanction was expulsion from the hostel. The chairperson of the SGB addressed a letter to the applicant's parents, advising them of the expulsion of their daughter. They were allowed to make representations in person to a sub-committee. An extraordinary meeting of the SGB was held to confirm the decision of the disciplinary committee (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):10).

Issue:

Does section 9(1) and 9(2) of the Schools Act require the HoD's approval of a decision regarding expulsion from hostels? (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):27) Does expulsion from hostel affect the right to attend a school and receive basic education? (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):13)

Holding:

The court held that a learner's right to attend a school and receive basic education should not be infringed by expulsion from a hostel (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):13).

Reasoning:

The judge mentioned that sections 9 and 12 of the Schools Act "deal with completely disparate issues and the reference to hostels in section 12(2) of the Schools Act is made in an entirely different context". The expulsion of the learner from the hostel clearly does not entail the expulsion of the learner from the school and, therefore, in his view, does not violate such learner's right to schooling as enshrined in section 29 of the Constitution (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66

(E):13). The judge was satisfied in all circumstances that the proceedings and the subsequent conformation thereof by the SGB had been procedurally fair. The judge stated:

It is furthermore clear from the transcript of the disciplinary proceedings that applicant was guilty of the conduct alleged. As to her sentence, it appears from the transcripts that the question as to the appropriate sanction to be imposed upon her was carefully considered. Alternative to expulsion from hostel were also weighed against the policy issues faced by the hostel as a whole. It is clear that all those involved in the determination of the sanction to be imposed upon applicant properly applied their minds thereto having regard to the definition of serious misconduct in the Hostel Rules. There is, accordingly, no basis upon which the decision to expel applicant from the hostel can be interfered with (*Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E):27).

Element of due process in this court case:

- Imposing appropriate sanction and procedural fairness

Due process requires that SGBs should impose appropriate sanctions when disciplining learners. SGBs may expel a learner from a hostel if the learner has committed a serious misconduct that is clearly defined in school policies (Hostel Rules). In such a case, expelling a learner from hostel does not constitute an infringement of the right to education, as the learner may continue to attend school while not staying in the hostel. This is procedurally fair.

4.5.2.13 Case briefing of Court Case 14

Citation:

Western Cape Residents' Association obo Williams v Parow High School 2006 (3) SA 542 (C)

Name of judge who delivered judgment in the case:

Judge Mitchell

Facts:

The applicant was a welfare organisation that professed to be acting on behalf of two of its members whose daughter was a Grade 12 learner at Parow High School. The applicant contended that B's rights to equality, dignity and freedom of expression were being infringed in that Parow High School had organised a function which was to be attended by invitees only and to which B had not been invited. It appeared that all Grade 12 learners had been informed, at the beginning of the school year, that attendance of the function was a privilege and would be accorded only to those learners whose conduct, both academic and otherwise, merited such a privilege. It was, thus, a privilege that would be forfeited if a learner's conduct were not acceptable. The respondent had adopted the view that, in light of B's disciplinary problems and lack of respect for authority, she had forfeited her right to attend the function. The applicant sought an order interdicting the respondent from excluding B from attending the function (*Western Cape Residents' Association obo Williams v Parow High School* 2006 (3) SA 542 (C)).

Issue:

Does section 38(e) of the Constitution allow an association to set itself up as a litigator on behalf of individual members whose individual rights have been infringed upon or threatened? Does the refusal to allow the learner to attend the function infringe on the learner's right to equality, dignity and freedom of expression? Can a learner who has committed misconduct be refused the right to attend a farewell function (*Western Cape Residents' Association obo Williams v Parow High School* 2006 (3) SA 542 (C))?

Holding:

The Judge held that the welfare organisation lacked the *locus standi* to litigate on behalf of individual members whose constitutional rights were being infringed or threatened. Section 38(e) of the Constitution empowers an association to go to court where the rights of all its members are being infringed upon by the same act or actions. The school's refusal to allow B to attend the function did not infringe on her right to equality, dignity and freedom of expression. Thus, a learner who has committed misconduct may be refused the right to attend a farewell function

(*Western Cape Residents' Association obo Williams v Parow High School* 2006 (3) SA 542 (C)).

Reasoning:

The Judge held that the applicant's reliance on section 38(e) of the Constitution was misconceived. The subsection empowers an association to go to court where the rights of all of its members are infringed by the same act or actions (*Western Cape Residents' Association obo Williams v Parow High School* 2006 (3) SA 542 (C)).

The Judge also held that

two of the important lessons that a school must teach its learners are discipline and respect for authority. The granting of privilege as a reward for good behaviour is one tool that may be used to teach such lesson. The withholding of such privilege can therefore not be claimed as an infringement of a right to equality or to dignity. The granting of the privilege in the absence of its having been earned may well constitute an infringement on the right to equality and dignity of those who have merited the privilege. The right to freedom of expression does not equate to a right to be ill disciplined or rude (*Western Cape Residents' Association obo Williams v Parow High School* 2006 (3) SA 542 (C)).

Element of due process in this court case:

- Difference between privilege and human right

Due process requires that learner should be able to differentiate between the withdrawal of privilege and the infringement of a human right. When a school decides to withdraw privileges, such as not giving a learner an award, this is not an infringement of a human right. However, it is essential that the learner code of conduct clarify the difference between the two.

4.6 RELATIONSHIP BETWEEN FINDINGS OF THE INTERVIEWS AND THE FINDINGS OF THE DOCUMENT ANALYSIS

As stated in chapter 3, triangulation was conducted during data analysis. Accordingly, this part of chapter 4 intends to show the relationship between the data collected from the interviews and those collected from the document analysis.

Similarities were found between the interview findings and the findings of the document analysis with regard to the understanding of due process, procedural due process and substantive due process. The findings of both research methods show that education managers lack sufficient understanding of due process, procedural due process and substantive due process.

With regard to the learner disciplinary process, most of the findings from interviews and document analysis are similar. In both the interviews and the document analysis, it was found that education managers lack sufficient understanding of the steps that should be followed during learner discipline, as well as knowledge on how to implement them. The findings from both data collection methods are that the codes of conduct provide for the preliminary investigation and education managers have an understanding in this regard. However, it was also found, from both the interviews and the document analysis, that the majority of education managers lack sufficient understanding of the content of disciplinary hearing notices and that the majority of codes of conduct do not say anything about this notice.

