

Schools and Obligations to Protect Learners Against Sexual Offenses

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Introduction

Schools have many legal obligations to address the problem of sexual violence and harassment by educators, particularly in the areas of screening educators, reporting abuse, and conducting investigations and disciplinary proceedings. However, guidelines distributed to schools by the national government are unclear and incomplete regarding these obligations. To compound the problem, the Department of Basic Education stated in 2012 that only about 12% of public schools had access to materials and information regarding sexual violence prevention and management.¹

Ensuring that Teachers are Not Registered as Sex Offenders or Dangers to Children

In 2008, the Department of Basic Education distributed *Guidelines for the Prevention and Management of Sexual Violence & Harassment in Public Schools*. These guidelines provide basic information about the procedures necessary to address sexual abuse against learners in public schools.² However, the guidelines do not point out the need to check whether a particular teacher is listed on the National Child Protection Register (NCPR), the National Register for Sex Offenders (NRSO), or the SACE Register. The NCPR and NRSO are lists of individuals found unfit to work

¹ CTR. FOR APPLIED LEGAL STUDIES, UNIV. OF THE WITWATERSRAND SCH. OF LAW & CORNELL LAW SCH.'S AVON GLOB. CTR. FOR WOMEN AND JUSTICE AND INT'L HUMAN RIGHTS CLINIC, *SEXUAL VIOLENCE BY EDUCATORS IN SOUTH AFRICAN SCHOOLS: GAPS IN ACCOUNTABILITY 18* (2014), *available at* http://ww3.lawschool.cornell.edu/AvonResources/Report_on_Sexual_Violence_by_Educators_in_South_African_Schools_FINAL.pdf.

² NAT'L DEP'T OF EDUC., *GUIDELINES FOR THE PREVENTION AND MANAGEMENT OF SEXUAL VIOLENCE & HARASSMENT IN PUBLIC SCHOOLS* (2008).

with children or convicted of sexual offenses against children, while the SACE Register contains the names of all individuals qualified to teach and who have not been removed for violating the code of professional ethics. Despite the law requiring schools to screen each new teacher against these registers, the DBE's guidelines are silent in this regard.

The Western Cape Education Department's *Abuse No More Protocol* does include the form for schools to check whether an educator is listed on the NCPR³. However, the protocol only makes a brief reference to the NRSO without any information about how to access this register,⁴ and has no information about the SACE Register.

In order to check all three registers, schools have a complex process to go through: a school must require its teachers to furnish personal information,⁵ present a certificate from SACE,⁶ and obtain a set of fingerprints from a police station,⁷ while a school official must obtain a certified copy of his or her own identity document⁸ and check the SACE online system to ensure that an educator's certification has not been revoked after the issuance of a certificate⁹. It's therefore crucial that government provides schools with complete and accurate information about this process.

³ W. CAPE EDUC. DEP'T, ABUSE NO MORE PROTOCOL 30 (2014), *available at* <https://www.westerncape.gov.za/text/2014/October/amended-abuse-no-more-protocol.pdf>.

⁴ *Id.* at 27.

⁵ W. CAPE EDUC. DEP'T, ABUSE NO MORE PROTOCOL 30 (2014), *available at* <https://www.westerncape.gov.za/text/2014/October/amended-abuse-no-more-protocol.pdf>.

⁶ South African Council for Educators Act 31 of 2000 § 24.

⁷ Criminal Law (Sexual Offenses and Related Matters) Regulations, GN R.561 of GG 8892 (22 May 2008).

⁸ W. CAPE EDUC. DEP'T, *supra* note 5.

⁹ SACE EDUCATOR STANDING, <http://www.saceonline.co.za/> (last visited June 29, 2015).

