

# Educator rights and duties in special education – a comparative study between the United States and South Africa.

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## *Abstract*

The purpose of this paper is to consider the rights of educators in special education by comparing the laws and policies of South Africa and the United States. This discussion begins with background discussion of the special education systems, followed by over-views of the employment rights and duties of educators in both countries. It is recommended that specific legislation dealing with special education in South Africa should be drafted in order to address the needs of learners and educators adequately. In order to succeed in the provision of inclusive education and fair working conditions for educators in South Africa, translating policy into action needs serious attention. It remains essential that educators receive the training, resources and support to which they are entitled, and that the class sizes and workloads are kept within reasonable limits.

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## **Introduction**

In the Republic of South Africa (RSA), the conditions of service and rights of educators employed in public schools are not incorporated in individual contracts but are contained in a number of statutory and regulatory provisions, as well as collectively negotiated benefits. Similarly, the rights of public school educators in the United States (US), are governed by a complex array of state and federal laws. It goes without saying that the legal systems in the RSA and US share some significant similarities as well as differences, particularly with regard to the role of educators and learners in need of special education. While the situation in the RSA, on the one hand, tends to accentuate the best interests of the child as well as the rights of

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educators, the law in the US highlights the duties that staff have to children. Even though both of these approaches reach essentially the same outcome, this difference in starting points accounts for divergences in the approaches that this paper examines.

With regard to special education, the RSA's national Department of Education has published policy documents detailing operational and conceptual guidelines for the development of a single inclusive education system as envisaged by the Salamanca Statement.<sup>1</sup> The change towards an inclusive education system significantly alters the duties and responsibilities of educators.<sup>2</sup> Extensive research in this regard, both in the RSA and elsewhere, has indicated that educators experience the redefinition of their traditional roles as highly stressful and that this impacts negatively on the implementation of inclusive education.<sup>3</sup> Although research has focused on the rights of parents in the implementation of inclusive education,<sup>4</sup> thus far, no study has focussed on the implications of the implementation of inclusive education with regard to the rights and interests of educators.

On the other hand, the US has one of the most advanced systems of special education that addresses the challenges of accommodating individual learners' needs in the least restrictive environment at public expense, while at the same time protecting the rights and interest of educators.<sup>5</sup> As noted,

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<sup>1</sup> Department of Education (DoE) 1995. White Paper on Education and Training. Government Notice 196 of 1995. Cape Town; DoE 1999. Consultative Paper 1 on Special Education: Building an Inclusive Education and Training System. Pretoria: Government Printer; DoE 1999. Personnel Administration Measures in terms of the Employment of Educators Act. Pretoria: Government Printer; DoE 2001. Education White Paper 6: Special Needs Education. Building an inclusive education and training system. Pretoria: Government Printer; DoE 2001. Education change and transformation in South Africa: A review 1994 – 2001. Pretoria: Department of Education; DoE 2003. Conceptual and operational guidelines for the implementation of inclusive education: District-based support teams. Pretoria: Government Printer DoE 2003 Conceptual and operational guidelines for the implementation of inclusive education: Full service schools. Pretoria: Government Printer; DoE 2005. Education for all – 2005 country status report: South Africa. Pretoria: Department of Education.

<sup>2</sup> World Conference on Special Needs Education: Access and Quality. *The Salamanca Statement and Framework for Action on Special Needs Education*. Salamanca, Spain, 7–10 June 1994.

<sup>3</sup> P Engelbrecht, M Oswald, E Swart & I Eloff 'Including learners with intellectual disabilities: stressful for teachers?' (2003) 50(3) *International Journal of Disability, Development and Education* 293–308.

<sup>4</sup> P Engelbrecht, M Oswald, M Swart, EA Kitching & I Eloff 'Parents' experience of their rights in the implementation of inclusive education in South Africa' (2005) 26/4 *School Psychology International* 459–477.

<sup>5</sup> For the purpose of uniformity the South African term 'educator' is used instead of the American term 'teacher'.

since the Individuals with Disabilities Education Act (IDEA)<sup>6</sup> focuses primarily on the rights of learners, the move towards full inclusion in the US requires more time, expertise, and energy from educators.

The purpose of this article is to consider the rights and responsibilities of educators in special education by comparing the laws of the RSA with those of the US. In this paper the term 'special education' includes the notion of inclusive education as contemplated in the South African context, a term that is broader than in the US since it is intended to address all barriers to learning. Barriers to learning, in the South African context, refer not only to medically diagnosed physical and mental disabilities, but also those that commonly arise from a range of institutional and curriculum factors, including socio-economic deprivation; negative attitudes to and stereotyping of difference; an inflexible curriculum; inappropriate languages of learning and teaching; inaccessible and unsafe built environments; inappropriate and inadequate support services; inadequate policies and legislation; the non-recognition and non-involvement of parents; and inadequately and inappropriately trained leaders and teachers in education.<sup>7</sup>

This discussion begins with a background discussion of the special education systems in both countries, followed by a brief overview of the how it impacts on the employment status of educators, before examining a variety of issues governing the rights of educators with regard to special education in the RSA and the US respectively.

### **Background to inclusive education in South Africa**

The process of developing a system of inclusive education in South Africa entails far-reaching conceptual and pragmatic changes from the traditional child-deficit, medical model towards an ecological and multilevel systems paradigm, suggesting support for all learners within a systemic and developmental approach within mainstream schools.<sup>8</sup> This inclusive approach enables the adequate accommodation of learners<sup>9</sup> who experience

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<sup>6</sup> 20 USCA 1415(I)(3).

