The 'best interests of a child' standard in education: An overview of South African case law

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1 Introduction

South African courts are obliged, in terms of international and national law, to apply the 'best interests' standard in all cases where a child's or children's rights and interests will be affected by their decisions.[1] International law in this regard includes article 3(1) of the Convention on the Rights of the Child (CRC) and article 4(1) of the African Charter on the Rights and Welfare of the Child (ACRWC).[2] National law in this regard includes section 28(2) of the Constitution of the Republic of South Africa of 1996 (Constitution) and section 7 of the Children's Act 38 of 2005 (Children's Act).[3] This obligation to apply the 'best interests of a child' standard also applies to cases dealing with education.[4] Except

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[1]In this article a 'best interests of the child standard' will be used as an umbrella concept to cover the best interests of a child as a right, an interpretive legal principle and a rule of procedure. See para 6 of CRC Committee on the Rights of the Child 'Comment number 14: Comment on the right of the child to have his or her best interest taken as a primary consideration' CRC/C/GC/14/2013. 'Child' will refer to a person under the age of 18 years. When reference is made to learners, it will refer to learners who will be protected by the 'child's best interests' standard, eg children under the age of 18 years.

[2]UN Doc A/44/49(1989) (hereinafter CRC). Ratified by South Africa on 16 June 1995; OAU Doc CAB/LEG/24.9/49 (1990) (hereinafter ACRWC). Ratified by South Africa on 7 January 2000.

[3]In this article, the Consolidated Children's Act as amended by the Children's Amendment Act 41 of 2007 and the Child Justice Act 75 of 2008, updated to *GG* 33076 of 2010-04-01, were used (hereinafter Act 38 of 2005).

[4]*Laerskool Middelburg v Departementshoof, Mpumalanga Departement Onderwys* 2002 JOL 10351 (T) 10 (hereinafter *Laerskool Middelburg*) available at: http://www.fedsas.org.za/downloads/12_53_49_Die%20Laerskool%20Middelburg%20en%20%E2%80%99n%20ander%20v%20Die%20Departementshoof%20Mpumalanga%20se%20Departement%20van%20Onderwys%20en%20andere.pdf (accessed 2014-02-10). Note this case report uses page numbers and not paragraph numbers.

for the legal obligation, the close relation between the 'best interests of a child' standard and education is undeniable. Because the right to an education is an empowering one, it will always be in the best interests of any child to receive a good education. Similarly, if a child is in a situation where his or her best interests in the school context are disregarded, his or her education will suffer as a result. By observing the 'best interests of a child' standard, one facilitates, as Banach describes it, 'the circumstances under which a child can be allowed to develop physically, intellectually and emotionally into a well-adjusted adult'.[5]

The promotion and full application of the 'best interests of a child' standard in the education sphere requires that the Department of Basic Education, provincial departments of education, school principals and governing bodies take note of the importance of the 'child's best interests' standard to school administration.[6] Schools, as organs of state, have a constitutional duty to observe and promote the 'best interests of a child' standard.[7] This obligation is also supported by international law. The Committee on the Rights of the Child, for example, holds that:

> Every legislative, administrative and judicial body or institution is required to apply the best interests' principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions.[8]

The 'best interests of a child' standard should, as Hammarberg suggests, 'influence law-making, administrative decisions and all other actions affecting the child'.[9] Thus, the adoption of a school's code of conduct, policies by the school governing body, the decision about whether or not to admit a child to the school or to discipline a learner, should always be based on the 'best interests of a child' standard.[10]

Social workers, family advocates, psychiatrists, educators and other professionals may attach totally different meanings to the notion of a child's best

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[5]Banach 'The best interests of the child: Decision-making factors' (1998) 79(3) *Families in Society* 331 at 334.

[6]*Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 9 BCLR 989 (CC) para 129 (hereinafter *Head of Department v Welkom and Harmony High Schools*).

[7]Nieuwenhuis, Beckmann and Prinsloo *Growing human rights and values in education* (2007) 98.

[8]CRC Committee on the Rights of the Child 'Comment number 5: Comment on General Measures of Implementation of the Convention on the Rights of the Child CRC/C/GC/5/2003 paras 45-47.

[9]Hammarberg (2008) 'The principle of the best interests of the child – what it means and what it demands from adults'. Speech delivered by Commissioner for Human Rights of the Council of Europe, Strasbourg, 30 May Comm DH/Speech (2008)10 available at: http://wcd.coe.int/ViewDoc.jsp?id=1304019 (accessed 2014-02-10).

[10]Reyneke *The best interests of the child in school discipline in South Africa* LLD thesis Tilburg University (Tilburg) (2013) 42.

interests.[11] Since courts give 'form, substance and meaning to legislative provisions in concrete situations', court reports are valuable sources of practical information that could be most useful to stakeholders in education.[12]

In this article, the authors first sketch the legal framework for the standard of the 'best interests of a child' and then, after conceptualising the standard, review education case law from 1994 to 2013 to determine how the courts have given form, substance and meaning to the 'best interests of the child' standard in education cases. While acknowledging that the application of a 'pre-determined formula for the sake of certainty, irrespective of the circumstances' would be regarded as contrary to the best interests of the child concerned,[13] the authors' rationale for conducting the research on which this article is based, was to deduce guidelines from case law through which meaning could be attached to the standard in the education context. The aim is to provide guidelines that will, as envisaged by Sachs J, 'promote uniformity of principle, consistency of treatment and individualisation of outcome' in the field of education.[14] Particular attention was paid to how courts apply the 'best interests of the child' standard in cases dealing with school policy, discipline and school fees.

2 Legal framework for the 'best interests of a child' standard

The 'best interests of the child' standard is well established in international human rights' law.[15] It developed from a mere international aspiration mentioned in the 1924 Geneva Declaration to an 'internationally acknowledged principle in the almost universally ratified CRC'.[16] The CRC is a progressive instrument that not only recognises the vulnerability of children, but also makes provision for the protection of their cultural, social, economic, civil and political rights. The United Nations Committee on the Rights of the Child has identified four general principles against which the interpretation of the entire Convention must be benchmarked.[17] These principles, which include the 'best interests of a child',

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[11] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 12 BCLR 1365; 2013 6 SA 582 (CC) para 78; Rankin 'Protecting the best interests of the child: Some issues and solutions' (2001/2002) 4 *Journal of Social Work* available at http://www.bemidjistate.edu/academics/publications/social_work_journal/issue04/articles/rankin.html (accessed 2014-02-10).

[12] Botha *Statutory interpretation: An introduction for students* (1998) 14.

[13] *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 24.

[14] *S v M* (n 13) para 36.

[15] Art 3 of the CRC; Art 4 of the ACRWC.

[16] Reyneke (n 10) 214.

[17] Mahery 'The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law' in Boezaart (ed) *Child law in South Africa* (2009) 315.

inform the interpretation of section 28 of the Constitution.[18] The Committee on the Rights of the Child states in Comment no 7 that all decision-making, including the decisions made by professionals such as educators, concerning a child's education must take into account the best interests of the child.[19] These interests must be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.[20]

Like the CRC, the ACRWC, drafted as a regional human rights instrument to address specific problems faced by children in Africa, provides for the 'best interests of a child' standard. It stipulates that, in all matters concerning children, their best interests shall be of primary importance.[21] Thus, it can be argued that the protection afforded by article 4 of the ACRWC is more extensive than that of article 3 of the CRC.