Similarities were also identified between the findings on hearings obtained from the interviews and the document analysis. These similarities include the fact that few education managers could explain how the disciplinary hearing process takes place. However, the findings from both methods reveal that there is a good understanding on the process of adjourning and considering facts on the part of the participants. There is also agreement between the findings from the interviews and the document analysis with regard to education managers' lack of understanding of the decision-making process.

Findings from both methods show that education managers understand the importance of having a code of conduct for a fair disciplinary process, but what is lacking in this regard is that some of the codes of conduct are inconsistent with the

Constitution and other legislation. Both methods of data collection provided findings that indicate that education managers lack understanding of the fair exemption procedure that should also be included in the code of conduct for learners. With regard to both interviews and documents the findings indicate the inclusion of irrelevant legislation for learner discipline. The findings from the interviews and documents also indicate that most participants did not know which documents should be used when disciplining learners.

The difference between the findings from the interviews and the document analysis includes the fact that, during interviews, most participants showed that they understood the difference between misconduct and serious misconduct. The challenge is however that, on examination, the codes of conduct were found not to differentiate between misconduct and serious misconduct. The findings from both methods indicate that some of the participants believe that age should not be considered when learners are disciplined.

The data gleaned from the interviews and the documents would thus seem to be interrelated.

4.7 CONCLUSION

This chapter discussed the data analysis and the findings from both the interviews and the document analysis. The findings were discussed under headings that were derived from the data and were guided by the conceptual framework adopted at the beginning of the study. The main purpose of chapter 4 was to discuss the education managers' understanding and implementation of due process during learner discipline. I reflected on the findings from the interviews and document analysis (code of conduct for learners, notice of hearing, minutes and court cases) which enabled me to make an informed conclusion that the majority of education managers lack understanding of due process. This lack of understanding of due process adversely affects the education managers' implementation of due process.

The next chapter discusses the conclusion to the study and includes recommendations and suggested solutions to the problem of the understanding and implementation of due process during learner discipline.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The previous chapter presented the results of the study. This chapter starts by restating the research questions. Thereafter the chapter presents the conclusions that were drawn from the study findings and the literature review. The conclusions also include a summary of the integrated findings from the interviews and the document analysis of the codes of conduct for learners, notices of learner disciplinary hearings, minutes of learner disciplinary hearings and selected court cases relating to due process. The significance of the study is highlighted in the discussion on the study's contribution of new knowledge. The chapter ends by suggesting further research topics in respect of learner discipline in schools.

5.2 RESEARCH QUESTIONS

The following academic dilemma motivated this study: How do education managers conceptualise and implement due process when disciplining learners in schools? In addition, there were also the following two sub-questions:

How do education managers understand due process?

How does their understanding of due process influence the way in which they discipline learners?

5.3 EDUCATORS' CONCEPTUALISATION AND IMPLEMENTATION OF DUE PROCESS WHEN DISCIPLINING LEARNERS: CONCLUSION

In the conclusion I relate the research findings to existing literature and also to the conceptual framework of due process in learner discipline in South Africa which was developed at the onset of the study.

The conclusions are based on how education managers understand due process and how their understanding of due process influences the way in which they

discipline learners in schools. The following conclusions were drawn based on both the research findings and the literature review:

- The majority of the education managers who were interviewed lacked an understanding of the meaning of due process. They considered due process to be a disciplinary process. While explaining the meaning of due process, most of the participants focused on the procedural aspects rather than the substantive aspects of due process. I had expected that when they explained what due process is, they would mention that there are two types of due process, that is, procedural due process and substantive due process. Their explanation of the meaning of due process differs from that provided by the literature. As explained in the literature review, due process is regarded as the fairness of the process or fair treatment (Joubert, 2008:43; Joubert & Prinsloo, 2009:130; *South African concise Oxford Dictionary*, 2006:359; Schimmel et al., 2008:83). Most of the education managers who participated in the study did not use the term 'fair' when explaining due process. Moreover, most of the participants did not understand the link between their schools' codes of conduct for learners and due process, with the concept of due process not being adequately reflected in the codes of conduct for learners. This is not in line with section 8(5) of the Schools Act, which provides that: "A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings" (RSA, 1996b). In the case of *High School Vryburg and the SGB of High School Vryburg v The Department of Education of the North West Province*, 1999, the disciplinary hearing had not been conducted according to the principle of due process, as stipulated in section 8(5) of the Schools Act. What can be learnt from this court case is that if a hearing is not conducted according to the principles of due process, the hearing will be declared null and void.
- The majority of the participants considered procedural due process to refer merely to following a procedure. However, the way the participants explained procedural due process does not tie up with what the literature provides. Procedural due process means to follow fair procedures or fair steps or fair methods when disciplining learners (Patterson, 1976:12; Rossow & Warner, 2000:198; Russo, 2001:19). Moreover, the concept of procedural due process

was not well reflected in the codes of conduct examined. This is not in line with section 8(5) of the Schools Act, which provides that a code of conduct must contain provisions for due process. As explained before, the fact that the code of conduct must contain due process simply means that it must contain procedural and substantive due process. Most participants did not include the word 'fair' in their explanation of this concept. In *SGB, Tafelberg School v Head, Western Cape Education Department, 2000*, the judge held that procedural due process was not followed when disciplining learners. What can be learnt from this court case is that if schools do not follow procedural due process, they can lose a case on the ground of unfairness.

- The majority of the education managers who were interviewed did not understand the meaning of substantive due process and failed to explain that substantive due process in the learner disciplinary process context involves considering the facts and ensuring that rules are appropriate and fairly implemented (Patterson, 1976:12; Alexander & Alexander, 2005:435; Joubert, 2008:45; Rossow & Warner, 2000:199). Substantive due process must be reflected in the learner code of conduct, notices, minutes and disciplinary reports. Most codes of conduct that were analysed did not reflect substantive due process. This is not in line with section 8(5), which mentions that the code of conduct must have provisions for a due process. Most minutes that were analysed did not reflect factors such as the learner's awareness of the broken rule, the reason for the decision, rule or standard consistently applied, sufficient proof, appropriateness of sanction, and so forth (Joubert & Prinsloo, 2009:231). In *Pearson High School v HoD, Eastern Cape Province, 1999*, it was found that the HoD had not applied his mind to the matter at hand because he had not taken into account the facts (reasons) provided by the school. The HoD in this case had refused to expel a learner who was guilty of serious misconduct despite the fact that the SGB had provided sufficient evidence to warrant such a step. What can be learnt from this court case is that facts (reasons) must be taken into account when decisions are made.
- The majority of the participants did not mention all the steps required in a fair disciplinary hearing. This means that there is a lack of sufficient understanding of procedural due process. The steps that should be followed during a learner

disciplinary process include investigating the evidence to determine whether a transgression of the code of conduct has taken place (preliminary investigation); informing the SGB of the transgression; a decision by the SGB to conduct a disciplinary hearing; sending out a notice to the parents and learner to attend the hearing; conducting a fair disciplinary hearing; adjourning the hearing to consider the facts; conveying the decision of the committee to the learner; and providing for a possible appeal.