<sup>7</sup> P Engelbrecht, M Oswald & C Forlin 'Promoting the implementation of inclusive education in primary schools in South Africa' (2006) 33/3 *British Journal of Special Education* 121.

<sup>8</sup> P Engelbrecht 'The implementation of inclusive education in South Africa after ten years of democracy' (2006) XXI/3 *European Journal of Psychology of Education* 253–264.

<sup>9</sup> For the purpose of uniformity the South African term 'learner' is used in this paper instead of the American term 'student' to denote a school-going pupil.

a variety of barriers to learning, including mild to moderate disabilities, within mainstream education.<sup>10</sup>

The key policy instrument, White Paper 6, proposes a time frame of twenty years for the implementation of inclusive education in South Africa.<sup>11</sup> A system is envisaged in terms of which existing special schools will continue to provide special education to learners that require intense levels of support.<sup>12</sup> In addition, special schools will acquire new enhanced roles to function as resource centres within districts to provide particular expertise and support to neighbourhood schools. Full-service schools will be developed from general schools to provide for the full range of learning needs. These schools will focus on multi-level classroom instruction, cooperative learning, problem solving and the development of learners' strengths and competencies. Within mainstream education, general schools will be orientated to become inclusive by providing services to all learners experiencing mild to moderate barriers to learning.

It is concluded in the policy, that schools, educators and families must collaborate to ensure that schools provide the resources to include children with diverse educational needs. Although the policy takes a strong stand on the socially constructed culture of disability and other barriers to learning, it does not specify or fund a system through which such an agenda should be achieved.<sup>13</sup> It is therefore important to note that a considerable disparity exists between policy and practice as the implementation of inclusive education, on a notable scale, is not yet evident in South Africa.<sup>14</sup> Despite a more equitable allocation of resources across schools since 1994, lack of instructional capacity with specific reference to suitably trained educators and adequate support services, constrain the implementation of inclusive education.<sup>15</sup>

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<sup>10</sup> DoE 2001 *Education White Paper 6: Special Needs Education. Building an inclusive education and training system* at 24.

<sup>11</sup> *Id* at par 3.1.

<sup>12</sup> *Id* at par 3.11.1.

<sup>13</sup> E Kozleski *et al* 'Where differences matter: a cross-cultural analysis of family voice in special education' (2008) 42/1 *Journal of Special Education* 26–35.

<sup>14</sup> J Beckmann J & E de Waal 'Views of Gauteng special school principals and SGB chairpersons regarding inclusive policies and the best interests of learners with barriers to learning' paper read at the International Conference of the South African Education Law and Policy Association, Mpekwani, Eastern Cape, 5 September 2006.

<sup>15</sup> Engelbrecht n 8 above at 5.

**Background to special education in United States**

Whereas South Africa does not have a statute dealing specifically with special education, the United States has the IDEA that mandates free appropriate public education for all learners with disabilities between the ages of three and twenty-one based on the contents of their Individualised Education Programs.<sup>16</sup> After being enacted in 1975 as the Education for All Handicapped Children Act, the IDEA was re-authorised and revised in 1986, 1990, 1997 and 2004.<sup>17</sup> The IDEA and its regulations, require states, through local educational agencies or school boards, to identify, locate, evaluate, and serve all children with disabilities, including those in non-public schools, regardless of the severity of their needs. Insofar as the child-find provisions are included as a related service in the IDEA's regulations, many school systems screen pre-school children to assist in the early identification of learners with disabilities.

The IDEA requires school boards to maintain a continuum of alternative placements, which range from placement within general 'mainstream' or fully inclusive classrooms, to private residential facilities, to homebound or hospital instruction.<sup>18</sup> Further, all placements must be made in the least restrictive environment (LRE) and at public expense. Learners with disabilities can be removed from general educational environments only to the extent necessary for them to be provided with special education services.<sup>19</sup>

At the heart of the IDEA is the requirement that all children with disabilities receive a free appropriate public education in the LRE. IDEA's provision for an 'appropriate education' for the individual learner in the 'least restrictive environment' with a preference for mainstreaming, has created an inherent tension in the debate over the educational placement of learners with disabilities.<sup>20</sup> This tension implicates the choice between specialised services and some degree of separate treatment on the one side, and minimised labeling and minimised segregation on the other. In the United States the inclusion debate continues over the quality of the education provided to learners with disabilities, and controversy remains over whether the best

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<sup>16</sup> CJ Russo & AG Osborne *Essential concepts & school based cases in special education law* (2008) at 13.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Id* at 94.

<sup>19</sup> 20 USC§1412(a)(5).

<sup>20</sup> S Gordon 'Making sense of the inclusion debate under IDEA' 2006 *Brigham Young University Education and Law Journal* 194.

placement for a child with a disability is in a general classroom or in a separate educational setting.<sup>21</sup>

Yet, as neither the IDEA nor its regulations include a definition of appropriate, it was necessary to seek judicial help for such an understanding. In *Board of Education of the Hendrick Hudson Central School District v Rowley (Rowley)*, its first case involving special education and the IDEA, the United States Supreme Court ruled that learners with disabilities are entitled to personalised instruction with support services appropriate to permit them to benefit from the instruction that they receive.<sup>22</sup> At issue before the court was the parents' insistence on a sign-language interpreter for their child, and the question of the level of services that school officials were required to provide in an Individualised Education Program (IEP), as well as the learner's educational placement in order to be appropriate under the IDEA.<sup>23</sup> The court interpreted 'appropriate' as providing a floor of opportunities rather than as a vehicle to maximise a child's potential.<sup>24</sup> The court ruled that an appropriate education was one that met the IDEA's procedures and was 'sufficient to confer some educational benefit' on the child. Insofar as the court was convinced that the child in question received 'some educational benefit' without the sign-language interpreter, it concluded that she was not entitled to one, even though she might have achieved at a higher level had officials provided her with such assistance. *Rowley's* interpretation of the IDEA as having set a minimum federal level of appropriateness, does not prevent states from setting higher standards.