Children are entitled to most of the rights contained in the Bill of Rights.[22] The general protections guaranteed by these rights are further enhanced by the children's clause.[23] This clause, according to Sachs J, gives evidence of how South Africa responded in 'an expansive way to our international obligations as a State party' to the CRC.[24] The wording of section 28(2), that is, 'A child's best interests are of paramount importance in every matter concerning the child', is much stronger and sets a higher standard than article 3 of the CRC or even article 4 of the ACRWC.[25] Furthermore, the constitutional values contained in section 1 will inform what is determined to be in the best interests of a child.[26]

In addition the guarantee provided in terms of section 28(2), South Africa also implemented the Children's Act to ensure that obligations under the CRC

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[18] *S v M* (n 13) para 17.
[19] CRC Committee on the Rights of the Child 'Comment number 7: Comment on implementing child rights in early childhood' CRC/C/GC/7/2005 para 13.
[20] Art 3 of the CRC.
[21] Viljoen 'The African Charter on the Rights and Welfare of the Child' in Boezaart (ed.) *Child law in South Africa* (2009) 332; Art 4 of the ACRWC.
[22] Ch 3 of the Constitution; Declercq and Verheyde 'Constitutionalisation of children's rights in Belgium: A comparative perspective on section 28 of the South African Bill of Rights' in De Groof, Malherbe and Sachs (eds) *Constitutional implementation in South Africa* (1996) 139. This right is restricted by inherent qualifiers in certain rights. For example, political rights and the right to vote or stand for public office are afforded only to 'every adult citizen' (s 19(3) of the Constitution).
[23] Section 28 of the Constitution. This principle had formed part of South African common law before it was included in the Constitution. See, for instance, *Van Deijl v Van Deijl* 1966 4 SA 260 where the common-law principle of the best interests of the child was defined as follows: 'The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral, and religious considerations'.
[24] *S v M* (n 13) para 16.
[25] Declercq and Verheyde (n 22) 153; Mahery (n 17) 319.
[26] Per Kriegler J in *S v Mamabolo (E-tv and others intervening)* 2001 3 SA 409 (CC) para 430F.

and the ACRWC are met.[27] This Act contains general principles that guide the 'implementation of all legislation applicable to children' as well as 'all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general'.[28] One of these principles is the 'best interests of a child' standard, which is explicated in section 7. Reyneke describes it as 'a national standard relating to the best interests of the child' and asserts that the list of factors is not suitable for application in the school disciplinary context.[29] Although we agree with Reyneke that the factors identified in section 7 are only applicable where required by the Children's Act, we contend that some of these factors are indeed applicable to the education context and others can be adapted to be applicable to it.[30] The following factors are also applicable to the education context:

> (*g*) the child's —
> (i) age, maturity and stage of development;
> (ii) gender;
> (iii) background; and
> (iv) any other relevant characteristics of the child;
> (*h*) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
> (*i*) any disability that a child may have;
> (*j*) any chronic illness from which a child may suffer;
> (*k*) the need for a child to be brought up within a stable family environment and, where this is impossible, in an environment resembling as closely as possible a caring family environment;
> (*l*) the need to protect the child from any physical or psychological harm that may be caused by —
> (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
> (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
> (*m*) any family violence involving the child or a family member of the child;
> (*n*) any action or decision that would avoid or minimise further legal or administrative proceedings in relation to the child.[31]

The authors allege that some of the remaining factors listed in section 7 can be adapted for the education context in the following manner:

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[27]Preamble to Act 38 of 2005.
[28]Section 6 of Act 38 of 2005.
[29]Reyneke (n 10*)* 203, fn 411.
[30]Act 38 of 2005 (n 3).
[31]*Ibid*.

The first of these factors is the nature of the relationship. In the school context this could include the relationship between learners and educators. This relationship is one where the educator is in a position of authority acting in the public interest and with the resultant obligation to protect the learners' rights. This factor can also be extended to other authoritative relationships such as the relationship between the education departments and schools and their governing bodies. Cameron J in *Centre for Child Law v Minister for Justice and Constitutional Development (NICRO as amicus curiae)* emphasised the relevance of section 28 in protecting children in unequal, authoritative relationships:

> Amongst other things section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory.[32]

The second factor is the attitude of the parent(s) towards the child and his or her responsibilities and rights with regard to the child. Adapted to the school context, the factor to be considered is the attitude of the school community with regard to culture and religion; for example, cultural and religious relativism or absolutism. When considering what is in the best interest of a child or a group of children (such as the learner population of a specific school) the question begs: whether it will be in the best interest of a child from a different religion or culture to be forcefully admitted in a school where another religion or culture is dominant or where religious or cultural absolutism is present? We do not argue in favour of religious or cultural absolutism, but argue that it should be considered as a factor when determining what is in the best interest of a child.

The third factor that can be adapted is the capacity of the parents or caregivers to provide for the needs of the child such as their emotional and intellectual needs. This factor can be adapted to cover the capacity of the school, with regard to resources, to provide for the educational needs of the child. For example, does the school have enough classrooms to accommodate more learners, and does it have educators that can teach learners in the language of their choice, if that differs from the school's language medium? It is accepted that a smaller class size would be in the best interest of learners, because there is a lesser possibility of noise and disruptive behaviour and the educator could thus spend more time teaching and will have more time for each individual learner. Furthermore, smaller class sizes allows the educator to use more time-consuming teaching and assessment methods that could enhance learning.[33]

The fourth factor that can be adapted to the school context is the likely effect

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[32]2009 11 BLCR 1105; 2009 6 SA 632 (CC) para 25.
[33]Ehrenberg *et al* 'Class size and student achievement' (2001) 2(1) *Psychological Science in the Public Interest* 1 at 1.

of any change in a child's circumstances such as being separated from a loved one.[34] Any circumstances which will impact negatively on the rights of a child and hamper the physical, intellectual and emotional development of a child will not be in compliance with the 'best interests of a child' standard.[35]

A factor which is absent from the list of factors in the Children's Act, and which Davel suggests should be considered in the education context, is the child's preferences, that is, the child's voice.[36] Children need to have a say, for example, in whether they want to be at the centre of a dispute insisting that they be placed at a specific school. Perhaps it is the parent's wish and the learner would not have preferred, necessarily, to attend that school in the first place. Government, parents and courts alike should not make children political toys; that can never be in the best interest of any child. Davel further adds the primary function of schools and the circumstances of the particular case as factors that should be considered when determining what is in the best interest of the child.[37] The authors contend that the right to an education should always be a major consideration in the educational context.

Having sketched the legal framework for the standard of the 'best interests of a child', the next step is to determine the meaning attached to this phrase. The authors agree with Reyneke that, in order to be able to interpret and apply the standard, one has to give content to it.[38] The content of the 'best interests' standard has been well-defined in custody cases,[39] which is understandable since the standard was limited to family law and care (custody) proceedings.[40] Nowadays, however, the standard is central to all fields of law,[41] including education-specific law.

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[34]In *Laerskool Middelburg* (n 4) 10 the court has indicated that it is not in children's best interest to be separated from their friends.

[35]Banach (n 5) 334; UNHCR 2006 *UNHCR Guidelines on the formal determination of the best interests of the child* at 5 available at: *http://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20realease%20May%2006.pdf* (accessed 2014-02-10).

[36]Davel 'In the best interests of the child: Conceptualisation and guidelines in the context of education' (2007) in 16th Conference of *Commonwealth Education Ministers (16CCEM): Commonwealth Education Partnerships 2007* 224 available at http://www.cedol.org/wp-content/uploads/2012/02/222-226-2007.pdf (accessed 25 February 2014). The importance of this factor is also highlighted by Visser 'Some ideas on the "best interests of a child" principle in the context of public schooling' (2007) 70 *THRHR* 459 at 462.