- Several of the education managers understood that, before a learner may be called to a disciplinary hearing, the principal or his/her delegate should conduct a preliminary investigation. Their understanding is in line with paragraph 13.2. of the Guidelines which states that the principal should investigate the case and decide whether there is any need for him/her to inform the SGB of the need to organise a hearing (DoE, 2008). The principal must inform the SGB chairperson immediately of serious misconduct that is threatening the safety of other persons because, in terms of section 9 of the Schools Act, the SGB chairperson is the only person who may take a decision on immediate suspension. This may be done to ensure the safety of other persons. The fact that the principal must conduct a preliminary investigation when a learner has committed a serious misconduct was reflected in most of the learner codes of conduct that were analysed.
- The majority of the education managers who were interviewed understood that learners have a right to information although they were not able to link the disciplinary procedures in their schools with the learners' right to information. Section 32 of the South African Constitution stipulates that: "Everyone has the right of access to any information held by the state; any information that is held by another person and that is required for the exercise or protection of any right" (RSA, 1996a).
- Most of the schools did not include sufficient information in their notices that they sent to the learners and their parents to attend a disciplinary hearing. Thus, many of the notices that are issued to learners and parents do not to meet the required standards. In addition, the way notices are written differs from the way that has been recommended by different authors. An author such as Stone (1993:356) maintains that all notices sent to parents informing them of

a school's recommendation to suspend the learner should include detailed reasons for the charges; the names of the learner; contact details of the school witnesses; a summarised testimony of the witness(es); the length of the learner's removal from school that has been recommended by the school; the right of learners to have legal representatives; advice on how to secure legal services that are free of charge or of low cost; date, time and place of the disciplinary hearing; information about admission to an alternative educational programme; and the name of the officer who will be conducting the hearing.

The Example of the Code of Conduct (DoE, 2008b:31) gives the following content of a notice of disciplinary hearing: name of the learner, learner's ID number, subject, teacher, date of hearing, time of hearing, venue of hearing, time of hearing, date served, charge against the learner, date of offence and nature of offence. If the learner is suspended from class, the notice must advise the learner that he/she has been suspended from class and from which date and time until which date and time. The notice must further state that during the period of suspension, the learner will not be permitted on the school premises unless written permission to enter the school premises has been given to the learner by a senior member of the management, or for attending the hearing. The learner must receive one copy of the notice while the signed copy must be kept and filed”.

Few codes of conduct reflect how notices should be written and how they should be sent to learners and parents. That is why most of the notices that are developed by most of the participants do not meet the standard for procedural and substantive fairness.

- The majority of the participants were aware of who should serve on a disciplinary committee. However, some of the persons mentioned by the participants were not, in terms of the law, supposed to be part of a learner disciplinary committee. In addition, several of the participants did not mention that it learner representatives could be included in the disciplinary hearing. This contradicts the literature which states that the disciplinary committee should consist of at least the principal or deputy principal, the chairperson of the SGB, a parent member of the SGB, and an educator and a learner in the case of a secondary school (Joubert & Prinsoo, 2009:135). The formation of a

disciplinary committee must meet the standards of both procedural and substantive fairness. The fact that the wrong people are included in the disciplinary committee and those who are supposed to be part of it are left out renders the formation of the committee procedurally and substantively unfair. In *Michiel Josias De Kock v the HoD and other, Province of Western Cape*, 1998, the judge found that a gross irregularity had taken place in that the head and the deputy head had simultaneously acted as witness, prosecutor and judge. The judge mentioned that one of the cardinal requirements for any fair trial has always been that the presiding officer of a tribunal should be impartial. What can be learnt from this court case is that members of a disciplinary committee cannot simultaneously act as witness, prosecutor and judge.

One of the participants understood a fair disciplinary committee as a committee that is chaired by a neutral person from the community. This is not in line with section 30(1)(b) of the Schools Act, which requires that “when the SGB establishes a committee (disciplinary committee), they may appoint persons who are not members of the SGB to such committees on grounds of expertise, but a member of the SGB must chair each committee (disciplinary committee)” (RSA, 1996b).

- In addition to the disciplinary committee, there are other persons who should be involved in a hearing. All the education managers who were interviewed knew who should be part of the disciplinary hearing although they mentioned different numbers of participants. The majority understood that learners should be represented by their parents or guardians. A few participants only mentioned that witnesses should form part of the disciplinary hearing. Section 8(6) of the Schools Act provides that parents should accompany their accused children (learners) to a disciplinary hearing, while section 8(7) of the Schools Act requires that, if the witness who is under 18 years would be exposed to undue mental stress or suffering if he or she testifies at proceedings, the SGB must appoint an intermediary (RSA, 1996b). Findings from interviews show that few participants understand that witnesses play an important role in providing evidence as part of substantive due process. My conclusion is that most of the participants were aware of who should be part of a disciplinary hearing.