The 'least restrictive environment' requirement is often confused with mainstreaming and/or inclusion.<sup>25</sup> But the LRE is the mechanism through which the child's individual needs are matched with a specific educational placement. Inclusion and mainstreaming, though often used interchangeably, are two different concepts. Mainstreaming refers to integrating learners with disabilities into the general education classroom for part of the day, typically during non-academic periods, to ensure social interaction. Full inclusion refers to educating learners with disabilities, regardless of the severity, in a regular education classroom with peers their own age. While inclusion is a

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<sup>21</sup> *Id* at 189.

<sup>22</sup> 484 US 305 (1988).

<sup>23</sup> Russo & Osborne n 16 above at 96.

<sup>24</sup> *Ibid.*

<sup>25</sup> Gordon n 20 above at 199.

means by which the LRE requirement can be met, the law does not require it. Nor is inclusion automatically the LRE for every learner.<sup>26</sup>

Even so, the First Circuit decided that a learner with severe disabilities need not demonstrate an ability to benefit from a special education program in order to be eligible for services.<sup>27</sup> In upholding the IDEA's zero reject principle and goal of full inclusion, the court declared that education encompasses a wide spectrum of training, including instruction in even the most basic life skills. Pursuant to *Timothy W*, school boards cannot refuse to provide services to learners if they deem children too disabled to derive benefit from those services, yet not all learners with disabilities must be placed in regular classes.<sup>28</sup> Courts in the United States have approved more restrictive placements where learners could not function in regular classes, even with supplementary aids and services, or inclusion did not work.<sup>29</sup>

### **Employment rights of South Africa educators**

The Bill of Rights in the Constitution of the Republic of South Africa, provides for fundamental labour rights in section 23 and determines that everyone has the right to fair labour practices. In addition, all workers have the right to form and join a trade union,<sup>30</sup> to participate in trade union activities,<sup>31</sup> and to strike.<sup>32</sup> Whether the educator's fundamental right to strike can be limited in accordance with the general limitation provisions of section 36 of the Bill of Rights,<sup>33</sup> will depend on the particular circumstances of each case. In essence, section 36 requires a proportionality assessment to determine whether the 'benefit to others' can be seen to outweigh the 'cost to the right-holder'.<sup>34</sup> It is foreseeable that learners' fundamental rights to

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Timothy W v Rochester, NH School District* 875 F 2d 954(1<sup>st</sup> cir 1989).

<sup>28</sup> Russo & Osborne n 16 above at 35.

<sup>29</sup> *Id* at 97.

<sup>30</sup> § 23(2)(a).

<sup>31</sup> § 23(2)(b).

<sup>32</sup> § 23(2)(c).

<sup>33</sup> For a detailed discussion on the limitation clause (s 36) see J De Waal, Currie & G Erasmus *The Bill of Rights handbook* (4ed 2000) at 144–165. Also, in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 3 SA 389 (W) Epstein J stated that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can operate only on the basis of rights being exercised harmoniously with the rights of others. The rights exercised by an individual may come into conflict with the rights exercised by another and, where rights come into conflict, a balancing process is required.

<sup>34</sup> De Waal n 33 above at 145.

receive basic education will outweigh the rights of educators to strike in most circumstances.

The Employment of Educators Act<sup>35</sup> is the primary statutory instrument which provides the framework for the conditions of service such as appointment procedures; the termination of service provisions; and disciplinary measures. The Labour Relations Act<sup>36</sup> codifies the labour rights of all workers (including educators) and includes collective rights such as the right to organise as unions, to negotiate employment conditions by collective bargaining, to resolve disputes, and the right to strike. South African educators have the right to strike as it is a fundamental right.

The specific day-to-day duties of South African public school educators are regulated by the Personnel Administration Measures which stipulate the core duties for each post level and other general matters.<sup>37</sup> The workload of school-based educators includes core duties during and outside the formal school day such as scheduled teaching time, relief teaching, extra and cocurricular duties, pastoral duties, administration, supervisory functions, professional duties (meetings, workshops), and planning, preparation and evaluation duties. Each post level within a school has different duties and responsibilities encompassing the core duties but varying in degree. Furthermore, the collective negotiations between the Minister of Education and the Education Labour Relations Council (ELRC) adjust specific terms and benefits such as remuneration, allowances, compensation, workload, working time, and other terms of service on an annual basis.

Educators employed by school governing bodies or independent schools are not remunerated from public funds and are therefore entitled to negotiate their employment rights by means of individual contracts. The contracts should provide for the minimum fair conditions of working time, leave, remuneration, and ancillary matters in accordance with the Basic Conditions of Employment Act.<sup>38</sup>

### **Employment rights of educators in the United States**

The primary source of law regulating the employment rights of educators in public schools is established at state level. Even so, federal law, especially

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<sup>35</sup> Act 76 of 1998.

<sup>36</sup> Act 66 of 1995.

<sup>37</sup> Personnel Administration Measures in terms of the Employment of Educators Act, 1998. GN 222 in GG 19767 of 18 February.

<sup>38</sup> Act 75 of 1997.



in the area of anti-discrimination, has a major impact on the employment rights of educators in public schools. However, non-public schools, which do not receive public funds, are governed largely by the law of contracts and accordingly the federal or state governments have little to say about their employment rights.