[37]*Ibid*.

[38]Reyneke (n 10) 202.

[39]*McCall v McCall* 1994 3 SA 201 (C) para 204.

[40]Kruger 'The protection of children's rights in the South African Constitution: Reflections on the first decade' (2007) 70(2) *Journal of Contemporary Roman-Dutch Law* 239 at 247; Skelton 'Children' in Currie and De Waal (eds) *The Bill of Rights handbook* (2013) 619.

[41]Heaton *The South African law of persons* (2008) 87.

3 Conceptualising the 'best interests of a child' standard

Giving content to the 'best interests of a child' standard cannot be achieved without considering children's legal status. The acceptance of children as autonomous legal subjects and thus as rights-bearers is essential for the promotion and observance of the 'child's best interests' standard.[42] Yet, the notion of children as autonomous beings and rights-holders developed slowly and is still not accepted universally. How children are viewed and the status accorded to them, impact on what is regarded as being in their best interests. The development of this notion went through three broad, overlapping phases. During the first phase, children were viewed as the property of their parents, as objects with no rights and interests of their own. What was in the best interests of a child was what was in the best interests of the child's parents.[43] This was the era when children's rights were confined to common law, with an emphasis on parental power rather than on parental rights and responsibilities.[44]

During the second phase, children were viewed as what Ennew calls 'a residual category of person',[45] a perception that is not entirely uncommon even today. Although regarded as legal subjects, they were not recognised as autonomous legal subjects with rights of their own. They were rather regarded as 'charity cases' or 'objects of concern', welfare subjects and in need of protection.[46] This was the view upheld by the Geneva Declaration (1924) and the Declaration on the Rights of the Child (1959).[47] What would be in the best interests of a specific child or children was determined by adults. Children were not regarded as capable of having a voice or a valid opinion.

In the third phase, children's legal status changed to that of 'active', autonomous, legal subjects with a voice and a right to self-determination.[48] The origin of this new status of children as subjects with rights can be found in the CRC. Zermatten correctly regards article 3 (the 'best interest of a child' clause)

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[42]Rankin (n 11).
[43]Declercq and Verheyde (n 22) 154.
[44]Foxcroft J also refers to this era in *V v V* 1998 4 SA 169 (C) page 176 C.
[45]Ennew 'The history of children's rights: Whose story?' (2010) 24(2) *Cultural Survival Quarterly* available at http://www.culturalsurvival.org/ourpublications/csq/article/the-history-childrens-rights-whose-story (accessed 2014-02-10).
[46]*Ibid*; Hammarberg (n 9).
[47]Ennew (n 44); Zermatten 2010 *The best interest of the child: literal analysis, function and interpretation. Working Report* at 2 available at: http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf (accessed 2014-02-10).
[48]Ennew (n 44); Zermatten (n 46). For a more detailed discussion of children's evolving capacities and the right to self-determination, see Coetzee '"Pregnant learners'" sexual rights: A constitutional perspective' 27(2) *SAPL* 488 at 493-495.

and article 12 (the right of children to have a voice) as the foundation of children's juridical position as legal subjects.[49] The CRC did not only give children a voice in article 12, but also introduced the notion of evolving capacities and made it possible for children to become active participants in matters affecting them.[50] Adults' view of what are in a child's best interests can no longer override their obligation to respect all the other rights of the child.[51]

South African courts promote the above notion that adults' view of what are in a child's best interests can no longer override their obligation to respect all the other rights of the child. In *Heystek v Heystek*[52] the court linked the need to uphold the best interests of the child with the need for an 'attitudinal shift from an antiquated Germanic parent and child relationship, which formed the substratum of the common law, to the rights of the child'. This notion was confirmed by the Constitutional Court when Sachs J held, with reference to the emancipatory character of section 28, that every child should be regarded as a distinctive personality and not as an extension of his or her parents, and that children's rights should be regarded as distinct from the rights of their caregivers.[53]

Several principles are, with regard to the content of the 'best interests' standard, accepted in South African jurisprudence. The first principle is that the 'best interests' standard applies to all children in general, to an identified or unidentified group of children and also to individual children.[54]

The second principle is that the 'best interests of a child' standard is a substantive right, an interpretive legal principle and a rule of procedure.[55] For the purpose of South African jurisprudence, it is a well-established fact that the 'best interests of a child' standard is not merely a legal principle that informs the interpretation and determines the ambit of and limits other competing rights, but also a fundamental right.[56] The 'best interests of a child' standard is a right with vertical and horizontal application that can be restricted in terms of the limitation clause like any other right in the Bill of Rights.[57] It is a right which is independent

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[49] *Id* (n 46).
[50] CRC (n 2).
[51] CRC Committee on the Rights of the Child 'Comment number 13: General comment on the right to protection from all forms of violence' CRC/C/GC13/2011 para 61.
[52] 2002 2 SA 754 (T) para 46.
[53] *S v M* (n 13) para 18; Skelton 'Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers' (2008) *Constitutional Court Review* 351 at 352, 364, 367.
[54] Comment number 14 (n 1) para 6(a); *S v M* (n 13) para 19.
[55] *Id* para 6(a), (b) and (c).
[56] Skelton 'Constitutional protection of children's rights' in Boezaart (ed.) *Child law in South Africa* (2009) 265, 280; *B v M* 2006 3 All SA 109 (W) para 110; *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17.
[57] Declercq and Verheyde (n 24) 145-46. The contention of Van Dijkhorst J in *Jooste v Botha* 2000 2 SA 199 (T) para 210C-D/E 'that this provision is intended as a general guideline and not as a rule of law of horizontal application' was overridden by the Constitutional Court. In this regard, see: *De*

of the rights listed in section 28(1) of the Constitution and is accorded to both citizens and non-citizens under the age of 18.[58] In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* Langa J held that one cannot interpret children's rights to have their best interests regarded as paramount to mean that this right 'trumps' all other rights in the Bill of Rights, because such an interpretation would be 'alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system'.[59] Bonthuys, however, argues that though courts claim the best interests of a child to be a right, they mostly failed (with the exception of the *Sonderup* case) to apply the two-stage enquiry required by the limitation clause.[60]

As a legal principle, the 'best interests of a child' in effect means that 'if a legal interpretation is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'.[61] Section 28(2) thus requires a child-centred approach to statutory interpretation and the development of common law.[62] Section 28(2) is a key provision in the Bill of Rights, because it is used to develop the meaning of other rights, to determine the ambit of or to limit other rights.[63]

As a rule of procedure, the 'best interests of the child' standard deals with the evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.[64]

Before one can consider the possible impact of one's decision, one first needs to understand what will constitute the child's best interests. Bonthuys, rightly so, warns that the 'indeterminacy and judicial discretion which the best interests standard invites can easily lead to prejudice and discrimination'.[65] What will be in the best interests of a child, in a specific case, is a factual question that depends on the facts and circumstances of the case.[66] The word 'best' in the phrase 'best interests', has an inherent comparative quality.[67]

Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2003 ZACC 19 paras 54-5; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) also reported as *LS v AT* 2001 2 BCLR 152 (CC) para 29; and *Minister of Welfare and Population Development v Fitzpatrick* (n 55) para 17.

[58]Declercq and Verheyde (n 22) 145; *Minister for Welfare and Population Development v Fitzpatrick* (n 55) para 18.