- Some of the education managers who participated in the study indicated that they did not conduct formal hearings even when learners have committed serious misconduct. They stated that they sometimes avoided holding hearings because the Department of Education did not want the learners' time to be wasted. Some of the participants indicated that they conducted disciplinary hearings themselves alone in their office. The above actions are not in line with section 9(1)(a) of the Schools Act, which provides that the SGB may suspend an ill-disciplined learner from school as a corrective measure. Section 9(1)(b) indicates that the SGB may suspend an ill-disciplined learner with the recommendation of expulsion (RSA, 1996b). In addition to the above, section 16A(2)(d) of the Schools Act states that "the principal must assist the SGB in handling disciplinary matters pertaining to learners" (RSA, 1996b). My conclusion is that some of the education managers who were interviewed avoided conducting disciplinary hearings because they lack sufficient understanding of the purpose of procedural and substantive due process and the fact that discipline is essential for effective teaching and learning in schools.
- A few of the participants understood that a reason has to be given for the decision taken during a disciplinary hearing. The reason for a decision was reflected in a few codes of conduct. The fact that other codes of conduct do not make provision for decision-making during learner discipline means that these codes of conduct are not in line with paragraph 12.4 of the Guidelines which states that all decisions leading to suspension or expulsion must take into consideration the applicable laws. The minutes of the disciplinary hearings conducted at a few of the schools revealed that these schools took the school's code of conduct for learners into account when taking a decision. Paragraph 13.5 of the Guidelines provides that: "The SGB must keep a record of the proceedings and hearing and may inform the Head of Department of its decision to suspend a learner or inform the Head of Department within twenty-four hours of its recommendation for expulsion of the learner" (DoE, 2008).

Just few of the participants mentioned that they based their decisions on the evidence heard during the disciplinary hearing. This shows that most participants lack sufficient understanding of the importance of substantive due process. The case of *Michiel Josias De Kock v the HoD and other, Province of Western Cape*, 1998

demonstrates that “apart from the question of whether or not sufficient evidence was placed before the SGB, it is clear that no such evidence, with the exception of the written statement by the head of the school, was included in the minutes” (Joubert & Prinsloo, 2009:132). What can be learnt from this court case is that it is important to reflect substance (facts, reasons, evidence, etc) in school documents such as minutes of disciplinary hearings, disciplinary reports, and so forth. The importance of substantive due process is mentioned by Burns (1999:197), who maintains that “the furnishing of reasons facilitates fairness and proper administrative behaviour, accountability and openness: unsound reason may form the subject of an appeal on the merits or a review of the validity of the action”. Some education managers indicated that they avoided taking decisions to recommend the expulsion of learners who had committed serious misconduct that could lead to expulsion. Others indicated that they avoided recommending the expulsion of learners who had committed serious misconduct because the process was so lengthy and the education department was not in favour of it. *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2002 (4) SA 738 (C) indicated that the education managers had lacked sufficient understanding of decision-making and that this influenced the decision-making process. What we learn from this case is that substantive due process requires that the punishment should be relevant to the offence and that decision-making must be based on the code of conduct for learners that has been formulated in accordance with legal requirements.

The cases *George Randell Primary v The MEC, Department of Education, Eastern Cape Province*, 2010; *Mose v Minister of Education in Provincial Government of the Western Cape*, 2008; *Maritzburg College v Dlamini*, 2005; *Phillips v Manser*, 1999 and *Tshona v Principal, Victoria Girls School*, 2007 also all indicate that education authorities often lack sufficient understanding of the decision-making process and that this can influence the process.

- Some of the participants were not aware which acts/laws applied to learner discipline and some mentioned irrelevant acts. In *HoD, Department of Education, Frees State v Welkom High School and Another*, 2013 and *HoD, Department of Education, Frees State v Harmony High School and Another*,

2013, the courts held that school policies should not be inconsistent with the Constitution and relevant legislation. It is, thus, essential that a fair disciplinary process (due process) be followed. In *MEC for Education, KwaZulu-Natal v Navaneethum Pillay*, 2008, the court found that the Code of Conduct for Learners had failed to provide expressly for a fair exemption procedure. This was the reason why the Chief Justice had ordered that the school, in consultation with learners, parents and staff, should amend the Code of Conduct for Learners to provide for a procedure to reasonably accommodate religious and cultural practices. Paragraph 12.4 of the Guidelines states: “All decisions leading to suspension or expulsion must take cognizance of applicable law” (DoE, 2008). What can be learnt from this court case is that procedural due process requires that the code of conduct for learners must provide for a fair exemption procedure. Codes of conduct that do not have fair exemption procedures also affect the substantive fairness of the disciplinary process.

- Most of the education managers interviewed could not mention the important documents that should be used and kept during learner disciplinary processes. In addition, the majority of the schools did not have copies of the minutes of disciplinary hearings that had been conducted. The main reason provided was that they did not keep or safeguard these minutes, with one school not keeping its minutes at the school. It was, thus, clear that the majority of the principals did not ensure the safekeeping of the minutes of their disciplinary hearings (RSA, 1996b). Section 16A(2)(a)(v) of the Schools Act states that the principal must, in undertaking the professional management of a public school as contemplated in section 16(3), carry out duties which include, but are not limited to, the safekeeping of all school records (RSA, 1996b).

In *Michiel Josias De Kock v the HoD and other, Province of Western Cape*, 1998, the judge held that the documents to be submitted to the Head of Department to enable him/her to make a decision should include a complete report of the circumstances resulting in the decision of the disciplinary committee; the minutes of the meeting during which the decision was taken; and any written representations by the learner/parents/ representative. However, the minutes of the disciplinary hearing did not comply with this basic requirement (Joubert & Prinsloo, 2009:132). The

Guidelines (DoE, 1998:40) state that the SGB must keep a record of the proceedings of the hearing, and may inform, in writing, the Head of Department of its decision to suspend a learner; or must inform the Head of Department within twenty-four hours of its recommendation for expulsion of the learner”. The documents relating to learner discipline that were identified in the literature study include the notice of hearing sent to the parents and learners (DoE, 2008:13); minutes of the proceedings; the attendance register; the written decision explaining the punishment and reasons for the decision (DoE, 2008a:13); a letter of recommendation to the HoD for expulsion (DoE, 2008a:14); and a disciplinary form signed by the complainant and the learner (DoE, 2008b:18). Most of the schools in this study did not have a disciplinary policy – a detailed document that guides staff members and the SMT on how to manage discipline in a school.

- There was clearly a misunderstanding on the part of the participants about the learner behaviours that constitute serious misconduct. A few of the participants stated that they did not consider stealing to be serious misconduct. Others did not understand whether a disciplinary hearing should be organised for learners who have committed criminal offences in a school. According to the Guidelines (DoE, 1998),

[the] offences that may lead to suspension include conduct which endangers the safety and violates the rights of others; possession, threat or use of a dangerous weapon; possession, use, transmission or visible evidence of narcotic or unauthorised drugs, alcohol or intoxicants of any kind; fighting, assault or battery; immoral behaviour or profanity; falsely identifying oneself; harmful graffiti, hate speech, sexism, racism; theft or possession of stolen property including test or examination papers prior to the writing of tests or examinations; unlawful action, vandalism or destroying or defacing school property; disrespect, objectionable behaviour and verbal abuse directed at educators or other school employees or learners; repeated violations of school rules or the Code of Conduct; criminal and oppressive behaviour such as rape and gender based harassment; victimisation, bullying and intimidation of other learners; infringement of examination rules; and knowingly and wilfully

supplying false information or falsifying documentation to gain an unfair advantage at school.