Collective bargaining in public education, allows school boards and educators to negotiate terms and conditions of employment. Even so, the extent to which boards may engage in bargaining varies from one jurisdiction to the next. States have the power to permit educators to engage in, or to refrain from, actions designed to bring about changes in employment conditions. Topics for bargaining are classified under three broad heads.<sup>39</sup> Mandatory topics include salaries and other terms and conditions of employment such as fringe benefits, sick days, and medical benefits. On the other hand, boards and unions are prohibited from bargaining on managerial prerogatives such as granting tenure,<sup>40</sup> creating school calendars,<sup>41</sup> and appointing principals or department heads.<sup>42</sup> The third category, permissive topics, is most readily subject to judicial interpretation and includes such issues as drug testing,<sup>43</sup> the timing and effective dates of lay-offs,<sup>44</sup> lump-sum payments for unused sick days,<sup>45</sup> and educator requirements to take assessment tests before having their licences renewed.<sup>46</sup> The ordinary means of redressing disputes relating to the administration of collective bargaining contracts is through grievances that, depending on state laws and local contracts, may pass through several stages before being subject to arbitration, mediation or conciliation. Some states allow educators to strike, yet, generally in the United States courts and legislatures ordinarily disapprove strikes by educators. Along with actual work stoppages, courts have also forbidden educators from engaging in such activities as mass resignations<sup>47</sup>

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<sup>39</sup> *Colonial School Board v Colonial Affiliate* NCCEA/DSEA/NEA, 449 A 2d 243 (Del Super Ct 1982).

<sup>40</sup> *Mindemann v Independent Sch Dist No 6 of Caddo County* 771 P 2d 996 (Okla1989).

<sup>41</sup> *Public Employee Relations Bd v Washington Teachers' Union Local 6* 556 A 2d 206 (DC1989).

<sup>42</sup> *Maine Sch Admin Dist No 61 Bd of Dirs v Lake Region Teachers Ass'n* 567 A 2d 77 (Me 1989).

<sup>43</sup> *Drivers, Chauffeurs and Helpers Local Union No 639 v District of Columbia* 631 A 2d 1205 (DC1993).

<sup>44</sup> *West Bend Educ Ass'n v Wisconsin Employment Relations Comm'n* 357 NW 2d 534 (Wis 1984).

<sup>45</sup> *Perrenod v Liberty Bd of Educ for Liberty Cent Sch Dist* 636 NYS 2d 210 (NY App Div 1996).

<sup>46</sup> *Massachusetts Fed'n of Teachers v Board of Educ* 767 NE 2d 549 (Mass 2002).

<sup>47</sup> *Board of Education of the City of NY v Shanker* 286 NYS 2d 453 (NY App Div 1967).

and absences to protest labour issues, treating these as the equivalents of strikes.<sup>48</sup>

From the above it is clear that educator rights in the United States with regard to terms and conditions of employment, are similarly structured to their counterparts in South Africa, the right to strike is the most significant difference between these countries.

In an emerging issue, the No Child Left Behind Act (NCLB) requires school boards to hire teachers who are ‘highly qualified’.<sup>49</sup> Matters are complicated by virtue of the fact that under the NCLB, the standards vary depending on whether a teacher is in regular or special education,<sup>50</sup> the level at which individuals teach, and whether educators are experienced or new. While litigation on whether teachers are ‘highly qualified’ has yet to emerge, the next section examines the NCLB’s requirements in some detail.

#### *The NCLB and ‘highly qualified teachers’*

In requiring school boards to hire teachers who meet its ‘highly qualified teacher’ (HQT) mandate, the NCLB directs local officials to create programs to improve the quality of teaching while instituting instructional leadership development programs for principals and superintendents<sup>51</sup> along with offering high quality professional development programs for all staff.<sup>52</sup> The NCLB also requires boards to improve teacher quality by supporting professional development programs that focus on practices grounded in scientifically based research to prepare and recruit HQTs.<sup>53</sup> The NCLB grants state and local school officials the flexibility to select the strategies that best meet their needs to improve teaching and learning. In return, local officials must demonstrate that their districts and/or schools have achieved annual progress by ensuring that all teachers in core academic subjects are HQTs.<sup>54</sup>

Under the NCLB, all students must be taught by HQTs in core academic subjects.<sup>55</sup> According to the NCLB’s regulations, ‘[t]he term “core academic subjects” means English, reading or language arts, mathematics, science,

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<sup>48</sup> *Pruzan v Board of Educ of City of NY* 217 NYS 2d 86 (NY 961).

<sup>49</sup> 20 USCA 7801(23) (dealing with teachers in regular education).

<sup>50</sup> 20 USCA 1401(10) (dealing with teachers in special education).

<sup>51</sup> 20 USCA 6301(1).

<sup>52</sup> 20 USCA § 6301(10).

<sup>53</sup> See *eg.*, 20 USCA 6316(b)(3)(A).

<sup>54</sup> 20 USCA § 6301(1).