Unfortunately, it's difficult to assess how many schools are complying with the teacher verification process. A recent government press release indicated that the Department of Social Development received 63 664 inquiries into Part B of the NCPR during the 2014/2015 financial year.¹⁰ If all of these inquiries came from schools, this would mean that each school submitted an average of two to three inquiries.¹¹ It is unlikely, however, that schools were the source of all or even most of the inquiries, since many organisations which provide services to children are required to check the register¹². It's likely that at least some schools have hired or were already employing educators without confirming their NCPR status.

The Duty of Teachers and Other School Employees to Report Sexual Abuse

School employees have a legal duty to report sexual abuse. In terms of the Children's Act, teachers, among other specified professionals, must report sexual abuse of a child to a designated child protection organisation, the provincial department of social development, or the police.¹³ In addition, the Sexual Offenses Act requires that any person who knows of a sexual offense against a child must immediately inform the police,¹⁴ and makes a failure to do so punishable by a fine and/or imprisonment up to five years.¹⁵

¹⁰ *Social Development on Child Protection Register*, SOUTH AFRICAN GOVERNMENT (June 3, 2015), <http://www.gov.za/speeches/social-development-child-protection-register-3-jun-2015-0000>.

¹¹ In 2010 there were 25 850 schools in South Africa. *Number of Schools in SA Drops – Survey*, NEWS24 (Feb. 29, 2012, 1:33 PM), <http://www.news24.com/SouthAfrica/News/Number-of-schools-in-SA-drops-survey-20120229>.

¹² Children's Act 38 of 2005 § 123.

¹³ *Id.* at § 110.

¹⁴ Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007 § 54.

¹⁵ *Id.*

Despite this, the DBE's guidelines mention reporting to the police or social workers only in passing,¹⁶ and the reporting requirements in the Children's Act and Sexual Offences Act are left out of the chart indicating procedures to be followed in cases of sexual violence perpetrated by educators¹⁷.

The Western Cape's protocol is somewhat more complete, including summaries of the reporting requirements sections of the Children's Act and Sexual Offences Act.¹⁸ The stated procedures to follow after a learner has told an educator of abuse perpetrated against him or her include reporting to the police and a school social worker.¹⁹ One annexure provides a basic guide to identifying child abuse,²⁰ although it does not clarify the level of certainty that triggers mandatory reporting. The annexures of the Western Cape guidelines also include spaces for filling in the contact numbers for the Department of Social Development, police, and welfare organizations in each area,²¹ as well as a five-page form for reporting abuse pursuant to the Children's Act, which requests personal information including identification number and contact details for the abused child, the alleged abuser, and the child's parents²².

But it appears these procedures are not being followed. According to one national study, when learner victims reported sexual assault in schools, the person receiving the report took any form of

¹⁶ NAT'L DEP'T OF EDUC., GUIDELINES FOR THE PREVENTION AND MANAGEMENT OF SEXUAL VIOLENCE & HARASSMENT IN PUBLIC SCHOOLS 10, 14 & 18 (2008).

¹⁷ *Id.* at 16.

¹⁸ W. CAPE EDUC. DEP'T, *supra* note 5, at 4–5.

¹⁹ *Id.* at 7, 9, 11.

²⁰ *Id.* at 23–24.

²¹ *Id.* at 15.

²² *Id.* at 16–20.

action in only 63.8% of cases.²³ Of those who did take action, only 8.4% informed the police and 3.4% reported the matter to the school.²⁴ The same study says that 49.7% of learner victims of sexual assault in schools would inform an educator of the offense²⁵ suggesting that a significant number of school employees fail to report what they know – in direct violation of the Sexual Offenses Act and the Children’s Act. Perhaps unsurprisingly – given poor dissemination and lack of clarity in national guidelines - interview research has indicated that some educators have conflicting understandings of the procedures for reporting sexual abuse.²⁶

Investigating and Disciplining Educators Accused of Sexual Misconduct – A Conflict in the Law

Schools are also responsible for conducting internal investigations and disciplinary proceedings when an educator is accused of sexually abusing a learner. These proceedings are governed by the Employment of Educators Act and are separate from any criminal trial or hearing before the South African Council for Educators (SACE).²⁷