- Half of the interviewees only mentioned that, according to their understanding, the age of the accused learners should be considered during disciplinary hearings. In *Phillips v Manser*, 1999, it was held that the HoD had limited powers to refuse the recommendation to expel a learner who had committed a serious misconduct. The right to basic education is limited if learners commit serious misconduct that disturbs normal teaching and learning in a school. Section 8(7) of the Schools Act requires that if the accused who is under 18 years “would be exposed to undue mental stress or suffering if he or she testifies at proceedings, the SGB must appoint an intermediary” (RSA, 1996b) The *Gauteng learner disciplinary regulations* provide that: “At least one of the parents of the learner must accompany the learner at the hearing, unless the learner is 21 (twenty-one) years or older” (GDoE, 2000). According to Roos and Oosthuizen (2003:55), it must be accepted that the administrative hearing of a learner of minority age must always take place in camera, unless legislation specifies otherwise.
- A few of the participants lacked information about the appeal process. Some of them cited an incorrect number of the days to be given to a learner and parents in which to lodge an appeal. Paragraph 12(2) of the Guidelines states: “The learner who has been expelled, or his/her parent, may appeal against the decision of the Head of Department to the Member of the Executive Council, within seven days of the decision so to expel him/her” (DoE, 1998).
- It emerged that one school only kept detailed minutes of hearings, thus ensuring that what each participant in the hearing had said was recorded. The minutes of two schools revealed that their disciplinary tribunals adjourned to consider the facts and evidence. Three schools had mentioned in their minutes how their tribunals go about conveying a decision while the minutes of two schools indicated that learners have the right to appeal. As already mentioned, section 16A(2)(d) of the Schools Act provides that the “principal should assist the SGB in handling disciplinary matters pertaining to learners” (RSA, 1996b), It is important that attention is given to the recording of the minutes during disciplinary hearings.

Finally, I conclude by stating that the majority of education managers do not have sufficient understanding of due process and this, in turn, has a negative influence on the way in which they implement due process during learner discipline in schools. This conclusion concurs with the assumption that I made at the beginning of this study that education managers may lack understanding of the due process and how due process should be implemented when disciplining learners.

5.4 CONTRIBUTION OF NEW KNOWLEDGE AND RECOMMENDATIONS

This section discusses the contribution the study makes by adding new knowledge to the existing knowledge in the fields of education management and education law as regards conceptualising and implementing due process in schools. The section then discusses recommendations for the understanding and implementation of due process during learner discipline.

Informed by the findings of the study, the contribution of the study to new knowledge and recommendations for future research include the following:

- The study found that the majority of the education managers who were interviewed did not have a sufficient understanding of due process, with several considering due process to be a disciplinary process only. Moreover, they did not consider due process to be a fair disciplinary process. The majority of them also maintained that procedural due process merely involved following a procedure and they did not consider it as following a fair disciplinary procedure. In addition, most of them did not understand the meaning of substantive due process. In general, the participants did not have sufficient understanding of the learner disciplinary process.
- Most of the education managers interviewed had not received proper training on due process. Pre-service and in-service programmes on due process should be designed in such a way as to provide educators and education managers with an understanding of due process and the types of due process, namely, procedural due process and substantive due process. In addition, the training should empower them to know the relationship between procedural due process and substantive due process. Furthermore, the Department of Basic Education should support education managers both theoretically and practically

in understanding and implement due process. Accordingly, the Department of Basic Education should offer sufficient, high quality, capacity-building programmes for both education managers and SGB members. These programmes should focus on the following:

knowledge of the steps that should be followed during learner discipline and which relate to due process, as well as the skills required to implement these steps

the formulation of a code of conduct that provides for due process

the development of a detailed learner discipline policy

the legal aspects pertaining to learner discipline

proper record keeping, especially with regard to disciplinary actions involving learners

the learner behaviour that constitutes serious misconduct. Education managers should be able to distinguish between Schedule One and Schedule Two misconduct.

the importance of considering the age of the accused learner during disciplinary action

aspects of the appeal process.

- The conducting of a preliminary investigation should be included in the disciplinary policy of schools. The code of conduct should also state that, following the internal investigation, the principal may recommend to the chairperson of the SGB that a learner should be suspended from school as a precautionary measure if he/she has reasonable proof that the accused learner poses a threat to other persons in the school.
- The document analysis in the study showed that the majority of the schools involved in this study did not include sufficient information in the notices to attend a disciplinary hearing sent out to learners and their parents. Accordingly, the notices do not meet the required standards as specified in the literature.

The inclusion of sufficient information in these notices should therefore receive attention.

- The majority of the schools in the study did not have a learner disciplinary policy although they did have a code of conduct for learners. In terms of section 8(5)(a) of the Schools Act, “the Code of Conduct for learners must contain provisions of due process, safeguarding the interests of the learner and the other party involved in disciplinary proceedings” (RSA, 1996b). A Code of Conduct for learners should also include the steps to be followed to guarantee all learners the right to just administrative action (due process) by the implementers of the disciplinary proceedings. In addition to the code of conduct for learners, a detailed learner disciplinary policy should be developed as a management document. This document should, among other things, inform the staff about how to discipline learners. It should explain to the staff what to do when disciplining learners, how to discipline learners and when to discipline learners. In addition, it should include all the required steps of the due process that education managers and the SGB should follow when engaging in learner discipline.
- Education managers should know who should serve on a disciplinary committee, as disciplinary committees should be constituted and should function in terms of the law.
- Fairness requires that the decision-making in disciplinary hearings must be done by an impartial body and the disciplinary committee members should not simultaneously act as witness, prosecutor and judge during a hearing. It is not necessary for governing bodies to consult with the HoD if they want to apply the interim suspension of a learner while they are waiting for the decision of the HoD on whether to expel a learner from school. In terms of section 30 of the Schools Act, a disciplinary committee that decides to recommend such expulsion must include SGB members and only the SGB chairperson may sign the letter recommending expulsion (RSA, 1996b). Section 9(1C) states that, if the SGB finds that the learner is guilty of serious misconduct, then the learner may be suspended from school following the correct disciplinary proceedings. Suspension should not be longer than seven school days or involve any other sanction contemplated in the code of conduct of the public school. If the SGB

has conducted a hearing and decides that the learner must be expelled, the SGB may recommend to the HoD that the learner be expelled (RSA, 1996b).