<sup>55</sup> 20 USCA § 6319(a)(2).

foreign languages, civics and government, economics, arts, history, and geography.<sup>56</sup>

The NCLB divides teachers who must become HQTs into two groups, those new to the profession, and those who have been teaching. New ‘highly qualified’ elementary teachers must meet two requirements. First, these teachers must have at least a bachelors degree. Second, these teachers must demonstrate, by passing rigorous state, rather than federal, tests, that they have subject knowledge and teaching skills in reading, writing, mathematics, and other areas of basic elementary school curricula.<sup>57</sup> New middle and secondary HQTs must have at least bachelors degrees and have demonstrated high levels of competency in each of the academic subjects in which they teach either by passing rigorous state tests in each of these subjects, or by successfully completing academic majors, graduate degrees, course work equivalent to undergraduate academic majors, or advanced certifications in credentialing in these areas.<sup>58</sup>

On the other hand, the NCLB requires experienced teachers to have at least a bachelors degree, meet the requirements for those new to the profession, and have passed rigorous state tests or demonstrate competence in all of the academic subjects that they teach. These competencies must be based on high, objective uniform standards that are set by states for grade appropriate academic subject matter knowledge and teaching skills; aligned with challenging state academic content and student academic achievement standards that have been developed in consultation with core content specialists, teachers, principals, and school administrators; created to offer objective, coherent information about individuals’ attainment of content knowledge in the subjects in which they teach; applied uniformly to all teachers in the same academic subjects and grade levels throughout states; take into consideration, but not be based primarily on, the time the teachers have been teaching in their academic subjects; are available to the public on request; and may involve multiple, objective measures of teacher competency.<sup>59</sup>

As applied to special education teachers, the HQT provisions require school officials to ‘take measurable steps to recruit, hire, train, and retain highly qualified school personnel to provide special education and related

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<sup>56</sup> 34 CFR § 200.55(b), 20 USCA § 6319(a)(2).

<sup>57</sup> 20 USCA § 7801(23)(B)(i).

<sup>58</sup> 20 USCA § 7801(23)(B)(ii).

<sup>59</sup> 20 USCA § 7801(23)(C).

services<sup>60</sup> for students with disabilities; similar rules apply to personnel who provide related services as well as to paraprofessionals.<sup>61</sup> In order to be classified as HQT, subject area teachers must not only be certified fully in special education or pass state-designed special education licensure examinations, but must also possess bachelors degrees and demonstrate knowledge of each of the subjects for which they are the primary instructors.<sup>62</sup>

Pursuant to the provisions relating to special education, which apply the same deadlines as for regular teachers under the NCLB,<sup>63</sup> currently employed special education teachers must meet these standards even if they teach multiple subjects.<sup>64</sup> New special education teachers have until up to two years after they are hired to become ‘highly qualified’ in different subjects, so long as they are fully certificated in at least one.<sup>65</sup> The Individuals with Disabilities Education Act<sup>66</sup> adds that teachers who satisfy its requirements as being HQTs, also qualify for this title under the NCLB.<sup>67</sup> Even so, the IDEA does not create a private right of action for parents to ensure that children are taught by HQTs.<sup>68</sup>

### **Class size in South Africa and the United States**

In South Africa, the expectation is that every public school educator must be able to account for 1 800 actual working hours per annum, and that educators should be at school during the formal school day, which should not be less than seven hours per day.<sup>69</sup> Before White Paper 6, the medical model for special education accorded weights<sup>70</sup> as a factor for learners with disabilities. The weights accorded per learner determined the class size, the learner:educator ratio, and the workload for educators in the previous special education system.

<sup>60</sup> 20 USCA § 1412(a)(14)(C)(D).

<sup>61</sup> *Id* at (B).

<sup>62</sup> 20 USCA § 1402(10)(B).

<sup>63</sup> 20 USCA § 1412(a)(14)(C).

<sup>64</sup> 20 USCA § 1402(10)(D)(ii).

<sup>65</sup> *Id* at (iii).

<sup>66</sup> 20 USCA §§ 1400 *et seq.*

<sup>67</sup> 20 USCA § 1401(10)(F).

<sup>68</sup> 20 USCA § 1412(a)(14)(E).

<sup>69</sup> Personnel Administration Measures §3.1–3.2.

<sup>70</sup> Prior to *White Paper 6*, the special education policies applied the model of medical diagnosis and accorded the following weights to learners in need of special education: Mild to moderate disability [weight factor :2]; specifically learning disabled [weight factor :3]; severely mentally handicapped [weight factor :3]; cerebral palsied [weight factor:3.5]; physically disabled [4]; hard of hearing [5]; blind [5]; deaf [5]; autistic [6].

Currently, the class size for mainstream public schools in South Africa is determined by the norm of 'reasonable practicability' learner: educator ratios and is set at 40:1 for primary schools, and 35:1 for secondary schools.<sup>71</sup> In the United States the average class size in public schools is twenty-five learners and thirty-two states have class size reduction programs or limit class size to twenty learners by law.<sup>72</sup>

However, according to White Paper 6, the class size and the educator: learner ratio for full service and special education schools, should be determined by the availability of specialised support rather than the category of disability.<sup>73</sup> This means that programmes will be structured around the training and qualifications of available staff (including psycho-social and health professionals), the curriculum, the physical infra-structure, and supportive technology.<sup>74</sup>

The demographic trends indicate that the South African educator population is ageing and that the cumulative attrition rate (ie the rate at which educators leave the workforce due to retirement, death, resignation, etc) has risen over the past five years.<sup>75</sup> As a result of the low rate of supply of new educators and the high attrition rate, it is estimated that by 2010 South Africa will experience a shortage of 60 000 educators. This implies that as a result of the shortage of educators and historical or contextual factors, the average class size in South Africa will probably exceed the proposed ideal. In addition, there is a lack of effective preparation of educators to accommodate unique individual needs in their mainstream classrooms.<sup>76</sup>

The shortage of educators, large class sizes, and additional in- and pre-service training that educators require to deal with learners who are experiencing barriers to learning, are all factors that will need to be addressed in order to attain the ideal of an inclusive education system. The

<sup>71</sup> *Norms and Standards for language policy in Public Schools* 1997. GN R1701 GG 18546 at par D 3.

<sup>72</sup> BJ Biddle & DC Berliner 'What research says about small classes and their effects' 2002 *Policy Perspectives* 1–23 (accessed online at [www.policyperspectives/west\\_end\\_publ/](http://www.policyperspectives/west_end_publ/) on 2008/06/13).