[59]*De Reuck v Director of Public Prosecutions* (n 56) paras 54-55.

[60]Bonthuys 'The best interests of children in the South African Constitution' (2005) 4 available at: www.childjustice.org/index.php/component/edocman/?task...id (accessed 2014-02-10).

[61]Comment number 14 (n 1) para 6(b).

[62]*S v M* (n 13) para 15.

[63]Skelton (n 55) 282.

[64]Comment number 14 (n 1) para 6(c).

[65]Bonthuys (n 59) 1.

[66]Davel (n 35) 223.

[67]Zermatten (n 46).

The Committee on the Rights of the Child has laid down the parameters within which the 'best interests of a child' should be given content.[68] These include:

a) the universal, indivisible, interdependent and interrelated nature of children's rights;
b) recognition of children as rights holders;
c) the global nature and reach of the Convention;
d) the obligation of States parties to respect, protect and fulfil all the rights in the Convention;
e) short-, medium- and long-term effects of actions related to the development of the child over time.

Zermatten interprets these parameters to mean that any approach to determining the 'best interests of a child' should demonstrate respect for:

- the importance of every child as an individual with opinions;
- the short-, medium- and long-term perspectives of the life of the child; bearing in mind that the child is a human being in development;
- the global spirit of the CRC;
- an interpretation that is not "culturally relativist" or denies other rights of the CRC, for example the right to protection against harmful traditional practices and corporal punishment.[69]

Ultimately, what is determined to be in the best interests of a child or children should always be the decision that in the circumstances best protects the rights of children.[70]

In an attempt to address the indeterminate character of the 'best interests of a child' standard, an open-ended list of factors that courts should consider when determining the best interests of a child or children was proposed in *McCall v McCall.*[71] The list, intended to be used in custody disputes, clearly informs the factors set out in section 7(1) of the Children's Act which, arguably, has a much broader application than that of custody cases alone.[72]

As mentioned above, recognising children's evolving capacities and their right to be heard is essential to observing the 'best interests of a child' standard.

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[68]Comment number 14 (n 1) para 16.
[69]Zermatten (n 46).
[70]UNHCR (n 36) 5.
[71]1994 3 SA 201 (C) paras 205B-G.
[72]Bekink '"Child divorce": A break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents' (2012) 6 *PER* 178 at 196 available at http://dx.doi.org/10.4314/pelj.v15i1.6 (accessed 2014-02-10).

The level of influence that a child will have on what is regarded as being in his or her best interests will depend on his/her age and maturity.[73] The fact that children are still developing makes it essential for courts or any education stakeholder to consider the short-, medium- and long-term impact of their decisions as well as the interplay between them.[74] Although the long-term impact should be considered, Reyneke argues that the indeterminacy of the standard is exacerbated by the impossibility of predicting the future accurately.[75]

In *S v M* it was held that a 'truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved'.[76] What is in the best interests of a child should be determined, not by simply regarding the child as an individualised person, but as part of a family, community and an integral part of the State.[77] In the minority judgment, Madala J warns that 'one cannot completely sacrifice the interests of society, which is served by the criminal justice system, for the interests of children'.[78] Ultimately, the decision should be about promoting 'uniformity of principle, consistency of treatment and individualisation of outcome'.[79]

What if the best interests of a child are established, but they are in conflict with the interests of others? In the education context, the application of the 'best interests of a child' standard, in many instances, requires balancing individual or group rights against institutional rights or interests. Hammarberg refers to the fact that such clashes are common in schools, for example, when a country does not have the resources to provide enough classrooms for all children and a two-shift system is adopted or when the community is in favour of corporal punishment due to cultural or religious interests, but it is in the best interests of children to prohibit the use thereof in schools.[80]

The inherent flexibility and a contextual nature of the standard will affect the weighing-up process and the paramountcy of the 'best interests of a child' standard plays a role in this regard.[81] Sachs J refers to the weighing-up process as the 'operational thrust for the paramountcy principle'.[82] The fact that the child's best interests are regarded as paramount does not mean that children's best

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[73]Hammarberg (n 9).
[74]Comment number 14 (n 1) para 84; *Sonderup v Tondelli* (n 56) para 28; Zermatten (n 46).
[75]Reyneke (n 10) 257.
[76]*S v M* (n 13) para 24.
[77]Zermatten (n 46).
[78]*S v M* (n 13) para 122.
[79]*Id* para 36.
[80]Hammarberg (n 9).
[81]*Ibid.*
[82]*S v M* (n 13) para 25.

interests can never be limited by other rights.[83] Cameron J explains the paramountcy principle as follows: '[T]he child's interests are more important than anything else, but [it] does not mean that everything else is unimportant'.[84] In *B v M*, Satchwell J similarly held the view that a child's:

> ... best interests is *[sic]* the pre-eminent consideration amongst all other considerations. However, the Legislature did not intend the "best interests" of the child to be the sole or exclusive aspect.

4 The application of the 'best interests of a child' standard in selected South African education case law

In this section, the application of the 'best interests of a child' standard in selected South African education case law will be discussed under the following headings: school policy (including age of admission policy, language policy, admissions policy and school policy on learner pregnancy); school discipline (code of conduct, learner discipline and suspension and expulsion of learners); school fees; and the right to a basic education. It is impossible to discuss all of the cases in detail in such a limited space, so only a brief overview was given. The focus was placed on how the courts interpreted and applied the 'best interests of the child' standard.

4.1 School policy

In 2001, in *Harris v Minister of Education*, the Constitutional Court considered the age requirements for admission to independent schools.[85] The court *inter alia* considered the long-term effect of allowing under-aged children to enter the already overcrowded school system and also considered the fact that such children tend to clog up the system owing to high failure and repetition rates, with inevitable cost implications for the State. However, as the case dealt with an independent school, the court held that the provision was unconstitutional.[86] The

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[83] *Ibid*; *De Reuck v Director of Public Prosecutions* (n 57) paras 54-55; *Sonderup v Tondelli* (n 56) paras 27-30.

[84] *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 6 SA 632 (CC) para 29.

[85] 2001 11 BCLR 1157 (CC) (n 103). The Age Requirements for Admission to an Ordinary Public School (item 4(A)) clearly states that a child may only be admitted to school prior to the year in which he or she turns seven, with the permission of the HoD. The latter must be convinced that the learner is ready to meet the challenges of formal education and that admission is in the best interests of the child.

[86] Reyneke (n 10) 248.

court held that, because the requirement failed to exempt children who did not turn seven during the intended admission year, even if they were manifestly ready for school, it required them either to repeat the final year of pre-primary or to sit around at home and wait to become old enough to attend school. The court concluded that such an action constituted an unjustifiable violation of section 28(2).[87] The court considered the fact that the child in question had already spent three years in pre-primary school and that the school psychologist had reported that the child was school-ready.[88] However, the court refused to decide the matter on the basis of the child's best interests, since the point was moot as the Minister had exceeded the powers conferred upon him by section 3(4) of the National Education Policy Act. The Minister was only authorised to determine national policy on the age of admission of learners and not to make law.[89]

In *Western Cape Minister of Education v Governing Body of Mikro Primary School,*[90] the governing body of an Afrikaans-medium public school refused the request from the Western Cape Department of Education to change the unilingual language policy of the school from Afrikaans to that of a dual-medium school (meaning that both English and Afrikaans would be used). In the *court a quo*, the argument was presented that it would not be in the best interests of the 21 English-speaking learners to be transferred to another school during their primary and most formative schooling years. Further arguments included that the learners had settled in, were happy, had made friends and that some parents were of the opinion that it would be in their children's best interests to stay at Mikro Primary School.[91] The court *a quo* had to weigh the children's best interests up against the value of legality.[92] Thring J held that the value of legality outweighs the time that had elapsed and the inconvenience to move the children to another school.[93]

The judge emphasised that, in the long-term, upholding legality would be in the best interests of the children, because legality is vital to an orderly society:

> Indeed, it is difficult to imagine how it could ever be in the best interests of children, in the long term, to grow up in a country where the state and its organs and functionaries have been elevated to a position where they can regard

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[87] *Harris v Minister of Education* (n 85) paras 2(b), 6.
[88] Adams (n 96) 41.
[89] *Harris v Minister of Education* (n 85) para 19.
[90] 2005 10 BCLR 973; 2006 1 SA (CSA).
[91] *Id* 47.
[92] *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 ZAWCHC 14 at 37 available at http://www.saflii.org/za/cases/ZAWCHC/2005/14.html (accessed 2014-02-10). Note this case report uses page numbers and not paragraph numbers.
[93] *Id* 51. Bertelsmann J in *Laerskool Middelburg* (n 4) seemingly regarded inconvenience to children as weighing heavier than legality.

> themselves as being above the law, because the rule of law has been abrogated as far as they are concerned.[94]

The Supreme Court of Appeal dismissed the appeal. It found the educational needs of all learners to be an important factor in determining the best interests of learners, but insufficient evidence that it would be possible to cater adequately for the educational needs of the English-speaking learners if they were to remain such a small group at school.[95] This ruling had the effect that, in spite of the number of months that had elapsed after their admission, the 21 learners were ordered to be enrolled at another suitable school as soon as reasonably practicable. Thus, the short-term best interests of the children in the school were set aside in favour of the long-term best interests of all the children. It would be both in the long-term best interests of the children in the school, as well as the newly admitted English-speaking learners, that the English-speaking learners be relocated to a new school.

Visser contends that the judgment indicates that the actions of the education officials were found not to have been in the best interest of the learners, because they pursued a political agenda and merely used the learners as pawns in their political game.[96] Reyneke supports the court's decision, stating that if the court had followed a different approach, it might have opened the door for excessive abuse by the Department by creating the impression that it could act unlawfully and then leave it to the courts to condone its actions by claiming that it would not be in the children's best interests if the courts did not condone the unlawful conduct.[97] This case is thus a good illustration of how the 'best interests of a child' standard provides an important check against possible abuse of state power.[98]

The Supreme Court of Appeal held that the considerations offered to the *court a quo* were not sufficient to make a case for the best interests of the 21 English-speaking learners. Streicher JA explains this conclusion by contending that:

- the fact that the children were happy at the time did not guarantee future happiness since they would be in a minority at the school;
- the learners could be as happy at another school;
- Mikro Primary was not the parents' first choice;

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[94] *Governing Body of Mikro Primary School v Western Cape Minister of Education* (n 92) para 30-31; Joubert 'Education, law and leadership that promotes the best interests of students in South Africa' (2009) 14(2) *International Journal of Law & Education* 7 at 13.
[95] *Western Cape Minister of Education v Governing Body of Mikro Primary School* (n 90) para 48.
[96] Visser (n 35) 469.
[97] Reyneke (n 10) 257-258.
[98] Visser (n 35) 468.

- it was uncertain whether the school would be able to cater adequately for the learners' educational needs;
- the legislature regarded it to be in the best interests of learners that they would be educated in schools that were governed and professionally managed in terms of the Schools Act which, within the context of this case, might not happen;
- the *court a quo* already addressed the learners' best interests by requiring that they be placed at a school that 'would cause minimal disruption in their lives'. However, the judge added the following rider to the order: 'The placement of the children at another suitable school is to be done taking into account the best interests of the children'.[99]

In *Seodin Primary School v MEC of Education of the Northern Cape*[100] the governing bodies of three schools in the Northern Cape sought to set aside the MEC's decision to convert a number of Afrikaans-medium schools to dual-medium schools. The court found that, even if the schools had a strong case to set aside the decisions of the MEC, the English-speaking learners at the school might not be excluded as there was no *curator ad litem* appointed to see to the best interests of the children. The court stated that the learners in these schools had a constitutional right to receive education in English in a public educational institution provided by the state, if reasonably practicable. Although these learners did not initially have such a right specifically against the schools, it had become immaterial as, in the court's view, the affected children had acquired a vested right to be at the various schools where they were learners and could not be removed from there without a court order. As it was regarded as in their best interests to remain in those schools and receive basic education, they acquired a vested right to receive English tuition in the schools involved.

The next case is *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*.[101] Laerskool Middelburg was an Afrikaans-medium public school and, at the time, it was the only school in a certain district in Middelburg that used Afrikaans as the sole medium of instruction. The MEC ordered the school to admit 24 learners for instruction in English.[102]

The court ruled that the administrative action of the MEC was not reasonable and just, but that the best interests of the 24 learners, then already admitted to the school, outweighed the Department's unlawful administrative action, the

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[99] *Minister of Education (Western Cape) v Mikro Primary School Governing Body* (n 90) para 48.
[100] 2006 1 All SA 154 (NC) para 154.
[101] *Laerskool Middelburg* (n 4).
[102] *Id* 5.

school's interests and the rights of single-medium schools in general.[103]

From this case one can deduce that, when the court has to consider the best interests of children with regard to access to schools, it will consider:

- the status of the school (in this case the curator held that Middelburg Laerskool was probably the best primary school in Middelburg);
- the status of the school with regard to not only academic performance, but also sport and cultural activities;
- the children's emotional security (in this case the curator held that the learners might feel rejected and insecure; they would have to give up friendships, which they had formed as they were already settled in the school, because the Department had forcibly admitted them to the school; and there had been a legitimate delay in bringing the case to court);
- the location of the school (in this case the school was closest to the children's homes);
- the effect on the school (in this case the school would need more classrooms and the court considered that this would most probably also be the case at the other schools to which the learners would be sent);
- the effect on other children (in this case the effect on the learners with special needs, because they had to vacate one of their two classrooms to make space for the 20 learners who wanted to be taught in English; and the right of other learners at the school to receive education in the language of their choice);[104]
- the court held that the right to be taught in the language of one's choice was subordinate to everybody's right to education and 'had to give way when there was a proven need to share teaching facilities with other cultural groups'.[105]
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Bertelsmann J acknowledged that his decision turned on the fact that the learners were already settled in the school and that it was in their best interest not to be inconvenienced by being transferred to other schools.[106] Although Bertelsmann J stressed that section 28(2) of the Constitution creates a fundamental right for *all* children,[107] he did not consider the best interests of the

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[103]Adams *The education sector as an essential service* LLM Nelson Mandela Metropolitan University (Port Elizabeth) (2011) 42; Bonthuys (n 59) 13.
[104]*Laerskool Middelburg* (n 4) 10.
[105]De Havilland 'The fate of Afrikaans-medium schools' (2008) December *Given Gain* available at: http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=72709&cause_id=2137 (accessed 2014-02-10).
[106]*Laerskool Middelburg* (n 4) 10.
[107]*Id* 11.

Afrikaans-speaking learners.[108] It is unfortunate that the court did not take the opportunity to consider how the interests of various groups of children, all with the right to have their best interests be of paramount importance, should be balanced.[109]

In *Head of Department Mpumalanga Department of Education v Hoërskool Ermelo*[110] after refusing several requests from the Department of Education of Mpumalanga to admit learners who desired to be taught in English, the Head of Department, acting under sections 22(1) and (3) and 25(1) of the Schools Act, revoked the power of the school's governing body to set the school's language policy. The Constitutional Court accepted that the school governing body had a duty, in terms of section 20(1), to promote the best interests of the school and of all learners at the school. However, it emphasised that the:

> governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.[111]

Thus, in this case the court weighed up the best interests of the learner population against the interests of the broader community and found in favour of the broader community.

Governing Body of Rivonia Primary School v MEC for Education: Gauteng Province[112] deals with the dispute regarding a Grade 1 learner's failure to find placement at Rivonia Primary School. According to the school's admission policy, as determined by the governing body, the capacity existed for 120 Grade 1 learners. When the application for placement was made the school had already reached this capacity and the learner was placed on a waiting list. The mother complained to the Gauteng Department of Education and the principal was ordered to admit the learner.[113] The school took the stance that the learner was

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[108]Smit 'Language and cultural rights' in Smit and Oosthuizen (ed) *Fundamentals of human rights and democracy in education: A South African perspective* (2013) 201.
[109]Visser (n 35) 466.
[110]2009 3 SA 422 (SCA).
[111]*Head of Department: Mpumalanga Department of Education and Minister for Education v Hoërskool Ermelo* 2009 ZACC 32 para 80.
[112]*MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11).
[113]*MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11) paras 9, 10. According to s 5 of the South African Schools Act, the governing body determines the school's admission policy. Once again, they must do so within the context of both the Constitution and the relevant provincial education laws. S 5(1) of the South African Schools Act goes further in stating that 'a public school must admit learners and serve their educational requirements without unfairly discriminating in anyway'.

properly placed on the waiting list, but the mother refused to accept this and took the matter to the Gauteng MEC, who then referred the matter to the HoD. The HoD ordered the school to admit the learner and when the principal refused to admit the learner, the HoD withdrew her admission function and officials physically placed the child in a class.[114]

The *court a quo* addressed the 'best interests of a child' standard with regard to two aspects. Mbha J acknowledged the fact that the school had withdrawn its application to reverse the admission of the learner by the HoD, because it felt that it would not have been in the best interest of the child due to the time that had since lapsed.[115] The court expressed its disapproval of the fact that the identities of learners, who were part of a dispute, had been disclosed in both the court papers and the media, because it was, *inter alia*, not in the best interest of the learner.[116] The Supreme Court of Appeal did not expressly consider the 'best interests of a child' standard.

The Constitutional Court called attention to the fact that both the Gauteng HoD and the school governing body failed to take the 'best interests of a child' standard as the reference point in managing the dispute between them.[117] It is difficult to understand the Constitutional Court's conclusion, because the school acted in the learner's best interests by accepting the learner's admission, despite the unlawful action by the HoD.[118] It emphasised that the principles of cooperative governance should be adhered to so as to ensure the best interests of the learners are furthered and the right to a basic education is realised'.[119] The court stated that different stakeholders in education must never lose sight of the fact that the educational needs of children must be met.[120] Furthermore, a balance must be found between the 'rights and duties of provincial education departments and school governing bodies', as well as the 'interests of parents in the quality of their children's education, and the state's obligation to ensure that all learners have access to basic schooling'.[121] Thus, the Constitutional Court emphasised

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[114] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11) paras 11-14.
[115] *Governing Body of Rivonia Primary School v MEC for Education: Gauteng Province* Reportable case: (11/08340) (2011) para 5.
[116] *Id* para 96.
[117] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11) para 2.
[118] *Governing Body of Rivonia Primary School v MEC for Education: Gauteng Province* (n 115) para 5.
[119] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11) paras 69, 77.
[120] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11) para 2.
[121] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (n 11) para 3.

that co-operative governance is grounded in the shared constitutional goal of promoting and protecting the best interests of learners.[122] Although the authors agree with this notion, they contend that the court erred in two respects. First, it created the impression that for schools to approach a court to uphold their administrative rights will inevitably translate into them being judged as not acting in the learners' best interests. Second, the court failed to acknowledge that the Department's failure to show regard for the best interests of the learners on the waiting list ahead of the learner it forcibly admitted, constituted a violation of those learners' right to have their best interests considered and not to be unfairly discriminated against.[123]

It is evident that in most of the cases (eg *Ermelo*, *Laerskool Middelburg*, *Seodin* and *Rivonia*) the short-term interests of the learners, who were not yet part of a schools' learner population, either outweighed the best interests of the learner population or these learners' interests were not even considered. The *Mikro* case was the only case where the long-term interests of the learner population was also considered by the Supreme Court of Appeal. A further observation that can be made is that this was the only case where legality (also seen as essential to uphold the best interests of the current and future learner populations) outweighed the best interests of the new applicants.

In *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School*[124] the governing bodies of Welkom High School and Harmony High School, respectively, adopted pregnancy policies that provided for the exclusion of pregnant learners from school for certain periods of time. In opposition to the school pregnancy policies set by the governing bodies of the schools, the HoDs instructed the schools to readmit two affected learners. The Free State HoD contended that the schools' policies on learner pregnancy did 'not allow the schools to take into account the "best interests of a child" as prescribed by section 28(2) of the Constitution when making a decision regarding learner pregnancy'.[125]

The Constitutional Court held that the pregnancy policies 'presumptively' unfairly discriminated against pregnant learners, limited their right to education,

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[122]Du Preez 'School governing bodies and admission policy: MEC for Education in Gauteng v Rivonia Primary School' available at http://www.givengain.com/cause/2137/posts/118512/ (accessed 2014-02-10).

[123]Lourenço 'South Africa: Gauteng Department of Education, acting in whose interests?' (2013) *Political analysis: South Africa* 25 October available at http://marisalourenco.com/2013/10/24/gauteng-department-of-education-acting-in-whose-interests/ (accessed 2014-02-10).

[124](CCT 103/12) 2013 ZACC para 25.

[125]*Head of Department v Welkom and Harmony High Schools* (n 6) para 111.

'infringe[d] upon their rights to human dignity, privacy and bodily integrity'.[126] It maintained that the schools' pregnancy policies were inflexible and did not allow the governing bodies and principals to consider the pregnant learners' best interests.[127] To promote the best interests of the pregnant learners, schools' pregnancy policies should acknowledge pregnant girls' level of intellectual, psychological and emotional maturity.[128]

The court held that the rights of children were being affected by these policies and, in the best interests of the children who were not party to these proceedings, it was important to determine what was allowable (with regard to the Constitution and South African Schools Act) in pregnancy policies.[129]

In a separate concurring judgment it was noted that, although this was a matter between school governing bodies and the HoD, their respective functions were to serve the needs of children. The respective parties had lost sight of the fact that the best interests of the children at the schools were paramount and, in fact, of a higher priority than the powers of the respective bodies. It was further emphasised that the 'best interests of a child' should be the starting point for engagement between the parties, and that their co-operation must serve the interests of the learners.[130]

4.2 School discipline

On the fraught issue of school discipline, Reyneke points out that the standard of the 'best interests of a child' has not yet been incorporated into the disciplinary contexts of South African schools:

> Another reason for the courts' apparent failure to refer to the best interests of the child is that there is currently no proper content given to the concept within the school disciplinary context. It would thus be up to either the legislator or the courts to give content to it and to develop the best-interests concept in this context. It is difficult to enforce and implement a right without proper content.[131]

In *Queens College Boys High School v MEC, Department of Education, Eastern Cape Government,*[132] a number of learners were found guilty of serious misconduct, ranging from alcohol use, to smoking dagga and insubordination.

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[126] *Id* paras 113, 114, 115.
[127] *Id* para 116.
[128] *Christian Lawyers South Africa v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* 2005 1 SA 509 (T) para 528; Coetzee (n 47) 488 at 493-495.
[129] *Christian Lawyers South Africa v Minister of Health (Reproductive Health Alliance as Amicus Curiae)* para 119.
[130] *Id* para 129.
[131] Reyneke (n 10) 202.
[132] (454/08) 2008 ZAECHC 165 (21 October 2008).

After the disciplinary hearing, they were recommended for expulsion, but the MEC did not accept the recommendation. The court set aside the decision of the MEC and made the following statement:

> Whilst it is legitimate under these provisions to expect public schools to consider rehabilitative options in relation to disciplinary infractions (even serious ones), the responsible member for education must also always have due regard to the fact that expulsion from a school is also an appropriate option in cases of serious misconduct. A failure to give proper regard to this aspect, and to have regard to the potential detrimental effect of a failure to order expulsion in a progressively worsening disciplinary situation may vitiate a decision not to order expulsion upon the recommendation of a governing body.[133]

Reyneke, in evaluating the judgment, refers to the fact that no reference was made to the best interests of a child.[134] With reference to the HoD's refusal to support the recommendation for expulsion, Reyneke states: 'Although she rightly insisted on rehabilitation and counselling for the perpetrators, she failed to consider the best interests of the other learners by downplaying the seriousness of the transgressions'.[135] However, it could be argued that the court, by acknowledging that expulsion is an option in bad disciplinary situations, by implication took into account the best interests of the other learners at school and their right to a safe environment.

In *Christian Education SA v Minister of Education of the Government of the RSA,*[136] the parents of learners at an independent Christian school argued that, by enacting section 10 of the Schools Act prohibiting corporal punishment, the government violated the rights of parents of children at independent schools who, in line with their religious convictions, had consented to its use. The court declared that the State was under a constitutional duty to protect all people, in particular children, from maltreatment, abuse or degradation. Furthermore, in every matter concerning a child, the child's best interests were of paramount importance. This principle was not excluded in cases where the religious rights of the parent were involved. After weighing up all the factors, the court was justified in limiting the rights of the parents and commented as follows:

> Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance.

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[133] *Id* para 32.
[134] Reyneke (n 10) 177.
[135] *Id* 209.
[136] 2000 10 BCLR 1051(CC).

> This Court has recently reaffirmed the significance of this right which every child has. The principle is not excluded in cases where the religious rights of the parent are involved.[137]

Many complex constitutional issues were argued in *Le Roux v Dey*.[138] As this article focuses on the 'best interests of a child' standard, only this part of the judgment will be discussed. In this case, three high school learners manipulated a picture of Mr Dey, the deputy-principal of the school they were attending, by placing a picture of Mr Dey's face on the body of a bodybuilder engaged in a compromising position with another bodybuilder, and then placing a picture of the school crest over their nether regions. This image was subsequently distributed among the other learners at the school. The Constitutional Court ordered the learners to pay Mr Dey an amount of R25,000 and to apologise to him.

In the majority judgment it was accepted that learners receive special protection under the Constitution, but that educators also have protected rights such as dignity and reputation; thus, if a learner crosses the line and infringes educators' rights, they may be held liable. A value judgment must be made.

In his minority judgment, Yacoob J explored the impact of the 'best interests of a child' standard in detail. He emphasised that 'courts are required to apply the standard of best interests by considering how the child's rights and interests are, or will be, affected by their decisions'. He further stated that section 28(2) provides a benchmark for the treatment and protection of children and that courts, as well as other reasonable persons, are obliged to give consideration to the effect of their decisions on the rights and interests of children. He also reiterated the approach in *S v M* that statutes must be interpreted in a manner that favours the protection and advancement of the interests of children. He therefore arrived at the following conclusion:

> If there are two reasonable interpretations of an image made by a child, one which renders the image defamatory and another which does not have that consequence, courts should prefer that interpretation which does not hold the child liable provided that the construction is not strained.[139]

4.3 School fees

In *Fish Hoek Primary School v G W*[140] it was judged whether a non-custodian

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[137] *Christian Education SA v Minister of Education of the Government of the RSA* (n 117) para 41.
[138] (CCT 45/10) 2011 ZACC 4; 2011 3 SA 274 (CC); 2011 6 BCLR 577 (CC); BCLR 446 (CC) (8 March 2011).
[139] *Le Roux v Dey* para 51.
[140] (642/2008) 2009 ZASCA 144; 2010 2 SA 141 (SCA); 2010 4 BCLR 331 (SCA); 2010 2 All SA 124 (SCA) (26 November 2009).

parent was liable for the payment of school fees.[141] The school sued the respondent for failing to pay the amount of school fees still outstanding for a minor learner. The school based its claim on section 40(1) of the South African Schools Act, which states that 'a parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act'. The respondent refused payment on the grounds that he was not the custodian parent of the learner, and thus not liable for payment. In the Supreme Court of Appeal, it was decided that both parents were liable. The court determined that an interpretation of the word 'parent', which lays the responsibilities for school fees on both parents, is in line with section 28(2) of the Constitution:

> An interpretation that burdens both parents with responsibility for school fees is consistent with the injunction in s 28(2) of the Constitution that 'a child's best interests are of paramount importance in every matter concerning the child'. It, unquestionably is in the best interests of a child that a non-custodian parent, who is unwilling, yet has the means to pay his child's school fees, should be made to do so, if necessary, by the injunction of an order of a competent court.[142]

4.4 The right to education

In the case of *Governing Body of the Juma Musjid Primary School v Essay NNO (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae),*[143] the Juma Musjid Trust allowed the Department of Education for KwaZulu-Natal to 'enlist the school as a public school with an Islamic religious ethos on its private property in terms of section 14(1) of the South African Schools Act 84 of 1996', subject to the proviso that a written agreement be concluded between them and the MEC for Education for KwaZulu-Natal as well as in terms of section 14(1) of the Schools Act.[144] After a number of unsuccessful attempts to conclude the agreement, the Trust obtained an eviction order against the school governing body and the state respondents despite the application of the parents of the children that the MEC had abandoned her constitutional responsibility to ensure that the children's best interests were of paramount

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[141]According to s 39(1) of the Schools Act, a public school may charge school fees subject to certain conditions. A decision regarding school fees must be adopted at a general meeting attended by the majority of the parents, and provision must be made for the exemption of parents who are unable to pay fees.
[142]*Fish Hoek Primary School v G W* (n 140) para 14.
[143]2011 8 BCLR 761 (CC).
[144]*Id* para 11.

importance.[145] In this case the horizontal application of section 28(2) was again confirmed.[146]

The Constitutional Court considered the importance of the right to education and stated that the right to a basic education is immediately realisable as there are no internal limitations requiring that the right be progressively realised.[147] The only limitation applicable to the right to a basic education is section 36(1) of the Constitution. The court noted that section 28(2) of the Constitution imposes a duty 'on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions' and that section 28 also has the effect of 'establishing a set of children's rights that courts are obliged to enforce'.[148] The Constitutional Court referred to the fact that the *court a quo* gave precedence to the right to property over the learners' right to a basic education and that as a result thereof the court *a quo* 'failed to accord sufficient weight to the entrenched rights of the learners and to the paramount importance of their best interests'.[149] The order of the High Court was set aside to give parties time to resolve the dispute on an amicable basis. When the dispute was not resolved, the court confirmed that the best interests of the children would be served before it granted the final eviction order.[150]

5 Concluding remarks and guidelines

From the foregoing discussions, it is evident that courts and education stakeholders alike have a legal duty, in terms of both international and national law, to observe and apply the 'child's best interests' standard in all their dealings with children. Although this is not a disputed fact, the manner in which the standard is interpreted is disputed. The courts and education stakeholders will only be able to interpret and apply the standard if they are able to give content to the 'best interests of a child' standard.

This article has addressed the uncertainty surrounding the content of the standard of the 'best interests of a child' in the education sphere by first establishing the legal framework relating to the standard; second, by conceptualising the standard; and, third, by reviewing education case law from 1994 to 2013 to determine how the courts have given form, substance and meaning to the 'best interests of a child' standard in education cases. As pointed

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[145] *Id* para 15.
[146] Reyneke (n 10) 251.
[147] See (n 135).
[148] *S v M* (n 13) paras 14-15.
[149] *Governing Body of the Juma Musjid Primary School v Essay NNO (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* (n 141) para 68.
[150] *Id* para 71.

out at the beginning of the article, the following eight guidelines benchmarked against the above investigation are suggested in an attempt to promote uniformity of principle, consistency of treatment and individualisation of outcome.

First, education stakeholders should bear in mind that South African children are regarded as autonomous legal subjects and rights-holders and that they consequently have a right to self-determination in relation to their evolving capacities. What will be in the 'best interests of a child' cannot be determined solely by considering adult views on the matter. In determining what would be in the 'best interests of a child', stakeholders should weigh up the need to protect and care for children against their status as autonomous human beings and rights-holders.

Secondly, learners' right to have their best interests be regarded as paramount, is afforded them not only as individuals but also as groups (learners with disabilities or English-speaking learners for example) and as children in general (eg *all* children). This principle was applied in *Western Cape Minister of Education v Governing Body of Mikro Primary School* where the court found the educational needs of *all* learners to be an important factor in determining the best interests of any particular group of learners. Here the court also took the long-term best interests of the children into account. In *Head of Department Mpumalanga Department of Education v Hoërskool Ermelo* it was stated that the school governing body did not have the right to determine a language policy on the basis of the interests of the learners in the school without taking into consideration the needs of the other children in the community. Whether this will translate into an obligation on the governing body to adopt policies that take the current learner community and not just specific learners within a school or feeder zone into account, is not certain. This is a guideline that could have affected the outcome in the *Rivonia* case, had it been considered. However, none of the courts considered the fact that one learner's right to education and best interests were privileged above the 39 other learners on the waiting list, even though this learner's right to access to education was not in question anymore because she was enrolled in a private school already. This begs the question how such a determination would relate to democratic school governance. What is certain is that, when the governing body of a school adopts policies, it will have to consider the best interests of the learners as children, the best interests of the learner community, the interests of specific groups of learners such as learners with special needs and interests as well as the interests of individual learners.

Third, from the case law it clear that judges do not merely see section 28(2) as an interpretative tool, but also as a fundamental right with its own standing within the Bill of Rights. This means that schools should also keep in mind that learners younger than 18 years old have a pertinent right to have their best interests be considered in all matters concerning them in the school.

Fourth, the principle that the 'best interests of a child' standard is a right with vertical and horizontal application was confirmed in education cases such as *Governing Body of the Juma Musjid Primary School v Essay NNO (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* and *Harris v Minister of Education*. It is evident from the cases studied that the 'best interests' standard was applied between the state and learners, schools and learners, educators and learners as well as between learners themselves. The best interest standard will thus apply where the Department wants to enrol a learner, but such enrolment may not be in the best interests of the current learner community, where two learners are involved in a fight, where a group of Afrikaans-speaking learners apply to be admitted at a Xhosa-speaking school or where a learner attacks an educator.

Fifth, the 'best interests of a child' standard is a right that can be restricted in terms of the limitation clause such as any other right. For example, if considering whether to recommend expulsion, the governing bodies will have to weigh the best interest of the learner up against the need to establish a disciplined and safe school; for example, the best interests of the rest of the learners. The 'best interests of a child' standard was used to decide between two opposing rights in *Seodin Primary School v MEC of Education of the Northern Cape*. Similarly, in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* the right of the school to just administrative action was weighed against the best interests of the learners involved. The court declared that the paramountcy of the 'best interests of a child' standard guarantees the fundamental right of every child to be first in line when conflicting rights are measured against each other. The best interests of the other learners and their need for a disciplined school environment was considered as a factor in the expulsion of a learner in *Queens College Boys High School v MEC, Department of Education, Eastern Cape Government*. In *Christian Education SA v Minister of Education of the Government of the RSA* it was justified, in the best interest of the children, to limit the rights of the parents. As was confirmed in *Le Roux v Dey*, educators also have rights that need to be considered. Although, in some instances, the 'best interests of a child' were limited in favour of other rights, there appears to be a clear tendency by the state to justify unsound behaviour and decisions by merely stating it was done in the 'best interests of a child'. This was even commented on by the judge in the *Rivonia* case.

The sixth guideline is that, if a legal interpretation is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. This approach was reiterated in *Le Roux v Dey,* where the minority judgment stated that the court should prefer the interpretation of an image that would not hold the child liable for defamation. In *Fish Hoek Primary School v G W* it was decided that both parents were liable for school fees

and that an interpretation of the word 'parent', which places the responsibility for school fees on both parents, is in line with section 28(2) of the Constitution.

The seventh guideline is that section 28(2) is a key provision in the Bill of Rights, because it is used to develop the meaning of other rights, to determine the ambit of or to limit other rights. In *Christian Education SA v Minister of Education of the Government of the RSA, Le Roux v Dey* and in *Governing Body of the Juma Musjid Primary School v Essay NNO (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* the importance of section 28 was accentuated. In *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* and *Antonie v Governing Body, Settlers High School,* rights other than the 'best interest of a child' also came into play.

The eighth guideline relates to the importance of general factors that could be considered when determining the 'best interests of a child' and improving consistency and clarity in law. From the case law it is evident that courts will consider factors related to the learner or learners that are party to the case, the interests and impact of the decision on the rest of the learners as well as situational and institutional factors related to the school as institution. Those include the status and capacity of the school; the available resources, including classrooms and educators; the location (how accessible it is to specific learners); its capability to cater for the educational needs of the learners; how well the school is managed; the possible impact of official departmental decisions on the school; and whether the school is the only and the best institution to provide education to a specific learner or learners. Factors related to the learner (who is party to the case) include his or her rights, which include the right to education, dignity, equality, and to receive education in the language of his or her choice; his or her age; educational needs; emotional security ('settledness', happiness, friendships); and the option of minimising disruption. Factors related to learners who are not party to the case include those learners' rights as well as the possible impact of the decision on them and on their education. Situational factors include the circumstances of the particular case. Over and above these factors, the value of legality and the rule of law must be considered.

In order to promote the observance and application of the 'child's best interests' standard in education, it is recommended that the standard should be pertinently included in education-specific law and policy. This policy should preferably include a list of factors that the principal, educators, SMTs and governing bodies could use to guide them on determining the best interests of a learner, a group of learners or the total learner population.

The 'best interests of a child' standard must thus be observed and applied in the education context, not only because it is a legal mandate, but because if it is not done, it will be impossible to give effect to a child's right to a basic education.