- The analysis of court cases relevant to the due process provided information on aspects such as decision-making, developing school policies, the roles of stakeholders, documents that are essential during learner disciplinary action and limitations of learner rights. One of the contributions that this study makes is the finding that decision-making during disciplinary hearings should be based on a code of conduct for learners that has been clearly communicated to parents and learners and which is based on the applicable legal aspects. School policies should be consistent with the Constitution (RSA, 1996a) and with relevant legislation, such as the Schools Act (RSA, 1996b).
- The education authorities cannot refuse to expel a learner who is guilty of serious misconduct if the SGB has provided sufficient evidence of misconduct and has conducted a fair hearing. It is also essential that education authorities apply their minds to disciplinary matters by scrutinising the facts (reasons) provided by the school. Due process requires that, where public officials are required to take decisions on learner discipline, this should be done within a reasonable time as specified by the rule of law.
- The majority of principals in the study lacked sufficient understanding of the importance of keeping the minutes of disciplinary hearings. In addition, they had not advised those individuals entrusted with recording the minutes on how to write detailed minutes. In addition, most of the principals did not ensure the safekeeping of the minutes of disciplinary hearings. They were generally unaware of the fact that the documents submitted to the HoD recommending the expulsion of a learner should include a complete report of the evidence heard during the disciplinary hearing, the circumstances resulting in the decision to recommend the expulsion of the learner, the minutes of the meeting during which the decision was taken and any written representations by the learner, the parents and their representative. Finally, the disciplinary hearing should reflect a lawful, reasonable and fair procedure.
- The expulsion of a learner who has committed serious misconduct in a hostel does not constitute an infringement of the learner's right to education as the learner may continue to attend school while not staying in a school hostel. Due

process requires that learners should be able to differentiate between the withdrawal of privilege and an infringement of a human right. Learners who are threatening the safety of other learners may be expelled from a school. The principal may recommend to the SGB chairperson that a learner must be suspended as a precautionary measure although the SGB chairperson must make the decision.

It would appear that the academic literature and previous empirical studies on the understanding and implementation of due process during learner discipline are limited. However, this study has addressed some of the gaps that existed.

5.5 THE SIGNIFICANCE OF THIS STUDY

This study provided detailed information about due process. In this regard, the literature review addressed the origin and meaning of the concept of due process. In addition, the study has provided guidelines for conducting fair disciplinary hearings.

The Schools Act (RSA, 1996b) provides that a code of conduct for learners should provide for due process. This study focused on the way school managers understand and implement due process in safeguarding the interests of learners during disciplinary proceedings. The study contributes to the existing literature in the field of education law, as there is a lack of information on the knowledge and understanding of due process when disciplining learners. Thus, the findings of the study add to the scholarly knowledge on the formal disciplinary hearings that are convened to discipline learners who have committed serious misconduct.

This study could assist officials from the Department of Basic Education to understand and support schools in implementing due process when disciplining learners. In addition, the study offers insights for education managers as regards their roles when disciplining learners. The study also makes recommendations on that way in which due process may be implemented during disciplinary proceedings.

5.6 SUGGESTIONS FOR FURTHER RESEARCH

I suggest that the following areas be explored in future studies:

- How do the characteristics of the decision-makers influence the way in which they implement due process?
- What effective strategies may be used to improve the implementation of due process in learner discipline?
- How do SGBs understand due process?

5.7 SUMMARY

This chapter attempted to answer the research questions that were formulated at the beginning of the study. The findings of the study were analysed in terms of the conceptual framework, which was guided by the literature study. Certain conclusions were then drawn. These conclusions provided a summary of the integrated findings from the interviews, the document analysis and the case briefings. The significance of the study was highlighted and specific recommendations made.

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ANNEXURES

Annexure A: Ethical clearance certificate



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Education

RESEARCH ETHICS COMMITTEE

CLEARANCE CERTIFICATE

CLEARANCE NUMBER :

EM 12/09/02

DEGREE AND PROJECT

PhD

Education managers' understanding and implementation of due process during learner discipline

INVESTIGATOR(S)

Nicholus Mollo

DEPARTMENT

Education Management and Policy Studies

DATE CONSIDERED

18 September 2014

DECISION OF THE COMMITTEE

APPROVED


Please note:

For Masters applications, ethical clearance is valid for 2 years

For PhD applications, ethical clearance is valid for 3 years.

**CHAIRPERSON OF ETHICS
COMMITTEE**

Prof Liesel Ebersöhn



DATE

18 September 2014

CC

Jeannie Beukes
Liesel Ebersöhn
Prof HJ Joubert

This ethical clearance certificate is issued subject to the following condition:

1. It remains the students' responsibility to ensure that all the necessary forms for informed consent are kept for future queries.

Please quote the clearance number in all enquiries.

Annexure B: Application letter to conduct research in Mpumalanga Secondary Schools (Mpumalanga Department of Education)



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Education

Enq: Mollo N.T.
Cell: 083 767 0330

P.O. Box 17454
Witbank
1035
Date: _____

Attention: Research Unit
The Head of Department (HoD)
Mpumalanga Department of Education
Private Bag X11341
NELSPRUIT
1200

Dear Madam

RE: APPLICATION FOR PERMISSION TO CONDUCT RESEARCH IN NKANGALA DISTRICT SCHOOLS

I am doctoral student at the University of Pretoria. The title of my research is *“Education managers’ understanding and implementation of due process during learner discipline”*.

I hereby humbly request your permission to conduct research in Nkangala District schools. I intend to collect data from 8 public high schools.

The purpose of this study is to complete my PhD and also contribute to the literature in the field of education law which is still lacking in term of the due process.

The process of collecting data will start as soon as my ethical application has been approved by the Ethic Committee of the University. The research process will not compromise tuition or contact time. Research findings will be made available to the Mpumalanga Department of Education.

I hope that my request will receive your favourable consideration.