<sup>73</sup> Department of Education *Guidelines to ensure quality education and support in special schools and special school resource centres* 9.

<sup>74</sup> *Ibid.*

<sup>75</sup> L Crouch & H Perry 'Educators' in: A Kraak & H Perold (eds) *Human resources development review 2003: education, employment and skills in South Africa* (2003).

<sup>76</sup> E Swart & R Pettipher 'Barriers teachers experience in the implementation of inclusive education' (2000) 15/2 *International Journal of Special Education* 175–189. See also Engelbrecht *et al* n 3 above.

question arises whether the changes toward an inclusive education system in South African amount to changes of the terms and conditions of employment of educators. This question will be addressed hereunder.

### **Rights of United States educators in inclusive education**

While this paper speaks of the rights of educators, it is important to bear in mind that educators must be aware of these provisions in safeguarding the rights of learners.

#### *Provision of supportive services and resources in special education*

In the United States, the IDEA requires states, through local school boards, to provide related, or supportive services to learners with disabilities to the extent that these children need these services to benefit from their special education programs.<sup>77</sup> The IDEA specifically lists developmental, supportive, and corrective services such as transportation, speech-language pathology, audiology, interpreting services, psychological services, physical therapy, occupational therapy, recreation, social work services, school nurse services, counseling services (including rehabilitation counseling), orientation and mobility services, assistive technology devices, and medical services (for diagnostic or evaluative purposes only).<sup>78</sup>

The obligation to provide these supportive services confers rights to learners to receive related services, and, at the same time, also assists educators in the performance of their duties. The IDEA unambiguously dictates that states must ensure free appropriate public education.<sup>79</sup> To provide appropriate education, educators must develop Individualised Education Programs (IEPs) in consultation with the parents of learners who require special education and related services. Obviously, educators are entitled to require sufficient funding and resources from the school in order to be able to provide the teaching services in terms of the IEPs. Similarly, educators are entitled to require assistance and provision of related services in order to perform their duties adequately and, in turn, find alleviation of their workload.

#### *Educators' duty to discipline learners under the IDEA*

In an area that continues to generate controversy, the IDEA has special rules for dealing with learners with disabilities. As important, and challenging, as the topic of disciplining learners with disabilities is, the IDEA did not

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<sup>77</sup> See n16 above at 133.

<sup>78</sup> *Id* at 134.

<sup>79</sup> 20USC § 1412 (a)(1)(A).

address it until 1997. The IDEA now permits school officials to discipline learners so long as they follow procedures that do not deprive children of their rights.

*Honig v Doe (Honig)*<sup>80</sup> is the Supreme Court's first and only case involving discipline and special education. In a dispute over whether school officials in California could exclude two learners with disabilities from school, the court addressed three issues. First, the court affirmed that the case was moot with regard to one of the two learners because he was already over the age of twenty-one. Second, in refusing to read a dangerousness exception into the statute, the court affirmed that the IDEA's stay-put provisions prohibit educators from unilaterally excluding learners with disabilities from school for dangerous or disruptive actions that are manifestations of their disabilities while review proceedings take place. The court added that officials could impose normal, non-placement-changing procedures, including temporary suspensions for up to ten school days, for learners who posed immediate threats to school safety. The court recognised that if educators and parents agreed, learners could have been given interim placements as proceedings went forward. If this approach failed, the court acknowledged that officials could have filed suit for injunctive relief to remove the children. Third, an equally divided court affirmed that state-level officials can be compelled to provide services directly to learners with disabilities when local boards fail to do so.

*Honig's* inability to resolve all of the legal issues involving disciplining learners with disabilities led to more litigation and eventually to legislative action. Congress tried to clarify unanswered questions by creating procedures as part of the IDEA's 1997 amendments.<sup>81</sup> In a major change, the IDEA allows educators to suspend special education learners for not more than ten school days provided that similar sanctions apply to children who are not disabled.

The IDEA's regulations state that a series of removals that result in a pattern of exclusions that cumulatively have children with disabilities out of school for more than ten school days, may be considered changes in placements.<sup>82</sup> The regulations indicate that if learners are suspended for misbehavior that is substantially similar to past misbehavior that was found to be a manifestation of their disabilities, then this constitutes changes in

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<sup>80</sup> 484 US 305 (1988).

<sup>81</sup> 20 USCA § § 1415(i)(j)(k)(l).

<sup>82</sup> 20 USCA § 1415(k)(1)(B).

placements.<sup>83</sup> In making such judgments, the regulations direct school officials to consider the length of each removal, the total amount of time that children have been removed from school, and the proximity of the removals to one another in evaluating whether changes in placements have occurred.<sup>84</sup>

Educators can remove learners with disabilities from school for separate, but dissimilar, acts of misconduct for more than ten cumulative days in a school year.<sup>85</sup> After learners with disabilities have been removed from school for ten days in a single school year, school officials must provide them with educational services during any later removal.<sup>86</sup>

Officials have increased authority when dealing with learners with disabilities who are found with weapons or drugs at school.<sup>87</sup> Under an expanded definition of a dangerous weapon, the IDEA incorporates language from another federal statute such that it now includes instruments, devices, materials, and substances that are capable of inflicting harm in addition to firearms, but does not include small pocket knives.<sup>88</sup> In addition, the IDEA defines illegal drugs as controlled substances but excludes those that may be legally prescribed by physicians.<sup>89</sup>

Educators may unilaterally transfer children to interim alternative placements for up to forty-five days for carrying or possessing weapons,<sup>90</sup> or for intentional possession, use, sale, or solicitation of drugs on school property or at school functions provided that this sanction applies under similar circumstances to learners who are not disabled.<sup>91</sup> In an important addition to the 2004 version of the IDEA, learners who have inflicted serious bodily injury on other persons while at school, on school premises, or at a school function can be placed in alternative educational settings. In defining serious bodily harm, the IDEA relies on another federal law which defines a ‘serious bodily injury’ as one that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.<sup>92</sup>

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<sup>83</sup> 34 CFR § 300.536(a)(2).

<sup>84</sup> 34 CFR § 300.536(a)(2)(iii).

<sup>85</sup> 34 CFR § 300.530(b)(1).

<sup>86</sup> 34 CFR § 300.536(b)(2).

<sup>87</sup> 20 USCA §§ 1415(k)(7)(A)–(B).

<sup>88</sup> 18 USC § 930(g)(2).

<sup>89</sup> 20 USCA § 1415(k)(7)(B).

<sup>90</sup> 20 USCA § 1415(k)(1)(G)(i).

<sup>91</sup> 20 USCA § 1415(k)(1)(G)(ii).

<sup>92</sup> 18 USC § 1365(h)(3).



Under the IDEA's interim alternative placement requirements, school officials must permit learners to continue to progress in the general education curriculum where they still receive necessary services that are outlined in their IEPs.<sup>93</sup> Educators must also provide learners with services and modifications that are designed to prevent the misbehavior from recurring.<sup>94</sup>

In a final matter, the IDEA's discipline provisions do not prohibit school officials from reporting learner crimes to the proper authorities, or impeding law enforcement and judicial authorities from carrying out their responsibilities.<sup>95</sup> If officials do report crimes, they must make copies of learners' special education and disciplinary records available to appropriate authorities.<sup>96</sup>

### **Rights of South African educators in inclusive education**

Classroom educators will be the primary resource and bear the responsibility for achieving inclusive education.<sup>97</sup> However, a fundamental concept of law is the right-duty construct, which entails that for every responsibility or obligation, a reciprocal and equal right exists.<sup>98</sup> Therefore, the converse side of educators' responsibilities, is their right to be trained and to receive collaborative support and sufficient resources to enable them to perform at the required standard of teaching.

#### *The right to receive adequate training*

In mainstream and full-service schools educators will have the right to be trained to be able to focus on multi-level classroom instruction by being responsive to individual learner needs and dealing with learners who are experiencing barriers to learning.<sup>99</sup> In special schools and resource centres, educators will have the right to be trained to fulfil their new roles of providing support to neighbouring schools.

#### *The right to receive adequate resources*

Educators in special and ordinary schools will have the right to receive training from district support teams to develop flexible curricula that remove barriers to learning. This entails that district teams should provide resources

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<sup>93</sup> 20 USCA § 1415(k)(1)(D)(i).

<sup>94</sup> 20 USCA § 1415(k)(1)(D)(ii).

<sup>95</sup> 20 USCA § 1415(k)(6)(A).

<sup>96</sup> 20 USCA § 1415(k)(6)(B).

<sup>97</sup> White Paper 6 at 18.

<sup>98</sup> WJ Hosten, AB Edwards, F Bosman & J Church *Introduction to South African law and legal theory* 1997 at 18.

<sup>99</sup> *White Paper 6* at 19.

and support with regard to curriculum content by supplying illustrative learning programmes, learning materials in the appropriate language medium of instruction, learning equipment and assessment instruments.

*The right to receive adequate support services*

Strategies for developing an inclusive system of support include the development of school-based support teams, the establishment of district support teams, the availability of a supplement of educational psychologists and school counselors, and the availability of special schools as resource centres.<sup>100</sup> In this regard, educators in mainstream and full service schools will be entitled to the collaborative support of these support services.

*The right to discipline learners*

In instances of serious misconduct, the South African Schools Act<sup>101</sup> provides in section 9 (1)(a) that the governing body of a public school may, after a fair hearing, suspend an ill-disciplined learner as a corrective measure for a maximum of one week (five school days). As an alternative, section 9(1)(b) determines that a governing body may suspend a learner with the recommendation of expulsion from the school, pending the decision of the head of the provincial department of education. In other words, section 9(1)(a) and section 9(1)(b) are mutually exclusive and refer to alternative situations.

Suspension in terms of section 9(1)(a) envisions corrective action where the learner can rectify the offence. Conversely, section 9(1)(b) of the South African Schools Act contains no reference to a corrective purpose and the suspension in terms of section 9(1)(b) applies to instances where correction or improvement will serve no further purpose.<sup>102</sup> Suspension should only be considered after all reasonable efforts have been made to correct the learner's behaviour. In circumstances where the safety or well-being of other learners and school staff is placed in jeopardy by ill-disciplined behaviour, expulsion is probably the appropriate action. Although no cases have been reported on matters involving ill-disciplined learners requiring special education, the courts have confirmed that schools are entitled to discipline learners by

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<sup>100</sup> Engelbrecht n 11 at 255.

<sup>101</sup> Act 84 of 1996.

<sup>102</sup> Maritzburg College v Dlamini NO & others [2005] JOL 15075 (N).

withholding privileges<sup>103</sup> and by removing ill-disciplined learners from leadership positions.<sup>104</sup>

Section 9(1D) of the South African Schools Act provides that a Head of Department must consider the recommendation by the governing body, and must decide whether or not to expel a learner within fourteen days of receiving such recommendation. The Schools Act contains no provision for what should happen when a Head of Department fails to reach a decision within fourteen days. As a result of this *lacuna* in the legislation, instances occur where officials reason that the suspension of a learner will or should lapse, if no decision is made within fourteen days as prescribed by section 9(1)(b). However, we submit that such reasoning is erroneous, as the failure by the Head of Department to discharge his duties should not nullify the governing body's decision to recommend expulsion. In such a case, we argue that the interim suspension in terms of section 9(1)(b) remains effective until the Head of Department reaches a decision on the matter.

The learner is entitled to lawful and fair internal administrative hearings, as well as equitable procedures.<sup>105</sup> If a learner who is subject to compulsory attendance (between the ages of 7 and 15 years) is expelled from a public school, the Head of Department must make alternative arrangement for the learner's placement at another public school.<sup>106</sup>

In comparison, the right of South African educators to discipline learners with disabilities is similar, but more restricted than, its American counterparts. A School Governing Body may suspend an ill-disciplined learner for five days in South Africa, whereas seriously ill-disciplined learners may be suspended for ten days in the United States.

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<sup>103</sup> *Western Cape Residents' Association obo Williams and another v Parow High School* 2006(3) SA 542(C). After a series of ill-disciplined conduct, the learner was refused permission to attend the matric farewell party.

<sup>104</sup> *Van Biljon v Crawford, Grey Boy's High School, MEC for Education, Eastern Cape Provincial Government, Minister of Education South Eastern Cape* (unreported case no 475/2007).

<sup>105</sup> *Phillips v Manser* 1999 1 All SA 198 (SE). The disciplinary committee found a seventeen-year-old learner guilty of a number of offences including serious assault of a fellow learner with a spanner, removing chloroform and inhaling it without permission, vandalising school property with graffiti, insulting educators, lying, forging a letter of absence and fighting. The fairness of the disciplinary hearing was challenged, but the court upheld the school governing body's recommendation to expel the learner.

<sup>106</sup> South African Schools Act § 9(5).

*The right not to be subjected to unilateral variation of conditions of service*  
Under South African common law, an employer is not permitted unilaterally to amend the terms of a service contract with an employee.<sup>107</sup> Unilateral change by an employer is unlawful and amounts to an unfair labour practice if it amounts to a change of the terms and conditions of employment.<sup>108</sup> It is trite that remuneration or components thereof do not form part of the 'benefits' or terms and conditions of employment as contemplated in section 186(2)(a) of the Labour Relations Act.<sup>109</sup> The unilateral variation of educators' remuneration, is accordingly not covered by the statutory definition of 'unfair labour practice'.

Although an employer, such as a department of education, has no right to require the educators to do work of a kind qualitatively or quantitatively different from that for which they were employed, the courts will in certain circumstances sanction unilateral change to service contracts by employers if there are sound commercial or operational reasons for so doing, and if the employer has negotiated the matter in good faith with the employees concerned.<sup>110</sup>

There is no clear legal rule that determines conclusively when a change in work arrangements amounts to a change in employees' terms and conditions of service.<sup>111</sup> The labour courts have not provided any specific guidelines for establishing when the introduction of new work methods or other changes amount to a variation of an employee's contractual obligations. A general test was formulated in the matter of *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA*.<sup>112</sup> In *Precision Tools* the Labour Appeal Court held that:

A description of the work should not be construed inflexibly, provided that the fundamental nature of the work to be performed is not altered. Employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner.

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<sup>107</sup> J Grogan *Workplace law* (8ed 2005) 272.

<sup>108</sup> *Ibid.*

<sup>109</sup> *HOSPERSA & Another v Northern Cape Administration* (2000) 21 ILJ 1066 (LAC); *Gauteng Provinsiale Administrasie v Scheepers & Others* (2000) 21 ILJ 1305 (LAC).

<sup>110</sup> Grogan n 107 above at 273.

<sup>111</sup> *Mineworkers Union – Solidarity/Eskom* (2002) 3 BALR 227 (P).

<sup>112</sup> *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others* (1995) 4 BLLR 11 (LAC).

It is only where the changes are ‘so dramatic as to amount to a requirement that the employees undertake to do an entirely different job’ that an employee may refuse an instruction to abide by the new working rules.<sup>113</sup> An employer, such as a department of education or a school, cannot expect educators to perform work falling outside their core duties, or entailing expertise or energy beyond that reasonably required to do work within it. The levels of competence and workload required of educators are determinable in terms of the provisions of the Personnel Administration Measures. Consequently, the amount of work educators can reasonably be expected to do in their working hours, can also be identified in an inclusive education system.

Accordingly, it is submitted that if South African educators receive the training, resources and support that they are entitled to, and if the class sizes and workloads are kept within reasonable limits, these educators will not succeed in claiming unilateral variation of the terms and conditions of employment as a result of implementation of the inclusive education system. Therefore, provided that the core content of teaching and the workload reasonably expected of educators remains fundamentally the same in the inclusive education system, South African educators will be required to accept and adapt to such changes.

### **Conclusion**

Comparing the extent and nature of educator rights in special education in South Africa and the United States, it becomes apparent that well developed legislation, such as the successive versions of the IDEA, are essential for the adequate administration of inclusive education. The policy statements by the South African national department of education are clearly inadequate to deal with the complexities of special education. Therefore, it is recommended that specific legislation dealing with special education in South Africa should be drafted to address the needs of learners and educators adequately.

Furthermore, it is clear that in order to succeed in the provision of inclusive education and fair working conditions for educators in South Africa, translating policy into action needs serious attention. It remains essential that educators receive the training, resources and support to which they are entitled, and that the class sizes and workloads are kept within reasonable limits. An agenda on how to implement inclusive education should therefore include the provision of adequate funding.

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<sup>113</sup> Grogan n 107 above at 274.