In general, the guidelines from the national and provincial governments provide only minimal information to schools about these internal hearings. The national guidelines provide an excerpt from the Employment of Educators Act, stating that educators found guilty of sexual assault on,

²³ This figure covers all report recipients, not just educators, but does not include reports of sexual offenses not classified as assault. PATRICK BURTON & LEZANNE LEOSCHUT, SCHOOL VIOLENCE IN SOUTH AFRICA: RESULTS OF THE 2012 NATIONAL SCHOOL STUDY 43 (2013).

²⁵ *Id.* at 43.

²⁶ See CTR. FOR APPLIED LEGAL STUDIES, UNIV. OF THE WITWATERSRAND SCH. OF LAW & CORNELL LAW SCH.’S AVON GLOB. CTR. FOR WOMEN AND JUSTICE AND INT’L HUMAN RIGHTS CLINIC, *supra* note 1, at 22.

²⁷ Employment of Educators Act 76 of 1998 § 17–18.

or a sexual relationship with, a learner must be dismissed.²⁸ The Western Cape protocol contains slightly more information, providing brief descriptions of children's rights and methods for making children more comfortable during disciplinary hearings²⁹, as well as an excerpt from the law with the required sanctions for educators found guilty³⁰.

Excerpts from the law, however, may not be enough to clarify schools' obligations. This is both because the required procedures are complex and because the law itself, insofar as it regulates sanctions for sexual misconduct, contains a notable inconsistency. The Employment of Educators Act provides that an educator *may* – but not *must* – be dismissed for rape, and only requires dismissal when an educator sexually assaults a learner or has a sexual relationship with a learner of the school at which the accused educator is employed.³¹ Thus, the Employment of Educators Act seems to leave the dismissal of educators who have committed other forms of sexual assault or rape to the discretion of the school or DBE. In contrast, the Children's Act and the Sexual Offenses Act, make it illegal to employ anyone who has raped or committed indecent assault against a child in a position with access to children.³² School officials taking a course of action that appears to be permitted by the Employment of Educators Act, then, might be directly violating other legal requirements.³³

²⁸ NAT'L DEP'T OF EDUC., *supra* note 17, at 15.

²⁹ W. CAPE EDUC. DEP'T, *supra* note 5, at 9, 27.

³⁰ *Id.* at 26.

³¹ Employment of Educators Act 76 of 1998 § 17.

³² Children's Act 38 of 2005 § 120, 123, Criminal Law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007 § 42, 45.

³³ See CTR. FOR APPLIED LEGAL STUDIES, UNIV. OF THE WITWATERSRAND SCH. OF LAW & CORNELL LAW SCH.'S AVON GLOB. CTR. FOR WOMEN AND JUSTICE AND INT'L HUMAN RIGHTS CLINIC, *supra* note 1, at 26–27 (pointing out this inconsistency).

Information from provincial departments of education provide little insight into what disciplinary measures have actually been taken against teachers who commit sexual offences. Because the categories provided in the departmental annual reports do not always clearly identify sexual offenses and because the reports do not specify what types of misconduct led to what types of sanctions, it is difficult to determine what final action was taken against teachers who committed sexual abuse.³⁴

While it's difficult to assess the full extent of the problems in the the law surrounding sexual misconduct in schools by educators, and the implementation of this law, there is certainly cause for serious concern. An overarching problem is the lack of information, or of helpful information, provided to schools about their legal obligations. It seems possible, then, that simply providing more information to schools would result in more effective implementation of procedures to prevent and address sexual abuse by educators.

³⁴ *See, e.g.*, W. CAPE DEP'T OF EDUC., ANNUAL REPORT 2013/2014 175 (2014), *available at* <http://www.wcpp.gov.za/sites/default/files/Annual%20Report%20-%20WCED%202014%20-%20Vote%205.pdf>.