Yours faithfully

Mollo N.T. (Mr)
Student number: 04315103

Prof. H.J. Joubert
Supervisor

Annexure C: Permission letter from Mpumalanga Department of Education to conduct research in schools



education
DEPARTMENT: EDUCATION
MPUMALANGA PROVINCE

Private Bag X 11341
Nelspruit 1200
Government Boulevard
Riverside Park
Building 5
Mpumalanga Province
Republic of South Africa

Litiko leTomfanelo Kwinqanongo neFundo Department van Onderwys Ndzimanulo ya Dyonelzo
Enquiries: A.H Baloyi (013) 766 5476

MOLLO N.T.
P.O. BOX 17454
WITBANK
1035

RE: APPLICATION TO CONDUCT EDUCATIONAL RESEARCH IN NKANGALA DISTRICT

Your application (Dated 20 October 2012) to conduct educational research on the topic: "Education managers' understanding and implementation of due process during learner discipline" was received on the 22 October 2012.

Your abbreviated research proposal, which includes the problem statement, aims and objectives, methodology, duration of the study, significance of the study, sampling and ethical considerations, gives an impression that your study will benefit the entire department especially the labor division and the school principals. Given the motivation and the anticipated report of the study, I approve your application to conduct your research in the institutions of the department.

You are further requested to read and observe the guidelines as spelt out in the attached research manual especially paragraph 2.2. The importance of this study cannot be overemphasized; therefore you are expected to share your findings with the department. It will be appreciated if you can present your findings in electronic form and make formal presentation to the strategic planning's research unit.

Sisonke Sifundzisa Sive



now

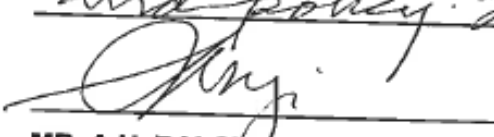
APPLICATION TO CONDUCT EDUCATIONAL RESEARCH IN NKANGALA DISTRICT

For more information kindly liaise with the department's research unit @ 013 766 5476 or a.baloyi@education.mpu.gov.za.

The department wishes you well in this important study and pledge to give you the necessary support you may need.

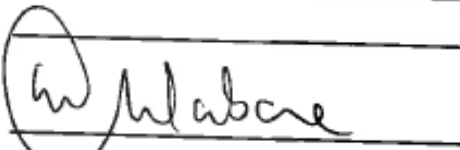
RECOMMENDED / NOT RECOMMENDED.

The research project is relevant for promotion of learner discipline and policy. It is recommended!


MR. A.H. BALOYI
RESEARCH SUBDIRECTORATE

24/10/2012
DATE

~~APPROVED/NOT APPROVED:~~


MRS MOC MHLABANE
HEAD OF DEPARTMENT

24/10/12
DATE

Annexure D: Application letter for permission to conduct research in schools



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Education

Enq: Mollo N.T.
Cell: 083 767 0330

P.O. Box 17454
Witbank
1035
Date: _____

The Principal

.....
.....
.....
.....

Dear Sir/ Madam

RE: REQUEST FOR PERMISSION TO CONDUCT RESEARCH IN YOUR SCHOOL

I am doctoral student at the University of Pretoria. The title of my research is *“Education managers’ understanding and implementation of due process during learner discipline”*.

I hereby humbly request your permission to conduct research in your school. The collection of data will take place in two phases. In phase 1, some of the learner disciplinary tribunal/ committee members will be interviewed. In phase 2, I will conduct document analysis where I will be looking at documents that the school use when implementing due process during learner discipline. Time and date for interviews and document analysis will be arranged telephonically to suit the participants.

The purpose of this study is to complete my PhD and also contribute to the literature in the field of education law which is still lacking in term of the due process. The process of collecting data will start as soon as my ethical application has been approved by the Ethics Committee of the University. The research process will not compromise tuition or contact time. Research findings will be made available to the school.

I hope that my request will receive your favourable consideration.

Yours faithfully

Mollo N.T. (Mr)
Student number: 04315103

Prof. H.J. Joubert
Supervisor

Annexure E: Participants' information letter and informed consent form



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Education

Enq: Mollo N.T.
Cell: 083 767 0330

P.O. Box 17454
Witbank
1035
Date: _____

Dear Participant

RE: REQUEST FOR YOUR CONSENT TO PARTICIPATE IN THE RESEARCH PROJECT

You are invited to participate in the research that is aimed at collecting information about how education managers understand and implement due process during learner discipline.

I am a registered doctoral student at the University of Pretoria and this study is done as part of my PhD degree.

Your participation in this research project remains voluntary. Should you declare yourself willing to participate in an individual interview, confidentiality and anonymity are guaranteed. You may decide to withdraw at any stage should you wish not to continue with an interview. You will be fully informed about the research process and purposes. You will not be placed at risk or harm of any kind. You will not be respondent to any acts of deception or betrayal in the research process or its published outcomes.

Title of research project

The following is the title of the research project: "*Education Managers' understanding and implementation of due process during learner discipline*".

Short description of the aims of the research

The purpose of this study is to investigate how education managers understand and implement due process during learner discipline.

What is expected of you as a participant in the study?

I will meet with you individually to explain what this study is about. During the meeting I will give you more information about the following:

- The title of the research project,
- The purpose of this study,
- What is expected of you in the study, and
- Your rights as participant in this study.

You will be given a chance to ask questions if you do not understand and need clarity. If you are willing to participate you will be requested to sign the consent letter. During the interview, you will be expected to answer the questions that are in the interview schedule. The interview will be tape-recorded.

Benefits

This study is important because it will benefit participants such as school management teams with knowledge on how due process should be implemented when disciplining learners. This study will also contribute to the body of knowledge in the field of education law and on how due process should be implemented. Recommendations will also empower you by providing knowledge on how to make use of due process during learner discipline. By being involved in this study, you are given a chance to contribute to learner discipline.

Declaration of your consent

If you are willing to participate in this study, please sign this letter as a declaration of your consent, i.e. that you participate in this project willingly and that you understand that you may withdraw from the research project at any time. Participation in this phase of the project does not obligate you to participate in follow-up individual interviews. However, should you decide to participate in follow-up interviews your participation is still voluntary and you may withdraw at any time. Under no circumstances will your identity be made known to any parties or organisations that may be involved in the research process and/ or which has some form of power over you.

Authorisation

I hereby declare that I understand the content of this consent letter and agree to participate in this study.

Name of participant:.....

Signature of participant:..... Date :.....

I hope that my request will receive your favourable consideration as I am looking forward to receiving feedback from you.

Yours faithfully

Nicholus Tumelo Mollo (Mr.)

UP-Student number: 04315103

Prof. H.J. Joubert

Supervisor

Annexure F: Semi-structures interview schedule for principals, deputy principals and heads of departments

Phase 1

Semi-structured interviews schedule

For all participants

1. Meaning of due process

(Understanding)

According to your knowledge, what does the concept “due process” mean to you?

2. Meaning of procedural and substantive due process

(Understanding)

There are two types of due process. They are procedural due process and substantial due process.

What does “procedural due process” mean to you?

What does “substantial due process” mean to you?

3. Steps in due process

(Understanding)

What are the steps that you must follow at you school when you discipline learners to ensure that the principle of due process is not compromised?

(Implementation)

How does your school implement the above mentioned steps when you discipline learners?

4. Legislation about due process

(Understanding)

Do you know of the legislations that emphasizes the need to follow due process when you discipline learners? If yes, mention them?

(Implementation)

In your school, how do you implement the legislations that promote due process during learner discipline?

5. Important document for due process

(Understanding)

Which are important documents that you need to prepare (write) to ensure that the disciplinary process meets the standard of due process?

(Implementation)

How do you use the documents that you have mentioned to ensure that the disciplinary process meets the standard of due process?

6. Types of offences

(Understanding)

In which types of learner offences must we use due process when we discipline learners?

(Implementation)

In which types of learner offences do you use due process in your school?

7. Important aspects to be considered during due process

(Understanding)

When you discipline learners following the due process, which are the important aspects that you think should be considered and remembered to ensure that the process is fair?

(Implementation)

How do you use the above mentioned aspects to ensure that the disciplinary process of learners is fair in your school?

8. Notices

(Understanding)

According to your knowledge, how should schools issue notices of disciplinary hearing?

(Implementation)

How does your school issue notices of disciplinary hearing?

9. Conducting a disciplinary hearing

(Understanding)

According to your knowledge, how should schools conduct learner disciplinary hearings?

(Implementation)

How does your conduct the learner disciplinary hearing?

10. Participant in the disciplinary hearings

(Understanding)

According to your knowledge, who should be involved in the disciplinary hearing?

(Implementation)

In your school, who is involved in the disciplinary hearing?

11. Impartial tribunal/ disciplinary committee

(Understanding)

According to your knowledge, who should be part of the impartial tribunal/ disciplinary committee?

(Implementation)

In your school, who is involved in the impartial tribunal/ disciplinary committee?

12. Right to information

(Understanding)

According to your knowledge, how should schools give learners a right to information during learner discipline?

(Implementation)

How do you ensure that learners in your school have the right to information during discipline?

13. Right to representation

(Understanding)

According to your knowledge, how should learners be represented during discipline?

(Implementation)

How do you ensure that learners in your school are represented during learner discipline?

14. Reason for decision

(Understanding)

According to your knowledge, how should we give learners reasons for a decision?

(Implementation)

In your school, how do you give learners reasons for the decision that has been taken by an impartial tribunal and the SGB?

15. Right to appeal

(Understanding)

According to your knowledge, how should schools give learners a right to appeal?

(Implementation)

In your school, how do you give learners a right to appeal?

16. Age

(Understanding)

According to your knowledge, do we need to considered age when we implement due process during learner discipline? Why?

(Implementation)

In your school do you considered age when you implement due process during learner discipline? Why?

Annexure G: Document analysis schedule

Phase 2

Document analysis

Name of school

(pseudonym): _____

1. Which documents does the school use when disciplining learners?

2. Do the above mentioned school documents contain the following concepts or concepts that are related to due process:

CONCEPTS	YES/ NO	OTHER RELATED CONCEPT (MENTION)	YES/ NO	NAME OF DOCUMENT
Due process		e.g. fair process, fair procedure, fair steps		
Procedural due process		e.g. fair procedure		
Substantial due process		e.g. facts, proof, evidence		
Fair				
Notices		e.g. letters to learners and parents		
Hearing		e.g. listen to both parties		
Impartial tribunal/ disciplinary committee				
Right to information,		e.g. give learners information, make learners aware		
Right to representation		e.g. lawyer, RCL, parent representation		
Reason for the decision		e.g. what led to the decision, informed decision		
Right to appeal				

3. Notices

Does the school have proof of notices that they used?

What is the content of the notice?

4. Hearing

Did the school conduct any hearing?

Does the school have minutes for a hearing?

What are the main contents of the minutes?

Does the school keep attendance register (for the hearing)? If yes, who are mentioned in the attendance register (e.g. parent, learner, witness, etc)?

5. Impartial tribunal (disciplinary committee)

Does your school disciplinary documents (such as minutes, etc) mention the names and positions of members who formed part of the tribunal for the specific disciplinary hearing?

Who (positions) is mentioned in the disciplinary documents (minutes, etc)?

Name of document	Member of a tribunal (position)

6. Right to information

How do documents prove that learners are given a right to information?

Name of document	Proof that learners are given the right to information

7. Right to representation

How do documents mention the right to representation of learners during the hearing?

Name of document	Mentioning of the right to representation

8. Reason for the decision

How do documents mention the reasons for decision?

Name of document	Mentioning of the reasons for decision

What is the relationship between the decision and the code of conduct (disciplinary measures)?

Reason for the decision	Relationship with the code of conduct

9. Right to appeal

How do documents mention the right to appeal of learners?

Name of document	Mentioning of the right to appeal

10. How do document mention the legislation that deals promote the use of due process?

Name of document	Legislation (Section and sub-section)	Content (summary)

Annexure H Case briefing schedule

1. Citation:

Descriptive information consisting of the names of the parties, the volume and page number of the book containing the opinion, the name of the court that wrote the opinion, and the date of decision.

2. Facts:

Information describing an occurrence or event. Briefly indicate:
the reasons for the lawsuit.

the identity and arguments of the plaintiff(s) and defendant(s), respectively;

the lower court's decision - if appropriate.

3. Issue:

Whether or in what manner a particular rules of law applies to the facts. What is the fight over the case?

4. Holding:

The court's answers to a legal issue that is the result of the court's application of one or more rule of law to the facts of the dispute.

5. Reasoning:

The court's explanation for reaching a particular holding for a particular issue on the opinion.

6. Elements of due process in this case:
