Advocating for Mediation as a means of addressing underlying issues with Discipline at Public High Schools in South Africa

Minor Dissertation

LLM in Dispute Resolution

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1. Introduction and Background

1.1 History of Discipline in South Africa

The term 'discipline' has multiple meanings.[1] Firstly, discipline is a form of education or training. It teaches socially acceptable behaviour and establishes order within society.[2] Children are taught to be kind to others, to say please and thank you, and not to steal. These lessons ultimately teach children about love, acceptance, and respect.[3] Thus ensuring that future generations are able to integrate into society and that as adults they will maintain this socially responsible society. Discipline can also be a form of punishment.[4] Used to correct improper behaviour or compel obedience.[5] It creates a power imbalance with the discipliner having authority and power over the person in need of discipline.[6] There are other meanings, but these are the two that will be spotlighted in this paper.

Historically, parents were given the important responsibility for their children's upbringing and care.[7] A responsibility divinely set in the book of Proverbs in the Christian Bible.[8] There are several scriptures in the Christian Bible that make references to the relationship between the parent and the child. These include but are not limited to the following:

- 'A wise child accepts a parent's discipline; a mocker refuses to listen to correction.'[9]

[1] Pitsoe, V & Letseka, M *Foucalt and School Discipline: Reflections on South Africa* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1526.
[2] Ibid at 1525.
[3] Ibid at 1526.
[4] Ibid at 1526.
[5] Ibid at 1526.
[6] Ibid at 1526.
[7] *Freedom of Religion v Minister of Justice* 2020 (1) SA 1 (CC) at para 8 and Oosthuizen, IJ *The in Loco Parentis Role of the Teacher: A Relationship Perspective* (1992) 57 Koers 1 at 123.
[8] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at 3-4; Pitsoe & Letseka op cit note 1 at 1528.
[9] *The Holy Bible, New Living Translation* (2004) Tyndale House Foundation. at Proverbs 13:1

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- 'Those who spare the rod of discipline hate their children. Those who love their children care enough to discipline them.'[10]; and
- 'To discipline a child produces wisdom, but a mother is disgraced by an undisciplined child.'[11]

Chastisement was believed by some traditional Christian parents as a necessary action for the proper upbringing of a wise and obedient child[12]. Notwithstanding, the responsibility of raising a child was also a legal one.[13] Under common law, parents held the legal right to use corporal punishment on their children. Corporal punishment is the use of physical forms of corrective discipline such as spanking.[14] As a result, moderate chastisement was an acceptable common law defence against an assault charge to correct a child's improper behaviour.[15] This common law right of moderate chastisement could be *in loco parentis* delegated to teachers (and schools).[16] This allowed teachers to administer corporal punishment to correct a learner's improper behaviour 'in the place of the parent'.[17]

However, from the late nineteenth century, there began a shift in the understanding of child rights and human rights.[18] Legislation such as the Child Care Act[19] began to afford children more protections.[20] The Constitutional Court (CC), in the 2008 case of *S v M*, stated that a child is a person distinct from their parents and they have their own legal rights that deserve primary consideration and protection.[21] Thus affirming this new position. In that case, the Court had to consider the impact of the best interest of the child standard in relation to the sentencing of M, a single mother with three children.[22] Later in 2018, the concerns regarding the constitutionality of corporal punishment in the home were brought before the court.[23] In *YG v S*, the court had to deal

[10] Ibid at Proverbs 13:24.
[11] Ibid at Proverbs 29:15.
[12] Pitsoe & Letseka op cit note 1 at 1528.
[13] *Freedom of Religion* supra note 7 at para 7-11.
[14] Ibid at para 7.
[15] *YG v S* 2018 (1) SACR 64 (GJ) at para 5.
[16] Oosthuizen, IJ supra note 7 at 130.
[17] Ibid at 126.
[18] *Freedom of Religion* supra note 7 at para 9.
[19] Child Care Act no 74 of 1983.
[20] *Freedom of Religion* supra note 7 at para 9.
[21] *S v M* 2008 (3) SA 232 (CC).
[22] Ibid at para 1-2.
[23] *YG v S* supra note 15 at para 20.

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with the common law defence of moderate or reasonable chastisement.[24] The appellant was charged with assault with intent to do grievous bodily harm against his son.[25] The appellant alleged that he was merely exercising his parental right to chastise in response to his son's ill behaviour.[26] The court held that the defence infringed on the child's rights to freedom and security, equality and dignity.[27] Thus, the appellant's method of discipline was unconstitutional.[28] This decision was upheld by the CC on the basis that the child's right to dignity was unjustifiably limited by the common law defence.[29] Mogoeng CJ highlighted and encouraged the use of less restrictive means- also known as positive parenting approaches- to administer discipline instead. Approaches that focus more on what children 'ought to do' and not what they 'should not do'.[30] To put this in simpler terms, the focus should not be on enforcing compliance through fear-based tactics. Rather the focus should be on promoting conviction-based compliance. Children ought to want to do the right thing. This approach promotes self-discipline.

The South African Schools Act[31] was enacted in 1996 and made it an offence to administer corporal punishment in public schools. This was done in order to bring school discipline in line with the constitutional rights of learners- which includes the right to freedom and security of persons.[32] In *Christian Education v Minister of Education*[33], the CC dealt with whether the statutory prohibition of corporal punishment. Parents of learners at private schools brought the matter before the court.[34] The parents claimed that they should be allowed to give consent allowing independent schools to use corporal punishment to discipline their children.[35] The court held that the generality of the law needed to be upheld and thus corporal punishment was prohibited in private schools, regardless of religion.[36]

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[24] Ibid at para 20.
[25] Ibid at para 1-3.
[26] Ibid at para 1-4.
[27] Ibid at para 85 read with para 36.
[28] Ibid at para 85.
[29] *Freedom of Religion* supra note 7 at para 73.
[30] Pitsoe & Letseka op cit note 1 at 1528.
[31] South African Schools Act 84 of 1996 (School's Act') at s10.
[32] Guidelines for consideration of governing bodies in adopting a code of conduct for learners (GN 776 of 1998) ('Guidelines') at guideline 4.
[33] *Christian Education South Africa* supra note 8.
[34]Ibid at para 2-3.
[35] Ibid at para 3.
[36] Ibid at para 52.

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In light of the prohibition of corporal punishment at schools, the School's Act went on to establish the code of conduct. The code of conduct is a written document establishing a disciplined and orderly school environment.[37] The purpose of the code of conduct is to establish positive discipline that is not punitive in nature but rather facilitates constructive learning.[38] This new disciplinary system would incorporate alternative disciplinary measures in place of corporal punishments.[39] Disciplinary proceedings are an alternative disciplinary measure explicitly prescribed in the School's Act as a form of discipline.[40] In the next chapter, I will look at this measure in greater detail.

1.2 The Research

1.2.2 Problem statement

More than two decades have gone by since this 'new' positive disciplinary system set out in the School's Act was established. The goal of the disciplinary system is to encourage responsibility of behaviour and self-discipline.[41] Self-discipline is the ability to be accountable for one's own behaviour.[42] Learners should want to act accordingly without being told and without fear of punishment.[43] However, the problem identified by the research is that the current disciplinary measures have not been effective in teaching learners' self-discipline.[44] The measures have not positively changed indiscipline plaguing schools.[45]

1.2.1 Research question

With this background, the question that should be asked is whether the disciplinary procedures in public high schools in South Africa achieve the purpose envisioned by its legislators. This requires a consideration of what the applicable laws are regarding the school disciplinary process at high schools in South Africa. Whether there are any challenges with the process. If this

[37] GN 776 supra note 32 at guideline 1.4.
[38] GN 776 supra note 32 at guideline 1.4.
[39] Foncha, JW et al *An Investigation into the Disciplinary Measures used in South African Schools: How Effective are they to the Learners?* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1160.
[40] Schools Act supra note 31 at s8.
[41] Foncha, JW op cit note 39 at 1160.
[42] Ibid at 1163.
[43] Ibid at 1163.
[44] Ibid at 1163.
[45] Ibid at 1163.

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is the case then whether mediation could be a suitable disciplinary measure to address and resolve those problems.

1.2.3 Aim of research

The research aims to uncover a disciplinary measure that would effectively teach self-discipline. A disciplined school environment allows for effective education and learning.[46] Put differently, discipline is necessary for the success of the schooling environment.[47] This would address the rising concern of indiscipline and school safety.[48] As a ripple effect, schools can expect an increase in teaching time and an improvement in school culture.[49]

1.2.4 Significance

There is a problem of bullying in South African schools.[50] The current school discipline process is failing to address this problem. Instilling self-discipline skills in learners is important now more than ever. Learners need to feel safe going to school.

1.2.5 Method

This research relies solely on a literature review. I will be making use of sources such as statutes, case laws, articles, internet sources and textbooks.

1.2.6 Outline of chapters

Chapter two will lay the foundation with discussions on the rights of learners- namely the right to education and the right to a fair hearing- and the applicable laws relating to the disciplinary proceedings at high schools in South Africa. Thereafter considering the challenges with the current disciplinary process.

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[46] GN 776 supra note 32 at guideline 1.1.
[47] Pitsoe & Letseka op cit note 1 at 1525.
[48] Ibid at 1163.
[49] Varnham, S *Seeing Things Differently: Restorative Justice and School Discipline* (2005) 3 Education and the law 17 at 90.
[50] Recent bullying incidents: Mpumalanga Education Department 'Mpumalanga Education condemns bullying incident' 31 January 2022, available at *https://www.gov.za/speeches/mpumalanga-education-condemns-bullying-incident-31-jan-2022-0000* , accessed on 10 February 2022; Tshikalange, S 'The pain is still there', says family of Limpopo teen who committed suicide after being bullied 28 December 2021 available at *https://www.timeslive.co.za/news/south-africa/2021-12-28-the-pain-is-still-there-says-family-of-limpopo-teen-who-committed-suicide-after-being-bullied/* , accessed on 10 February 2022; and Patrick, A 'Grade 8 pupil suspended for setting girl's hair on fire in class' 19 May 2021, available at *https://www.timeslive.co.za/news/south-africa/2021-05-19-grade-8-pupil-suspended-for-setting-girls-hair-on-fire-in-class/* , accessed on 10 February 2022.

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Chapter three will focus on mediation. I will look at the terms, concepts and process of mediation. As well as its benefits, drawbacks and whether mediation could be used to resolve these challenges identified in the disciplinary process.

Chapter four will be a comparative study of the use of peer mediation in the school discipline context in New Zealand and the United States, and peer counselling measures in Kenyan schools. As well as the lessons South African schools can take when considering the implementation of peer mediation.

Chapter five will have a discussion on whether it makes a difference to implement mediation as an alternative to disciplinary proceedings or as a preliminary step prior to a hearing. Thereafter concluding the discussions with some reflections.

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2. The State of School Discipline

This chapter will focus on the laws relating to disciplinary proceedings in South African public schools. Firstly, I will consider the rights of learners in disciplinary hearings. Learners have the right to education and also the right to a fair disciplinary hearing. Thereafter, I will unpack the rules relating to disciplinary hearings, suspension, and expulsion.

2.1 The Right to Education

2.1.1 The Constitution

Education is vital for the development of children and it is paramount for the advancement of our democratic society.[51] The South African Constitution[52] provides that:

> 'Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
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> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'[53]

This socio-economic right is twofold. Firstly, the right to basic education must be realised immediately.[54] The Department of Education has defined basic education as 'the legal entitlement, every person has, to begin and complete education that meets the learning needs appropriate to the age, experience and of the person'.[55] This right is only available until grade nine or until the age of 15, whichever comes first.[56] This means that for those with this legal entitlement, school is compulsory and the government has a responsibility to ensure such persons have access to school. However, this right may be justifiably limited so long as it is done as a matter of general application.[57] In other words, if the right to basic education is to be limited, it must apply generally

[51] South African Schools Act 84 of 1996 (School's Act') at preamble.
[52] Constitution of the Republic of South Africa, 1996.
[53] Ibid at s29(1).
[54] *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) at para 37.
[55] The White Paper on Education and Training (GN 196 of 15 March 1995) ('white paper'); *AB v Pridwin Preparatory School* 2020 (5) SA 327 at para 160-162; and United Nations Educational, Scientific and Cultural Organization World Declaration on Education for All (1990) at Article 1.
[56] *Juma Musjid* supra note 54 at para 38.
[57] Ibid at para 37 and Constitution supra note 52 at s36.

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and not target a specific person.[58] Rule of law requires that the law be clear, be accessible and be of general application.[59]

Secondly, section 29(1)(b) of the Constitution places a positive obligation on the state to progressively realise the right to further education. This right is available to learners above grade nine or the age of 15.[60] The Constitutional Court, in *Grootboom*, stated the government should actively implement policies and measures that are capable of progressively fulfilling their obligation[61]. Although in that case, the Court dealt with the constitutional right to housing[62], it is still applicable to the right to education. Thus 'progressively realise' creates an internal limitation on the right to further education and provides the Government with a legal shield in the absence of available resources. The Constitutional drafters acknowledged that the State could not provide everyone with further education immediately. The government does not have the necessary resources to achieve this goal. Therefore, the government must take reasonable measures to provide further education.[63] Additionally, the right to further education must be made 'progressively available'.[64] State is required to overtime, and within available resources, continue to further realise the rights of everyone.[65] State has to make progressive, and not take regressive, steps. Lastly, further education must be made progressively… accessible'.[66] This means that the State must ensure that further education is accessible to all people regardless of race, gender, disability, geographic location and economic background.[67] Ensuring all people are treated equally and with dignity.[68]

2.1.2 International Law

[58] *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) at para 98.
[59] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at para 102.
[60] *Juma Musjid* supra note 54.
[61] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 at para 39-44.
[62] Constitution supra note 52 at s26 and *Grootboom* supra note 62.
[63] *Grootboom* supra note 62 at para 82.
[64] Constitution supra note 52 at s29(1)(b).
[65] *Grootboom* supra note 62 at para 46.
[66] Constitution supra note 52 at s29(1)(b).
[67] *Grootboom* supra note 62 at para 44.
[68] Ibid at para 44.

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The right to education is also protected on an international level. Under the Convention on the Rights of the Child[69]:

> 'States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>
> (a) Make primary education compulsory and available free to all;
>
> (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
>
> …
>
> 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.'[70]

Similar to the Constitution, the Convention also recognises that the States are not able to ensure that all children have access to education suddenly. That the right to education has to be progressively realised.[71] This is monitored by the United Nations Committee on the Rights of the Child.[72] The Committee ensures that States who have ratified the Convention are compliant and that States create and implement and policies that progressively realise the right to education.[73] Additionally, the Convention calls for free education.[74] As a result South Africa, a State Party to the Convention, should actively work towards making education free for all primary level and secondary level children.[75]

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[69] The Convention on the Rights of the Child, United Nations General Assembly, adopted 20 November 1989 (Convention''). South Africa signed the treaty in 1993 and later ratified on 16 June 1995.
[70] Ibid at Article 28.
[71] Ibid at Article 12 and Constitution supra note 52 at s29(1)(b).
[72] Convention supra note 69 at Article 43.
[73] Ibid at Article 43.
[74] Ibid at Article 12.
[75] Convention 12

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Moreover, the African Charter on the Rights and Welfare of the Child[76] makes use of the same wording in article 11[77]. One could assume the Charter took inspiration from the Convention since the Charter was enacted a year later than the Convention. This would not be surprising since most of the signatories of the African Union Charter are also signatories of the United Nations Convention.

2.2 The Right to a Fair Hearing

Effective education and learning at schools depend on the establishment of a purposeful and disciplined school environment.[78] Discipline is an important feature of education.[79] Without school discipline, schools cannot run effectively. [80] In South African public schools, the discipline of serious misconduct is conducted through a disciplinary proceeding (also known as a disciplinary hearing).[81] The concept of a disciplinary hearing will be discussed later on in this chapter. Disciplinary proceedings are to be 'fair, just, ... and educative'.[82] So what makes a hearing fair and just?

2.2.1 The Constitution

[76] African Charter of the rights and welfare of the child, African Union Ordinary Session of the Assembly of Heads of State and Government, adopted July 1990 ('Charter').
South Africa has signed and ratified this treaty.
[77] Ibid at Article 11:
1. Every child shall have the right to education. ...
3. State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
(a) provide free and compulsory basic education:
(b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all; …
5. State Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.'
[78] *White paper* supra note 55 and Guidelines for consideration of governing bodies in adopting a code of conduct for learners (GN 776 of 1998) ('Guidelines') at guideline 1.1.
[79] Pitsoe, V & Letseka, M *Foucalt and School Discipline: Reflections on South Africa* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1525.
[80] Ibid at 1525.
[81] Smith, A et al *Experiences and challenges of evidence leaders in learner disciplinary hearings in public schools* (2015)18 Potchefstroom Elec LJ 6 at 2370.
[82] GN 776 of 1998 supra note 78 at guideline 7.2.

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School disciplinary hearings must be 'lawful, reasonable and procedurally fair'.[83] Lawfulness requires that the hearing be lawfully mandated by the specific school's code of conduct.[84] Thus the code of conduct must adequately set out the procedural and substantive rules of the disciplinary hearing. Rules such as the definition of each misconduct, voting and composition of the disciplinary committee. Additionally, the disciplinary committee must have been lawfully constituted and have the requisite authority to hear and decide on the disciplinary matter.[85] The decision taken needs to be reasonable.[86] A reasonable decision is one that is both rational and proportional.[87] For a hearing to be procedurally fair, the party's procedural rights to be heard must be protected.[88] Mogoeng CJ said 'Procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered'[89].

In addition, there is s28(2) of the Constitution. It requires that the interest of a child, which is any person under the age of 18, should be given 'paramount importance' in all matters that concern them.[90] The Constitutional Court (CC) has held that this is both an independent right that should be protected and a guiding principle that should permeate all laws concerning a child.[91] This is necessary because children are vulnerable members of our society.[92] Their dependency on their parents or caregivers for financial, emotional and developmental support makes them vulnerable. Thus, s28(1) of the Constitution and other measures need to be put in place to ensure their safety.[93] Other measures such as require all learners appearing before a disciplinary hearing to be accompanied by a parent or representative of the parent.[94]

Section 28 of the Constitution applies in all situations concerning the child. Thus, it could be concluded that it must be given paramount importance in their school disciplinary proceedings

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[83] Constitution supra note 52 at s33.
[84] Hoexter, C *Administrative Law in South Africa* 2 ed (2012) at 256.
[85] Ibid at 256-257.
[86] Constitution supra note 52 at s33.
[87] Hoexter, C op cit note 84 at 340-346.
[88] Ibid at 363.
[89] *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA30 (CC) at para 64.
[90] Constitution supra note 52 at s28(2).
[91] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) at para 65.
[92] *Pridwin* supra note 55 at para 142.
[93] Ibid at para 142.
[94] School's Act supra note 51 at s8(6).

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involving a child. It is in the child's interest to be given a fair hearing. This includes the right to present arguments before decisions relating to blameworthiness and to sanctions are made.[95] Furthermore, due consideration must be given to the potential impact of all decisions on the learner's legal rights and social well-being.[96] A potential impact could include the effect on the learner's right to education if suspended or expelled. As well as the likelihood of the learner getting involved in criminal activity if suspended or expelled.

2.2.2 International Law

The child's right to make representation is also protected in International Law. Article 12 of the Convention provides that:

> '... [a] child who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'[97]

Similarly, Article 4(2) of the Charter provides that:

> '... a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard … and those views shall be taken into consideration.'[98]

Allowing learners to participate and to be heard in their disciplinary hearing is very important. Firstly, the decision will have an impact on them. In the short term, it may mean not being able to physically attend classes and interact with their classmates. In the long term, it may affect the prospects of passing the school year or ultimately matric. Secondly, allowing learners an opportunity to speak and feel heard promotes information sharing and creates open dialogue.[99] This is important because the disciplinary committee will be in a better position to make a decision if they have all the facts and evidence.

The right to make representation, as set out in both the Charter and the Convention, are in accordance with the best interest of the child principle. It is in the best interest of the child to be

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[95] Regulation relating to disciplining, suspension, and expulsion of learner at public schools in the western cape (Provincial Notice 365 of 2011) ('Regulation') at reg 7(1) and 7(7).
[96] *Pridwin* supra note 55 at para 149.
[97] Convention supra note 69 at Article 12.
[98] Charter supra note 76 at Article 4(2).
[99] Pridwin supra note 55 at para 237.

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allowed to share their views in all matters that affect them. Khampepe J noted that although parents could speak on behalf of their child, allowing a child the opportunity to speak is part and parcel of the best interest of the child standard.[100]

Noticeably, where the Constitution provides for 'paramount importance'[101], the Charter provides for 'primary consideration'[102]. In the South African case of S v M, the CC stated that paramount importance is 'emphatic'.[103] Put differently, paramount importance is stronger than primary consideration[104]

Furthermore, it seems the scope of the representation differs between the Convention and the Charter. The Convention states the weight of the child's views, to be heard and considered, will depend on the age and maturity of the child.[105] While the Charter only states that the views of those capable of communicating will be heard and given primary consideration. It gives no similar limitation, of age and maturity, on the child's views. This raises the question of whether even the view of a toddler must also be heard.

2.2.3 Foreign Law - United States

The right to due process in terms of school discipline is also protected in the United States. The United States Supreme Court, in *Goss v Lopez*, held that the learners facing suspension (for up to 10 days) have a due process right to notice and a disciplinary hearing.[106] At the very least, learners should be allowed an opportunity to hear the evidence against them and make representation.[107] This matter was brought before the court by students, who had been suspended for 10 days following widespread student unrest in the State of Ohio.[108] The principals had

[100] Ibid at para 24.
[101] Constitution supra note 52 at s28(2).
[102] Charter supra note 76 at Article 4(2).
[103] *S v M* 2008 (3) SA 232 (CC) at para 25 and Reyneke, Reyneke, JM *The best interest of the Child in School discipline in South Africa* (2013) unpublished thesis: Tilburg University at 234,
[104] Reyneke, JM op cit note 103 at p234,
[105] It must be highlighted that this wording has been adopted into South African law. Children's Act 38 of 2005 at s10- 'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'
[106] McMasters, J *Mediation: New Process for High School Disciplinary Expulsions* (1990) 84 Northwestern University Law Review 2 at 740.
[107] Pattison, BM *Questioning school discipline; due process, confrontation, and school discipline hearings* (2008) 18 Temple Political & Civil Rights Law Review 1 at 51.
[108] McMasters, J op cit 106 at 740.

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suspended the learners without notice of suspension or a disciplinary hearing.[109] The principals argued that the Ohio Code allowed for a 10-day suspension or an expulsion where a learner had committed a misconduct.[110] The court noted that the Code protected the right to education.[111] Thus the right to education could not be withdrawn, on the basis of misconduct, if there had not been a fair hearing to determine if indeed the misconduct had occurred.[112]

The right to due process ensures that learners' other rights and interests are protected, and any limitations of their rights are done so fairly and with good reason. The right to due process, also allows the school to exercise their rights freely and with deference in accordance with the law.

Interestingly, the court stated that the right to basic education under the Ohio Code was available to citizens between the ages of five and 21.[113] This age range is much wider than our South African law. Basic education is available in South Africa until grade nine or until the age of 15 whichever comes first.[114] It also seems to go further than the Convention and the Charter- which distinguish primary education from secondary education.[115] The Code's age range seems to imply that the definition of basic education encompasses both primary and secondary education.

2.2.4 Common Law

Procedural fairness is based on two common law principles, namely, the *audi alteram partem* rule and the *nemo iudex in sua causa* rule. *Audi alteram partem* is a Latin phrase that means 'hear the other side'[116]. Common law recognises the need for those, who may be affected by the outcome of a decision, to be heard before the decision is made.[117] It safeguards their right to dignity.[118] Also it ensures decision-makers do not act arbitrarily.[119] Ngcobo J explained that audi alteram partem provides insurance against arbitrariness because the decision-maker, having

[109] Ibid at 740.
[110]Ibid at 740.
[111] Ibid at 741.
[112] Ibid at 741.
[113] Ibid at 741.
[114] Schools Act supra note51 at s3(1) and *Juma Musjid* supra note 54 at para 38.
[115] Convention supra note 69 at Article 28 and Charter supra note 76 at Article 11.
[116] Merriam-Webster.com 'Audi Alteram Partem Definition of Audi Alteram Partem' available at *https://www.merriam-webster.com/dictionary/audi%20alteram%20partem* accessed on 10 October 2021.
[117] Hoexter, C op cit note 84 at 363.
[118] Ibid at 363.
[119] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) at para 187.

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consulted all affected persons, would have all the facts available to make a fair decision.[120] Furthermore, this ensures that the decision is of greater quality since more information is made available to the decision-maker.[121] Thus in the context of a disciplinary hearing, the disciplinary committee should not take a decision without hearing first from the learner. The committee has a duty to act fairly.

The *nemo iudex in sua causa* principle translates to 'nobody shall be [a] judge in his own case'.[122] This principle speaks to bias and essentially means that decision-makers need to be, and seen to be, impartial in order to ensure the hearing and the decision are fair.[123] They cannot be allowed to make decisions based on their own personal beliefs over the facts.[124] For a party to request for the recusal of the decision-maker or for a decision to be set aside for bias, the Appellate Court said that there needs to be 'a reasonable apprehension' of bias in the mind of the party.[125] In other words, the person alleging bias does not need to prove that actual bias but rather an appearance of bias.[126] The latter being a lower burden of proof.

2.2.5 Statutory Law

'A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings'[127]. The Schools Act requires each school's code of conduct to make provision for due process at every step of the disciplinary process.[128] Due process requires proceedings to be both procedurally and substantively fair.[129] Procedural fairness, as alluded to earlier, requires the proceedings to be conducted in accordance with the procedural requirements.[130] For instance, the learner and the evidence leader are to be given an opportunity to present arguments and evidence.[131] Additionally, where it appears that a

[120] Ibid at para 187.
[121] Hoexter, C op cit note 84 at 363.
[122] MacMillan Dictionary.com 'Nemo Iudex In Causa (noun) definition and synonyms' available at *https://www.macmillandictionary.com/dictionary/british/nemo-iudex-in-causa-sua* accessed on 10 October 2021
[123] Hoexter, C op cit note 84 at 451.
[124]Ibid at 451.
[125] *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A) at p34.
[126] Hoexter, C op cit note 84 at 452- 453.
[127] Schools Act supra note 51 at s8(5).
[128] Ibid at s85.
[129] Smith, A op cit note 81 at 2374.
[130] Ibid at 2374.
[131] Provincial Notice 365 of 2011 at Reg 7(5).

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child witness may be exposed to undue mental stress from testifying at the hearing, an intermediary may be appointed.[132] The role of the intermediary is to be the go-between for that witness. [133]

Substantive fairness requires the decision to be based on fair and reasonable rules in the code of conduct.[134] Thus due process guarantees learners to a fair disciplinary proceeding.[135] Due process protects the rights and interests of affected learners.[136] Without it, a learner may be unduly excluded from receiving an education. Such exclusion may deprive them of, or weaken their chances at, a successful life.[137]

The evidence leader also has a part to play in ensuring a fair disciplinary hearing. The evidence leader acts akin to a prosecutor.[138] Their duties include conducting an initial investigation, drafting up the charge sheet, preparing arguments to support charges, and presenting arguments.[139] In the advancement of fairness, an evidence leader must act in the best interest of the school and the learner.[140] The best way of achieving the balance between these interests is to, firstly, present their case objectively.[141] This is in keeping with the notion of independence and impartiality. This ensures a fair consideration of all interests. Additionally, they should not knowingly misstate or falsify the version of events to suit their case.[142] Such could unduly prejudice the learner's case and result in an unfair disciplinary hearing.

2.3 Disciplinary Proceeding: Procedure

Section 8 of the Schools Act requires the School Governing Body (SGB), of all public schools, to establish its own code of conduct in consultation with the school's learners, their

[132] Schools Act supra note 51 at 8(7).
[133] Ibid at 8(7).
[134] Smith, A op cit note 81 at 2374.
[135] General No 776 supra note 78 at guideline 13.1.
[136] Pattison, BM op cit note 107 at 52.
[137] Ibid at 52. I must highlight that I use the word 'success' quite loosely. Success looks different to everyone. However, it is universally understood that education is an important factor in a person's quality of life and success.
[138] Smith, A op cit note 81 at 2372.
[139] Ibid at 2372.
[140] Ibid at 2385.
[141] Ibid at 2385.
[142] Ibid at 2385.

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parents and the teachers.[143] The code of conduct is a written document establishing the disciplined school environment.[144] It sets out the values, vision and principles of the school as well as the substantive and procedural rules of each school discipline.[145] It must provide a fair hearing and for relevant support measures to counsel learners involved in the hearing.[146] The purpose the code of conduct is to '[establish] a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process'[147]. The learner, the parent and other stakeholders in the school community must be given a copy of the adopted code of conduct.[148] They should also receive a new copy if amendments are made to the document.[149] The code of conduct is only enforceable against the learners of that particular school and therefore they have an obligation to comply with the code.[150] Thus any failure to comply may result in an investigation by the school's principal.[151] The investigation may include speaking to witnesses and accessing video footage, if any, to establish the facts.[152] After an investigation is conducted and there is sufficient evidence of the alleged breach of the code, a disciplinary hearing may be instituted against the learner.[153]

The hearing must be held no later than five school days after the learner has received notice of such hearing.[154] During this time, the learner may on reasonable grounds be suspended (for a maximum of seven school days) as a precautionary measure.[155] A suspension is the act of prohibiting a learner from physically attending the school in which they are enrolled at.[156] However, I must note that neither the Schools Act, the regulations or the guidelines make provision as to what constitutes a reasonable ground. Nevertheless, before the precautionary suspension is imposed, the learner must be allowed an opportunity to make representation in relation to the

[143] Schools Act supra note 51 at s8.
[144] Ibid at s8(2) and s8(5) and GN 776 of 1998 supra note 78 at guideline 1.
[145] GN 776 of 1998 supra note 78 at guideline 1.4 and 1.9.
[146] Schools Act supra note 51 at s8(5).
[147] Ibid at s8(2).
[148] GN 776 of 1998 supra note 78 at guideline 1.5.
[149] Ibid at guideline 1.5.
[150] Schools Act supra note 51 at s8(4).
[151] Provincial Notice 365 of 2011 supra note 95 at reg 2(1).
[152] Smith, A op cit note 81 at 2387.
[153] Provincial Notice 365 of 2011 supra note 95 at reg 2(1).
[154] Ibid at reg 5(1).
[155] Ibid at reg 2(2)
[156] Ibid at reg 1

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precautionary suspension.[157] However, if the learner has been suspended and a hearing must be held after seven calendar days, the SGB must first receive approval by the Head of the Department of Education ('HOD') for an extension of the suspension.[158] I would assume this is to safeguard the learner's right to due process. The notice shall include charges, sufficient information of the alleged misconduct, the date and time of the disciplinary hearing, the process in which the hearing will be conducted and the rights of the learners.[159] The court, in *Beauvallon*[160], said that in accordance with the principle of due process, the affected person must be informed of the 'gist' of the matter so that they can make 'meaningful' representation[161]. Additionally, the parents, or representative of the parent's choosing, must accompany the learner to the hearing.[162] However, and only with good reason can the hearing continue without the presence of a parent, or a representative.[163]

A disciplinary hearing is quasi-judicial in nature thus it is similar to a judicial court hearing but it is not technically a court of law.[164] At the hearing, the chairperson will begin by reading out the charges and asking the learner to plead to each respective charge.[165] The chairperson is required to ensure the learner understands the charges and the consequences associated with their plea.[166] Should the learner plead guilty, the learner still has the right to make representation regarding the possible sanctions such as suspension or expulsion.[167] Should the learner plead not guilty, the school and then followed by that the learner will be given an opportunity to present arguments, adduce evidence, cross-examine and re-examine.[168] During this process, the SGB or the governing body's disciplinary committee, who are presiding over the hearing, may ask questions of clarity.[169]

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[157] Ibid at reg 2(3) and reg 4(1)(a)
[158] Ibid at reg 2(5)
[159] Ibid at reg 5(1)
[160] *Minister of Education for the Western Cape v Beauvallon Secondary School* 2015 (2) SA 154 (SCA).
[161] Ibid at para 19.
[162] Schools Act supra note 51 at s8(6)
[163] Ibid at s8(6)
[164] Smith, A op cit note 81 at 2370-2371
[165] Provincial Notice 365 of 2011 supra note 95 at reg 7(3)
[166] Ibid at reg 7(4)
[167] Ibid at reg 7(4)
[168] Ibid at reg 7(1) and 7(5)
[169] Ibid at reg 7(5)(c) and (e)

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The disciplinary committee must comprise of at least five members, three of which should be members of the school governing body.[170] The chairperson must be a member of the SGB.[171] The disciplinary committee must be fair and impartial.[172] Thus any member of the committee who has a conflict of interest in the matter is not eligible to hear or be part of the decision-making process.[173] They would be ineligible. For instance, if they have a real or apparent personal relationship with a transgressor learner[174] because it affects their decision.[175] In that instance, it could be proven that there is a reasonable appearance of bias.[176] Thus that member of the disciplinary committee must be recused to preserve the fairness of the hearing.[177]

At the end of the disciplinary hearing, the disciplinary committee must make a ruling whether the learner is guilty or not of the alleged misconduct.[178] If the learner is found guilty, they may recommend a suitable sanction.[179] The sanction must be based on the evidence before them.[180] Additionally, the learner must be allowed an opportunity to make representation as to possible sanctions.[181] Sanctions may include detention, suspension and expulsion.[182] These sanctions are typically listed in a school's code of conduct.

The committee may hand down suspension as a correctional measure.[183] This form of suspension must not be longer than seven days, unless extended by the SGB.[184] It must be noted that a learner cannot be suspended for longer than 21 school days.[185] Again neither the Schools Act, the regulations or the guidelines explain the significance of 21 school days. I would assume

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[170] Ibid at reg 6(2)
[171] Ibid at reg 6(3)
[172] Ibid at reg 6(1)
[173] Ibid at reg 6(5)
[174] The transgressor learner being the learner accused of transgressing one or more of the rules in the code of conduct.
[175] Hoexter, C at 455.
[176] Hoexter, C at 452.
[177] Schools Act supra note 51 at s26
[178] Provincial Notice 365 of 2011 supra note 95 at reg 7(5)(f).
[179] Ibid at reg 7(7).
[180] Ibid at reg 7(7).
[181] Ibid at reg 7(6) and reg 7(7).
[182] Oosthuizen, IJ, Wolhuter, CC & Du Toit, P *Preventive or punitive disciplinary measures in South African schools: which should be favoured?* (2003) 68 Koers 4 at 472-473.
[183] Schools Act supra note 51 at s 9(1)(a).
[184] Ibid at s 9(1)(a) and Provincial Notice 365 of 2011 supra note 95 at reg 4(1)(b), 8(2).
[185] Provincial Notice 365 of 2011 supra note 95 at reg 4(2).

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keeping a learner out of school for any longer than a month would greatly affect the learner's prospects of completing the school year.

In *Phillips v Manser*, A learner had been suspended pending the HOD's decision whether to expel the learner or not.[186] The learner, with the assistance of his parents, instituted legal proceedings to declare the disciplinary hearing unfair and inconsistent with s9 of the Schools Act.[187] Although the case was dismissed, one point must be highlighted. Suspensions, whether precautionary or correctional, must be decided on by the SGB.[188]

Where the committee recommends expulsion, the recommendation and all the minutes and written evidence from the hearing are to be forwarded to the HOD for approval.[189] An expulsion is defined as the permanent prohibition of attendance of a learner from the school they were enrolled in.[190] The HOD has 14 days, after receipt of recommendations, to decide whether to expel the learner or not.[191] Should they decide not to expel the learner, a different and lesser sanction must be given or alternatively, the decision must be remitted to the SGB to decide a different and lesser sanction.[192] However, if the HOD does decide to expel the learner, they must inform the learner, their parents and the school, in writing and with good reasons.[193] The arrangement must be made for expelled learners, who are between the ages of seven and 15 or grade one and nine[194] to attend a different school in the province.[195] This is because these learners have a legal entitlement to basic education.[196] Furthermore, if a learner is expelled in the last term of the academic year, they must be allowed to write the final examination in a separate venue from their classmates.[197]

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[186] *Phillips v Manser and Others* 1998 JDR 0882 (SE) at 1.
[187] Ibid at 1.
[188] Ibid at 27.
[189] Schools Act supra note 51 at s9(1)(b) and Provincial Notice 365 of 2011 supra note 95 at reg 8(1)(b).
[190] Provincial Notice 365 of 2011 supra note 95 at reg 1.
[191] Schools Act supra note 51 at s9(2) and Ibid at reg 8(3).
[192] Provincial Notice 365 of 2011 supra note 95 at reg 8(4) and 8(5).
[193] Ibid at reg 8(6).
[194] Schools Act supra note 51 at s3(1) and Juma Musjid supra note 54 - These learners still have a right to basic education.
[195] Schools Act supra note 51 at s9(5) and Provincial Notice 365 of 2011 supra note 95 at reg 10(1).
[196] Constitution supra note 52 at s29(1)(a) and Ibid at s3(1).
[197] Provincial Notice 365 of 2011 supra note 95 at reg 10(3).

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The learner may appeal the decision of the HOD to their provincial Member of the Executive Council (MEC) of Education.[198] The MEC has 14 days, after the date of the HOD's decision, to overturn the expulsion and impose a different sanction.[199] Pending the MEC's decision, the learner must be allowed access to education.[200] This may include physical attendance at a different school in the province and may require HOD to take reasonable steps to protect the rights of the other learners.[201]

It must be highlighted that neither the Schools Act, the regulations nor the guidelines make provision for informal disciplinary processes or alternative discipline measures. Such forms of discipline are left to the SGB's discretion when drafting its school's code of conduct. Moreover, to each educator, when opportunities for discipline arise in the classroom.

It is clear that there are still some gaps in this area of the law. Unless a SGB is aware of the gaps, it is unlikely that they would make provisions addressing them in their specific school's code of conduct. Moreover, it would be unfair to expect every SGB to identify such gaps. There is room for the law to be developed to address the gaps and create clarity and certainty in the law. Potential development of the law could be the inclusion of mediation into the current disciplinary process. This will be discussed in more detail from chapter three.

The laws governing school discipline seem to consider the learner's rights. Specifically, the right to education and the children, fair hearing. Firstly, the legislation attempts to ensure access to education. This can be seen by the provision calling for alternative schools to be found for expelled learners, who have the right to basic education. As well as allowing learners expelled in the last term an opportunity to write the year-end examinations.[202] Secondly, it attempts to ensure that disciplinary hearings are fair. It is clear from above that the Schools Act and the regulations together have set out the procedure of the disciplinary hearing in some detail. From provisions relating to the notice of a hearing all the way to provisions relating to the appeal process. They also set out the authority and role of the committee. This despite the gaps mentioned earlier.

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[198] Schools Act supra note 51 at s9(4).
[199] Provincial Notice 365 of 2011 supra note 95 at reg 9(3).
[200] Ibid] at reg 10(3).
[201] Ibid at reg 10(3) and (4).
[202] Ibid at reg 10.

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But does this process adequately protect the right to education and the right to a fair hearing? I would argue not. The laws relating to the disciplinary process do not make a proper effort to keep the transgressor learner in school and learning. The law has not provided for what suspended learners should be doing in terms of continued learning during the suspension period. In terms of a fair hearing, how fair can a quasi-judicial hearing be if the evidence leader and the disciplinary committee have no legal education? Both prosecutors and judges undergo years of legal education before practising. Even if it can be argued that the disciplinary committee and the evidence leaders have training that prepares them for their role, this sort of training is not sufficient. Qualitative research conducted on the experiences of evidence leaders at public schools shows the majority of evidence leaders admitting that they had not received training for the role.[203] So how can a hearing be fair if stakeholders in the hearing do not understand their role?

In the rest of this chapter, I will discuss the challenges the current high school disciplinary system is faced with. It is noteworthy to mention that during my time acting as a representative on behalf of parents, whose children were facing disciplinary hearings, I observed several problems with the process. Next, I will draw your attention to two main problems and the impact that these problems have on the rights of the learner. Firstly, I will consider the retributive nature of the disciplinary hearings and thereafter I will consider whether the disciplinary hearings are in the best interest of the transgressor learner.

2.4 A Disciplinary process that is retributive and adversarial

As alluded to in chapter one, the purpose of the code of conduct is to create a disciplined and safe schooling environment.[204] The guidelines develop this further by calling for positive discipline and constructive learning.[205] However, the drafters seem to contradict themselves in their formulation of the formal disciplinary process. I will argue that the disciplinary proceedings are not positive in nature but rather retributive.

2.4.1 Retributive versus Restorative

[203] Smith, A op cit note 81 at 2387.
[204] Page 7 of chapter 1.
[205] Schools Act supra note 51 at s8(2) and General No 776 supra note 78 at guideline 1.4.

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Retributive justice takes the approach that where a rule has been broken, an appropriate punishment must be given because the offence was committed.[206] What is important is to determine what rule has been broken, who broke the rule and what would the appropriate punishment be for breaking this rule.[207] It has often and wrongly equated to vengeance, that is 'an eye for an eye, a tooth for a tooth'.[208] In Criminal law, the retribution is carried out by the State and not the victim.[209] The State is the one who creates the rule, enforces it, investigates all contraventions and punishes those found guilty.[210] This is similar to the school disciplinary process. It is the SGB that establishes the rule and enforces it.[211] The evidence leader, who is a teacher appointed by the school, investigates.[212] The SGB or its disciplinary committee determine blameworthiness and punish those found guilty.[213] In the retributive process the victim is not involved[214], rather they are left to be a spectator in the process.

Upon observation, it is evident that South Africa's criminal justice system takes a retributive approach. A person accused of committing a crime is brought before the court. Where the State is able to prove, beyond a reasonable doubt, that the accused is guilty, the Court has to hand down an appropriate punishment. The Constitutional Court, in *S v Makwanyane*, confirmed that punishment is rooted in retribution, prevention and deterrence.[215] The appropriate punishment is deserved and thus must be proportional to the seriousness of the crime committed.[216]

Restorative Justice is another approach to justice. This approach employs more reconciliative methods.[217] It was modelled on the practices of the *Māori* community in New

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[206] Terblanche, SS *A Guide to Sentencing in South Africa* 3ed (2016) at 184-185.
[207] Reyneke, JM & Pretorius, JL *Aligning School Discipline with the Best Interest of the Child: Some Deficits in the Legislative Framework* (2017) 35 Perspective in Education 1 at 124 and Reyneke, JM op cit note 103 at 433.
[208] Terblanche, SS op cit note 206 at 183 &188 and *The Holy Bible, New Living Translation* (2004). Tyndale House Foundation at Leviticus 24:19-21.
[209] Terblanche, SS op cit note 206 at 183.
[210] Reyneke, JM & Pretorius, JL op cit 207 at 117.
[211] Schools Act supra note 51 at s8.
[212] Smith, A op cit note 81 at 2372.
[213] Provincial Notice 365 of 2011 supra note 95 at reg 7.
[214] Reyneke, JM & Pretorius, JL op cit 207 at 116.
[215] *S v Makwanyane and Another* 1995 (3) SA 291 (CC) at para 46.
[216] Terblanche, SS op cit note 206 at 188.
[217] Varnham, S *Seeing Things Differently: Restorative Justice and School Discipline* (2005) 3 Education and the law 17 at 91.

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Zealand.[218] Where an action taken or not taken, violates a person, that violation creates an obligation to repair the damage.[219] A conference between the victim, offender and the broader community is then held to determine how best the damage is to be repaired.[220] The aim is to determine what harm there is, who was harmed, how the damage can be repaired and also how future similar acts can be addressed.[221] Unlike retributive justice, the victim is placed at the forefront of discussions in a restorative justice process.[222] Furthermore, the focus is not on the violation but rather on correcting the wrong that was done.[223]

There are two well-known uses of the restorative approach in the South African legal context. Firstly, the Truth and Reconciliation Commission (TRC) which was established to 'promote national unity and reconciliation', '[restore] human and civil dignity' and '[recommend] reparation measures'.[224] The other is in the Child Justice Act[225] through the practice of diversion. This is done by 'diver[ting] a matter involving a child away from the formal court procedures in a criminal matter'.[226] The matter is resolved outside the court and thus ensures the child does not have a criminal record.[227] The Child Justice Act aims to encourage accountability of harm, promote reintegration into the community and promote reconciliation between the child offender and the victim.[228]

Both these approaches to justice acknowledge that where there is a disruption in the balance of human interaction and relationship, action must be taken to address the disruption. However, the approaches taken are typically seen as polar opposites. The retributive approach is offender centred.[229] It accords with the principle of proportionality.[230] The punishment is carried out to all

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[218] Ibid at 92.
[219] Reyneke, JM op cit note 103 at 435.
[220] Varnham, S op cit note 217 at 91-92
[221] Reyneke, JM & Pretorius, JL op cit note 207 at 124 and Reyneke, JM op cit note 103 at 433.
[222] Reyneke, JM op cit note 103 at 435
[223] Ibid at 435.
[224] Promotion of National Unity and Reconciliation Act 34 of 1995 at s3: (1) The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past…'.
[225] Child Justice Act 75 of 2008
[226] Ibid at s1.
[227] Mujuzi JD *Diversion in the South African criminal justice system: Emerging jurisprudence* (2015) 1 SACJ at 43.
[228] Child Justice Act supra note 225 at s51.
[229] Reyneke, JM & Pretorius, JL op cit note 207 at 116.
[230] Terblanche, SS op cit note 206 at 182.

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those who deserve it and such punishment must be proportionate to their blameworthiness.[231] Moreover, retributive justice maintains authoritarian order between the powerful State and its powerless subjects.[232] On the other hand, the restorative approach is focused on the victim and those not directly involved in the matter.[233] This approach is compatible with the principle of *Ubuntu*.[234] *Umuntu ngumuntu ngabantu* which translates to 'I am because you are' and describes the importance of community solidarity.[235] Sachs J, in *PE Municipality v Various Occupiers*, highlighted the close connection between restorative justice and ubuntu.[236] Lastly, restorative justice is forward-looking as it focuses on reconciliation and ensuring future similar situations are dealt with differently.[237]

2.4.2 The approach that is taken in public high schools.

With this background, the formal school disciplinary process takes a retributive approach.[238] Firstly, the process focuses on the learners' non-compliance with the code of conduct.[239] Learners are required to comply with the code of conduct.[240] Where a learner is accused of breaking a rule in the code of conduct, they may be brought before a governing body.[241] The governing body, after hearing the schools and the learner's arguments, makes a decision on the blameworthiness of the learner.[242] If the learner is guilty, an appropriate punishment or sanction is recommended.[243] Secondly, the aim of the proceeding is to establish whether the learner is guilty or not.[244] It creates a win-lose battle instead of a collaborative exploration of solutions to the harm.[245] There is no consideration of how the relationship between the transgressor learner and the

[231] Ibid at 188.
[232] Reyneke, JM & Pretorius, JL op cit note 207 at 117.
[233] Varnham, S op cit note 217 at 91.
[234] Himonga, C, Taylor, M & Pope, *A Reflections on Judicial Views of Ubuntu* 16(5) PER (2013) at 397.
[235] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 36.
[236] Himonga, C, Taylor, M & Pope, *A* op cit note 234 at 397 and *Port Elizabeth Municipality* supra note 235 at para 36.
[237] Reyneke, JM & Pretorius, JL op cit note 207 at 124-125.
[238] Ibid at 118.
[239] Ibid at 117.
[240] GN 776 of 1998 supra note 78 at guideline 3.4.
[241] Reyneke, JM & Pretorius, JL op cit note 207 at 117.
[242] Provincial Notice 365 of 2011 supra note 95 at reg 7(5)(f).
[243] Ibid at reg 7(7).
[244] Pitsoe, V & Letseka, M supra note 79 at 1531.
[245] Reyneke, JM op cit note 103 at 425.

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victim could be repaired.[246] Especially since relationships are important features of a school environment. Thirdly, accountability for action is defined as a punishment rather than repairing harm.[247] The sanctions- such as detention, suspension and expulsion- are punitive methods that exclude the learner from the school environment.[248] These forms of punishments are akin to the criminal punishment of imprisonment.[249] Rehabilitative programmes are seldomly considered in school disciplinary hearings.[250]

2.4.3 Retributive justice and school disciplinary hearings: a pleading for change.

I believe a purely retributive justice is not in line with the objective of school discipline and the code of conduct. The law calls for positive discipline.[251] However, positive discipline has yet to be explicitly defined by South African lawmakers. Oosthuizen et al defines it as a method of discipline that builds a learner's self-esteem and encourages them to actively participate.[252] As a consequence, learners learn to take responsibility for their actions and self-discipline.[253] Shouting, physical forms of punishment and time-out-corner, isolating the learner for the group, are examples given as harmful and damaging to the learner's self-esteem.[254]

Reyneke takes the view that positive discipline is distinguishable from restorative discipline.[255] Reyneke defines positive discipline as encompassing both retributive and restorative measures.[256] Thus each school ought to implement school discipline methods that are a hybrid of retributive and restorative measures.[257] For instance, where a disciplinary committee finds a transgressor learner guilty, rehabilitative measures may be implemented instead of suspension or

[246] Reyneke, JM & Pretorius, JL op cit note 206 at 124 and Reyneke, JM op cit note 103 at 443.
[247] Pitsoe, V & Letseka, M supra note 79 at 1531.
[248] Reyneke, JM & Pretorius, JL op cit note 207 at 118.
[249] Ibid at 117-118.
[250] Ibid at 123-124: 'The legislation and the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners ("Guidelines") do not really provide proper guidance on what an acceptable alternative to a punitive system should look like. Furthermore, the examples of acceptable disciplinary measures provided in the Guidelines (Cf par 10 of Guidelines) are still punitive in nature, and formal disciplinary proceedings are also very adversarial in nature.'
[251] GN 776 of 1998 supra note 78 at guideline 1.4.
[252] Oosthuizen, IJ, Wolhuter, CC & Du Toit, P op cit note 182 at 468-469.
[253] Ibid at 469.
[254] Ibid at 469.
[255] Reyneke, JM op cit note 103 at 476.
[256] Ibid at 476.
[257] Ibid at 477.

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expulsion.[258] In *Queens College Boys High School*, the Court stated that there is a legitimate expectation on schools to consider rehabilitative measures in relation to serious misconduct.[259]

Although I prefer Reyneke's interpretation, the guidelines distinguish positive discipline from retributive discipline: '*The main focus of the Code of Conduct must be positive discipline; it must not be punitive and punishment oriented but facilitate constructive learning*'.[260] Thus, I believe it should be understood as an approach akin to restorative justice. It implies that positive discipline should be constructive. Through discipline, learners should learn responsibility, empathy and problem-solving. Restorative justice teaches these lessons.

Thus, the current retributive disciplinary process is problematic. If we take positive discipline to be akin to restorative justice, the law on discipline would be contradictory because the formal disciplinary process would not be in accordance with the purpose of the code of conduct. On the other hand, if positive discipline is in fact how Reyneke proposes, a blend of restorative and retributive measures, we still reach the same conclusion. The guidelines would contradict the School's Act. Thus, the Legislator needs to address these contradictions.

2.5 Suspensions in light of the best interest standard.

Suspensions are commonly used as a way to address improper behaviour. The Act makes provision for the suspension of a learner as a precautionary measure and as a corrective measure.[261] This raises another problem with the law, regulating public school discipline. In this section, I will argue that suspensions are not in the best interest of the learner, who has a right to basic education.

2.5.1 Defining the best interests of the child

As previously mentioned, the best interests of the child must be considered in all matters that concern them.[262] This is a constitutional right. The Constitutional Court in *Fitzpatrick*, stated

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[258] *Queens College Boys High School v Member of the Executive Council, Department of Education, Eastern Cape Government, and Others* (ECG) unreported case 454/08 (21 October 2008) at para 22.
[259] Ibid at para 32.
[260] GN 776 of 1998 supra note 78 at guideline 1.4.
[261] Schools Act supra note 51 at s 9(1)(a) and Provincial Notice 365 of 2011 supra note 95 at reg 2(2) and 4(1)(a).
[262] Page 13 of chapter 2.

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that the best interests of the child is a standalone right.[263] In this matter, British citizens living in South Africa wanted to adopt a South African born child.[264] However the statute prohibited such adoption where the potential parents qualified for citizenship but had not taken the necessary steps to apply for naturalisation.[265] The court found the section to be unconstitutional.[266] If the best interests of the child were given paramount importance, it would be unconstitutional to prevent South African children the possibility of being adopted by non-citizens.[267]

The first point that must be understood about s28(2) is that interests are distinguishable from rights.[268] Section 28(1) protects the rights of children while section 28(2) protects the interests of children.[269] Although these may often overlap, interests must be understood as going further than rights.[270] It considers more than what is explicitly protected by the Constitution.[271] In *Fitzpatrick*, Justice Goldstone provided an illustration of an adoptive child's interests.[272] It may be the case that a South African orphan child's closest family relation is a non-South African resident who is willing to adopt the child.[273] It cannot be in the best interest of the child to not get adopted.[274] Moreover, it cannot be assumed that the adoptive parents will choose to continue to reside in South Africa for the rest of their days on earth. [275] It cannot be in the best interest of the child to be abandoned in South Africa if the adoptive parents relocate.[276] This illustration shows how despite there being no explicit protection afforded to a South African child with non-South African parents, the best interests of the child steps in.

Secondly, the best interests are determined on the facts of each case.[277] In Fitzpatrick, the court said that section 28(2) is not exhaustive and should be applied flexibly on a case-by-case basis.[278]

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[263] *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) at para 17
[264] Ibid at para 1.
[265] Ibid at para 1.
[266] Ibid at para 37.
[267] Ibid at para 16.
[268] Reyneke, JM op cit note 103 at 226.
[269] Constitution supra note 52 at s28.
[270] Reyneke, JM op cit note 103 at 226.
[271] Ibid at 226-227.
[272] *Fitzpatrick* supra note 263 at para 19.
[273] Ibid at para 19.
[274] Ibid at para 19.
[275] Ibid at para 19.
[276] Ibid at para 19.
[277] Ibid at para 17-18.
[278] Ibid at para 17-18.

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The Constitutional Court affirmed this, a few years later in *S v M*, stating that various factors need to be considered in order to find the best interest in each particular case.[279] Applying a rigid predetermined formula would not be in their best interest.[280]

Thirdly, the best interest of the child is not absolute. 'Paramount importance' does not create an unqualified standard. It may be limited where justifiable under the limitation clause of our Constitution.[281] Section 28(2) should apply 'in a meaningful way without unduly obliterating other valuable and constitutionally protected interests'[282]. Different interests must be weighed up against each other to ensure the best interest of the child is paramount in each particular case.[283]

The best interest of the child has also found protection under the Children's Act.[284] The Children's Act was enacted to give effect to the constitutional rights of children.[285] Section 7 sets out the factors to be considered when applying the best interest of a child standard.[286] Unfortunately, this list seems to relate more to family law related matters- such as divorce and adoption. It lacks consideration of other areas of law involving children such as matters in a school discipline setting.[287] However, there are some factors that can be useful in our context. The factors include the nature of the relationship between the transgressor learner and the victim[288] and various care-giver's (teacher, principal and parents) attitudes towards the transgressor learner.[289] The likely effect of any change, such as suspension, may have on a learner in the same position.[290] The learner's age, maturity, gender, socioeconomic background, if the learner has any disability and chronic illness and other relevant factors.[291] Lastly, whether the learner needs any protection from physical and psychological harm.[292] These kinds of factors need to be considered by the evidence leader and disciplinary committee in their investigations and decision-making respectively to

[279] *S v M* 2008 (3) SA 232 (CC) at para 24.
[280] Ibid at para 24.
[281] Ibid at para 26 and Constitution supra note 52 at s36.
[282] Ibid at para 25.
[283] Reyneke, JM op cit note 103 at 234.
[284] Children's Act supra note 105 at s41.
[285] Ibid at s2.
[286] Ibid at s7.
[287] Reyneke, JM op cit note 103 at 280-281.
[288] Children's Act supra note 105 at s7(a)
[289] Ibid at s7(b)
[290] Ibid at s7(d)
[291] Ibid at s7(g-j)
[292] Ibid at s7(l)

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ensure the best interests of the child are given paramount importance. This includes the decision to suspend - whether as a precautionary or corrective measure.

2.5.2 Are suspensions in the best interest of the child?

The best interest standard must be considered in all matters concerning the child. This includes all matters provided for by the School's Act. Although the best interest standard is only explicitly mentioned in terms of exemptions to compulsory attendance[293], admission to public school[294] and governing body[295]. I take the opinion that it should still be applicable in terms of school discipline since it concerns a child. The statute must be applied in accordance with the Bill of Rights. School disciplinary hearings are held where a learner is charged with an alleged violation of the code of conduct.[296] All decisions made throughout the process from the decision to investigate the matter, to charge to the learner and to suspend the learner must uphold the section 28(2) constitutional right.[297]

The Act makes provision for the suspension of learners under two circumstances, namely, where there is a precautionary need and as a punishment to correct improper behaviour.[298] Arguably, the aim of a suspension, as a precautionary measure, is to protect the interest of other learners from further or potential harm from the transgressor learner. The interest of the other learners outweighs the interest of the transgressor learner. Whereas the aim of a corrective suspension is similar to that of imprisonment.[299] To remove the 'bad ones' for society and to deter others from violating the rules.[300] The interest of justice outweighs the interest of the transgressor learner. What the School's act fails to do is set out what the learner ought to do during the period of suspension - especially learners with the right to basic education.

During my time in university, I joined a non-profit organisation that helped parents[301] of learners facing disciplinary hearings to ensure a fair disciplinary process. I would assist the parents

[293] School Act supra note 51 at s4(1)
[294] Ibid at s5(4)(d)
[295] Ibid at s17(1) and s20(1)
[296] Provincial Notice 365 of 2011 supra note 95 at reg 2(1)
[297] Reyneke, JM & Pretorius, JL op cit note 207 at 116.
[298] Schools Act supra note 51 at s 9(1)(a), Provincial Notice 365 of 2011 supra note 95 at reg 2(2) and *Phillips* supra note 186 at 27.
[299] Reyneke, JM & Pretorius, JL op cit note 207 at 118
[300] Ibid at 118
[301] The organisation's policy was to act on behalf of the parent unless the learner was over the age of 18.

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and the learner to understand their role and rights throughout the whole disciplinary process. Since they had the right to be heard and to present arguments before a decision on blameworthiness was made,[302] I would help them prepare arguments. In some instances, I helped them through the appeal process to the Head of Department of Education. A few of the suspended learners that I assisted would be sent home with no homework to complete during the suspension. Those who did not have supportive teachers or classmates to send them work struggled to keep up with the pace when they eventually returned to class. Some were not even allowed to write tests or submit assignments during the suspension period. Certainly, this cannot be in the best interest of the learner. Moreso if as a result of the suspension the learner fails to progress to the next grade.

Not providing any provision for alternative learning or 'child-care' cannot be in the best interest of the suspended learner. We have huge problems of gangsterism, substance abuse and teenage pregnancy among the youth in South Africa. In terms of illegal drug use, research shows that this is a major problem among the black and coloured youths in South Africa.[303] A 2016 Reproductive Health study found that white teenage girls were less likely to fall pregnant than teenage girls of other races. Also, those with unemployed fathers or deceased fathers are more likely to get pregnant. Concluding that poor black teenage girls were most likely to get pregnant.[304] Gangsterism in South Africa has largely been affected by our history. Gangs are established as a form of resistance by no-white people against the oppression of colonisation and Apartheid.[305] It was then where prison, mining and street gangs started especially around Johannesburg and Cape Town.[306] Today, most of these gangs still exist with poorer non-white youth being recruited to joining.[307] Thus it is vital to have measures in place to keep suspended learners occupied and away from such activities.

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[302] Provincial Notice 365 of 2011 supra note 95 at reg 7(1) and reg 7(5)

[303] R Isaac 'Factors associated with illegal drug use in South Africa: a Qualitative Literature Review (2019) (unpublished thesis) Malmö University. Available at *https://www.diva-portal.org/smash/get/diva2:1486313/FULLTEXT01.pdf*, accessed 18 January 2022 at 13-14

[304] K Jonas *et al.* 'Teenage pregnancy rates and associations with other health risk behaviours: a three-wave cross-sectional study among South African school-going adolescents' (2016) 13 Reprod Health 50. Available at *https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-016-0170-8#citeas*, accessed 20 December 2021 at 12.

[305] A Mveng et al 'Gangsterism in South Africa' (2020) trauma clinic counselling available at *https://www.traumaclinic.co.za/wp-content/uploads/2020/12/Gangsterism_In_South_Africa.pdf*, accessed 18 January 2022 at p12.

[306] Ibid at 12.

[307] Ibid at 12-19 and 28-29.

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Moreover, children from lower-income households are more likely to get suspended, or even expelled. Since these children cannot afford to seek legal representation or advice, they are left to figure things out on their own. Unaware of all the laws and rights available to them, they are at a disadvantage. Something as simple as not calling witnesses could weaken their arguments and the right of appeal. Thus, resulting in a poorer outcome. Similarly, with schools with low financial budgets, or those in poorer communities. Where schools can afford to train their disciplinary committee or even employ an evidence leader with a legal background, their disciplinary hearings are more likely to be fair and in keeping with the law.

In the United States, a study was conducted to determine if there were racial disparities within school discipline.[308] The study found that black learners were much more likely to be suspended and expelled than their white counterparts.[309] More specifically 13.46% of black learners reported having experienced 'out-of-school'[310] suspension while only 3.5% of white learners did. 0.51% of black learners reported that they had been expelled, compared to 0.81% of white learners who expressed the same.[311] Racial bias unduly prejudices black children.[312] Black learners who appear before a disciplinary hearing are at a higher risk of receiving a negative outcome.[313] An outcome that could affect their chances at employment in the future.[314]

As a consequence, one might come to the conclusion that suspension may not be in the best interest of the child where less restrictive measures can be used. Especially measures that do not violate the learner's right to education. Other positive educational sanctions may be given instead of corrective suspensions.[315] Examples that could be introduced are counselling, compensation and rehabilitation. Other examples might include placing the learner in another class or a neighbouring school for the period of the suspension. However, often suspensions are given without any consideration of other positive educational sanctions. Perhaps this is because suspensions are more widely known than the alternatives. or because of the retributive nature of South Africa's school

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[308] Riddle, T & Sinclair, S *Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias* (2019) 116 Proceedings of the National Academy of Sciences 17
[309] Ibid at 8255
[310] Ibid at 8256
[311] Ibid at 8256
[312] Ibid at 8255
[313] Ibid at 8255.
[314] Ibid at 8255.
[315] *Queens College Boys High School* supra note 258 at para 32.

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discipline. Regardless, the guideline states that suspensions should be employed as a sanction of last resort.[316]

2.6 Corporal Punishment as a form of discipline

A third problem that should be addressed is the use of corporal punishment. Historically, physical punishment was used to correct improper behaviour. However, with the birth of our Constitution and the protection of human rights, physical means of punishment were no longer deemed lawful. Corporal punishment violates a learner's right to freedom and security and to bodily and psychological integrity.[317]

Despite the statutory prohibition on the use of corporal punishment at schools[318], evidence still shows that teachers are still employing corporal punishment in South African schools.[319] Statistics South Africa completed a General Household Survey in 2018 and found that 5,7% of learners in South Africa said they had experienced corporal punishment.[320] Most of the learners came from the Free State, Eastern Cape and North West while the least number of learners came from the Western Cape and Gauteng.[321] Although there has been a significant decrease from 16,6% in 2009[322] physical and illegal forms of punishment are still being used.

When asked how public school teachers felt about school discipline, several themes arose.[323] First, some teachers felt that learners lacked respect and self-discipline.[324] Other teachers were of the view that corporal punishment worked best or that was better than the current processes - it has a deterrent effect against indiscipline. They hold this view despite research proving that a punitive

[316] General No 776 supra note 78 at guideline 10.2.
[317] Constitution supra note 52 at s12 and Ibid at guideline 4.4.
[318] Schools Act supra note 51 at s10 and Ibid at guideline 4.
[319] Western Cape Education 'Western Cape Education on statistics of corporal punishment in 2018' (4 June 2019) available at *https://www.gov.za/speeches/latest-stats-sa-survey-4-jun-2019-0000,* accessed 20 December 2021.
[320] Ibid.
[321] Ibid.
[322] Ibid.
[323] Segalo, L & Rambuda, AM *South African public school teachers' views on right to discipline learners* (2018) 38 South African Journal of Education 2 at 3-4.
[324] Ibid at 3-4.

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measure has little deterrent effect.[325] While other teachers felt disempowered by the current system which they find to be ineffective.[326]

Thus, I believe that if we can address the problems with the current system, and resolve them, we can simultaneously resolve the corporal punishment problem. In the next chapter, I will consider mediation and whether it could address these challenges identified with the high school discipline process.

[325]Nkosana, B *Strategies to Ensure the Effective Implementation of Learner Discipline Policies: A Case of 4 South African Secondary Schools* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1581 and Foncha, JW et al *An Investigation into the Disciplinary Measures used in South African Schools: How Effective are they to the Learners?* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1163-1164.
[326] Segalo, L & Rambuda, AM op cit note 323 at 4.

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3. A Place for Mediation within School Discipline

Based on the previous chapters it is evident that the current disciplinary process at South African public high schools has challenges. It is not achieving the purpose that the legislators had envisioned that is encouraging self-discipline and responsibility for behaviour.[327] In this chapter, I will be exploring mediation and considering if mediation is able to address and resolve high school-related disputes more appropriately.

As a point of departure, I will discuss the terminology and conceptualise mediation. Thereafter I will look at how mediation can address the issues or problems with the current disciplinary process and whether it can help encourage self-discipline. I will also consider whether mediation would be best implemented as an alternative to or an addition to the high school disciplinary process. Finally, I will consider how mediation could be practically implemented by essentially reviewing a framework for South African public schools.

3.1 A look into the Mediation process

3.1.1 The Definition of Mediation

In mediation there is an independent third party, who assists two or more disputing parties to reach a voluntary and mutually agreeable resolution to their conflict.[328] There are several principles that stem from this definition. Firstly, mediation is a voluntary process that parties must agree to make use of.[329] Any party who does not agree to the process cannot be bound by the settlement reached. Secondly, mediation acknowledges that there may be more than two parties in a conflict.[330] For example, in a dispute about child custody, parties may include more than just the parents- such as the stepparents, the child and other family members. Thirdly, the parties work together to find a resolution or settlement with some assistance from the mediator.[331] Since this

[327] Guidelines for consideration of governing bodies in adopting a code of conduct for learners (GN 776 of 1998) ('Guidelines') at guideline 7.1.
[328] Anstey, M *Managing Change: Negotiating Conflict* 3ed (2012) at 245.
[329] McMasters, J *Mediation: New Process for High School Disciplinary Expulsions* (1990) 84 Northwestern University Law Review 2 at 770.
[330] Spencer, D & Brogan, M *Mediation Law and Practice* ed (2006) at 110.
[331] Graham, T & Cline, PC *Mediation: An Alternative to Discipline* (1989) 72 The High School Journal 2 at 73.

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process is voluntary, for an effective resolution to be reached, all parties need to agree to all the terms. A settlement agreement is drafted setting out all the terms and it is legally binding on the parties to the mediation who sign it.[332] Next, the mediator is only there to assist the parties- in other words, the mediator facilitates the conflict resolution.[333] Unlike a judge or an arbitrator, the mediator has no judicial or authoritative power to make a decision for the parties.[334] Lastly, mediators should be neutral and impartial.[335] A neutral mediator is not a party to the dispute and owes no duty to any party in the matter.[336] Whereas an impartial mediator is one who is unbiased.[337] They should not expect to receive any financial benefits (except payment of mediator fees) or other rewards for being the mediator.[338]

A mediator cannot always be neutral and impartial.[339] Anstey believes this is not always the case.[340] There can be an interested mediator and a disinterested mediator.[341] A disinterested mediator is one who is neutral and impartial. They neither have a relationship with any of the parties nor are they affected by the outcome.[342] A good example of such mediators are those at the Commission of Conciliation, Mediation and Arbitration ('CCMA').[343] The CCMA is an independent body established by the Labour Relation Act to help resolve workplace disputes.[344] These mediators or commissioners have no direct or indirect interest in the parties or the outcome.[345] On the other hand, an interested mediator either has an interest in the outcome or in the parties.[346] Their interest may affect how they mediate and the tactics they may employ.[347] An example of such is a family elder mediating a land claim dispute between two heirs. The family elder would have an interest in the parties by virtue of relation. They also have an interest in the

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[332] *Rules Board for Courts of Law* Act 107 of 1985: Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa ('Magistrate Court Rules') at rule 77(4)(c)(ix).
[333] Graham, T & Cline, PC op cit note 331 at 73.
[334] Anstey, M supra note 328 at 245.
[335] Ibid at 246.
[336] Ibid at 246.
[337] Ibid at 246.
[338] Hoexter, C. *Administrative Law in South Africa* 2 ed (2012) at 454-459.
[339] Anstey, M supra note 328 at 246.
[340] Ibid at 246.
[341] Ibid at 246.
[342] Ibid at 246.
[343] Ibid at 247.
[344] Labour Relation Act 66 of 1995 at chap 7.
[345] Anstey, M supra note 328 at 246.
[346] Ibid at 247.
[347] Ibid at 247-248.

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outcome because the land belonged to their family. Moreover, the land may have been in the family for many generations. On reflection, this would raise a concern about neutrality. An interested mediator cannot be impartial.[348] However, Zartman argues that an interested mediator may in some circumstances be better suited to facilitate the mediation.[349] Returning to the family land mediation illustration, the heirs might prefer being mediated by the family elder because they would understand the history and context of their family and the land. A disinterested mediator, who has no interest in the outcome, may not be the right choice in such a situation.

I would disagree with this. Mediators cannot be disinterested. Mediators are human beings. They exist in society and not in a vacuum. They have views, and opinions that affect how they perceive life.[350] Dennis and Klare, assert that judges - who have decision making authority- are influenced by society.[351] Their views and opinions will naturally have some effect on their decisions- whether they know it or acknowledge it.[352] Thus they will have an interest in the outcome albeit indirect.[353] Although Mediators do not have decision-making powers, they help parties navigate conflict. How they do so will, even if only unconsciously, be influenced by their views and opinions. For example, in a child custody mediation, if the mediator is a parent, that will affect how the mediator mediates the matter. Moreover, having been a child themselves may also impact how they facilitate the mediation. Thus, on this line of thinking, adjudicators and mediators cannot truly be neutral. Notwithstanding, they should still be perceived as neutral and impartial.[354] Parties need to trust that they will be treated fairly.

3.1.2 The Mediation Process

There are three main stages to the typical mediation process.[355] Beginning with the preliminary stage which includes preparation, the pre-mediation meeting and opening statements.[356] The second stage is a joint session which is where options are considered.[357] Private

[348] Ibid at 247
[349] Ibid at 248
[350] Ibid at 247- 248
[351] Davis, DM & Klare K *Critical Legal Realism in a nutshell* in Christodoulidis, E et al. *Research Handbook on Critical Legal Theory* ed (2019) at 36-37.
[352] Ibid at 36-37.
[353] Anstey, M supra note 328 at 247- 248.
[354] Hoexter, C op cit note 338 at 451.
[355] Spencer, D & Brogan, M op cite 330 at 48
[356] Ibid at 48
[357] Ibid at 48

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sessions, where each party meets with the mediator separately, may also be held before the final joint meeting.[358] The final stage is where the mediator assists the parties assess the various options until the parties reach a mutually agreeable solution.[359]

Much needs to happen before a joint meeting can take place.[360] Once the parties agree to mediate their dispute, they will need a mediator.[361] The logistics of the mediation -such as date, time and venue- also need to be decided.[362] However, some mediators may organise this on the party's behalf. If there are any costs – such as for the mediator and the venue- that needs to be agreed upon by the parties.[363] As well as the division of the costs. The date of the mediation should be held after a reasonable time to allow for the parties to adequately prepare.[364]

Preparation is so important as it increases the potential for a mutually agreeable solution.[365] The mediator may conduct a preliminary conference with each party to better understand the conflict and plan measures to remove obstacles that may prevent resolution.[366] During the conference, the mediator should introduce themselves and the process to the parties.[367] This includes explaining what mediation is, how the mediation will proceed, the rules and the roles and expectations of everyone, including the mediator.[368] As well as determining if the parties present have the authority to make decisions and to sign the settlement agreement.[369]

Since mediations are not as formalised as litigation and arbitration, it makes it more important to set the ground rules at the start and ensure everyone is on the same page. It may even be a good idea to formalise this in writing through a contract or agreement to mediate.[370] This would prevent parties from walking away from the table for procedural reasons. This step also helps to establish rapport. Building rapport, at the start and throughout the mediation, is vital for

[358] Ibid at 48.
[359] Ibid at 49 and McMasters, J op cit note 329 at 761.
[360] Ibid at 48.
[361] Ibid at 56.
[362] Ibid at 55.
[363] Ibid at 50.
[364] Ibid at 53.
[365] Ibid at 49.
[366] Ibid at 49.
[367] Ibid at 49.
[368] Ibid at 49 and McMasters, J op cit note 329 at 761.
[369] Ibid at 54.
[370] Ibid at 50-51.

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the success of the mediation.[371] This can be done through 'genuinely car[ing] about the needs and concerns of each party, and … demonstrat[ing] this genuine concern'[372]. This is because as humans, we are more likely to trust and say yes to someone we like or is familiar to us.[373] It encourages parties, in the mediation, to trust the mediator and to actively communicate with the mediator and each other.[374] After all, reaching a settlement is dependent on the principles of voluntariness and consensus.

During the preliminary stage, the mediator will ask for a brief outline of the dispute.[375] The goal of this is to determine what the dispute is about and what information needs to be exchanged.[376] If parties know what they want and need. It's also a good idea to consider what the other side would want and need out of this. The more prepared parties are, the more likely they are to reach a settlement that benefits all parties.

Thereafter, the parties and mediator will meet again for the joint meeting. In this stage, the mediator will set the scene and then parties will each have an opportunity to make an opening statement.[377] The mediator will summarize the opening statements ensuring parties are properly heard and determine the points of contention and the common grounds.[378] After the opening statement the mediator may meet with each party individually in private sessions to allow the party to speak openly to the mediator without the other parties.[379] The mediate may also use this session to find out what each party's best alternative to a negotiated agreement (commonly known as BATNA).[380] Additional private sessions may be necessary to help parties refocus or re-assess positions and strategies. Mediators should also note to the parties that what is said is kept in strict confidence unless permission is given by the party to be shared with the other parties if necessary.

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[371] Goldberg, SB *The Secrets of Successful Mediators* (2005) 3 Negotiation journal 21 at 336.
[372] Ibid at 374.
[373] Cialdini, RB *Influence: the Psychology of Persuasion* Revised ed (2007) at 167-207 and Shell, RG *Bargaining for Advantage: Negotiation Strategies for Reasonable People* 2ed (2006) at 140-142.
[374] Goldberg, SB op cit note 371 at 6368.
[375] Spencer, D & Brogan op cit note 330 at 51 and McMasters, J op cit 329 at 761.
[376] Spencer, D & Brogan op cit note 330 at 52.
[377] Ibid at 56- 57.
[378] Ibid at 57 and 60.
[379] Ibid at 57.
[380] Ibid at 67.

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At the final joint meeting, options and possible solutions are explored.[381] Depending on the circumstance of the matter, the order and the type of assistance the mediator provides will vary.[382] For example, for less complex matters the initial private session may be adequate. Whilst more complex medications may require numerous private sessions to allow parties to analyse their options and strategies. Numerous private sessions may also be necessary where the principal parties (such as corporations) send agents to meditate on their behalf.

Lastly, the settlement stage. Once parties have assessed the various options and have reached a resolution, a settlement agreement needs to be written and signed by all parties.[383] A settlement agreement is a contract that sets out the resolution reached.[384] This means it is legally binding and failure to abide by it could result in legal consequences.[385] It is important to ensure those signing have the requisite authority and capacity to enter into legally binding contracts.[386]

It must be mentioned that there are differing views on the role of the mediator. Although everyone agrees that the role of the mediator is to assist the parties; what differs is the extent to which they should provide assistance. The first school of thought is the Facilitative mediator. These mediators take on the role of procedural assistants.[387] They take control of the procedure in order to help the parties move through the different stages of the mediation process and ensure parties reach a conclusion.[388] The parties remain in control of the content of the dispute.[389] Conversely, Evaluative mediator assists the parties to evaluate the substantive content- such as the issues and parties' BATNA.[390] The last one is the transformative mediator who is focused on the relationship. Their aim is to empower parties and improve relationships by using positive mechanisms such as helping parties understand the conflict from the perspective of the other party.[391]

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[381] Ibid at 70.
[382] Ibid at 102-103.
[383] Ibid at 73.
[384] Ibid at 73.
[385] Ibid at 73.
[386] Ibid at 54.
[387] Moore, CW *The Mediation Process: Practical Strategies for Resolving Conflict* (2014) 4 San Francisco: Jossey-Bass at 46-47.
[388] Ibid at 46-47.
[389] Ibid at 46-47.
[390] Ibid at 54- 56.
[391] Ibid at 47-50.

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3.1.3 The Benefits of Mediation

Brassey J beautifully commented:

> *'The success of the [mediation] process lies in its very nature. ... [T]he process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation.'*[392]

Mediation is considered to be an alternative conflict resolution approach to litigation.[393] One of the biggest issues with the justice systems is access to justice.[394] Access to justice is an all-encompassing term. In a nutshell, it is an overarching principle that speaks of various rights - such as the right to a fair hearing, the right to legal education, the right to courts and legal services.[395] Access to courts in South Africa is such a big problem.[396] People can expect to wait months if not years before their matter is heard before a court. This is evidenced by the length that it typically takes from when the crime is committed to when the criminal is brought to justice.[397] Alternative Dispute Resolution helps to promote access to justice.[398] Alternative Dispute Resolution is said to be a more efficient and more cost-effective alternative to litigation.[399]

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[392] *Brownlee v Brownlee* (GS) unreported case no. 2008/25274 (25 August 2009) at para 50.
[393] Graham, T & Cline, PC op cit note 331 at 74.
[394] Greenbaum, L *Access to justice for all: a reality or unfulfilled expectation?* (2020) De Jure Law Journal available at *http://dx.doi.org/10.17159/2225-7160/2020/v53a17*, accessed 10 February 2022 at 248.
[395] Ibid at 250.
[396] *Ibid* at 263.
[397] For example: Mitchley, A 'Ex-cop Rosemary Ndlovu slapped with 6 life terms for killing partner, 5 relatives' News24 (5 November 2021) available at *https://www.news24.com/news24/southafrica/news/just-in-ex-cop-rosemary-ndlovu-slapped-with-life-imprisonment-for-murdering-six-people-20211105* (accessed 20 December 2021) and Smith, D 'Shrien Dewani goes free after a trial doomed from day one', 8 December 2014 available at: *https://www.theguardian.com/world/2014/dec/08/shrien-dewani-murder-trial-collapse-anni-south-africa* accessed 20 December 2021.
[398] Magistrate Court Rules supra note 332 at rule 71.
[399] *Brownlee* supra note 392 at para 55 - 'Parties resolve their problems so much more cheaply as a result and the burden on the court rolls has been considerably lightened. Informed estimates put the success rate of mediation at between eighty and ninety percent'.

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It has been seen to be most effective in cases where there is an existing and ongoing relationship.[400] This is because mediation focuses more on the relationships rather than on who is right and who is wrong. The focus is on constructive problem-solving.[401] The issues are identified and then through brainstorming the best solution is determined. Thus, ensuring a mutually agreeable solution is reached. Secondly, mediation is forward-looking.[402] Rather than only considering if a rule was breached or harm was done, mediation looks at how parties can move forward and how relationships can be restored.[403] All relevant stakeholders are included to help find positive proactive measures to ensure the problem does not arise again.[404]

3.1.4 The Drawbacks of Mediation

Mediation is flexible.[405] There are no set legal rules for mediation, no set role of a mediator and no precedent to rely on.[406] This raises a question as to the fairness of mediation.

Fairness is twofold, it has to be procedurally and substantively fair. Procedural fairness, as we have discussed in chapter two, requires affected parties to be given an opportunity to make representation and due process.[407] At the start of the mediation, a procedural agreement should be concluded and signed, setting out the 'rules of the game'.[408] This may include rules pertaining to dignity and respect.[409] Compliance with the procedural agreement ensures fairness (procedural fairness).[410] Which in turns allows parts to try and reach a fair outcome of the substantive issues.[411] On the other hand, substantive fairness, speaks to the fairness of the decision. *Fisher and Ury* established a principled way of negotiating. It incorporates four elements.[412] First, parties need to 'separate the people from the problem' which essentially means to remove the ego and emotions

[400] McMasters, J op cit note 329 at 762.
[401] Varnham, S *Seeing Things Differently: Restorative Justice and School Discipline* (2005) 3 Education and the law 17 at 89.
[402] McMasters, J op cit note 329 at 762.
[403] Ibid at 762.
[404] Ibid at 762.
[405] Spencer, D & Brogan, M op cit note 330 at 100
[406] Ibid at 85 and 100
[407] Pages 17-18 of Chapter 2.
[408] Anstey, M op cit note 328 at 117.
[409] Shapira, O *Conceptions and Perceptions of Fairness in Mediation* (2012) 2 S Texas Law Review 54 at 291
[410] Ibid at 291
[411] Anstey, M op cit note 328 at 117-118
[412] Fisher, R & Ury W *Getting to Yes: Negotiating an Agreement Without Giving in* ed (1981) at 10

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from the discussion.[413] Secondly, parties should 'focus on interests [and] not positions'.[414] Focusing on the latter will not result in an outcome that adequately addresses the parties underlying concerns.[415] Third, is to invent many 'options for mutual gain'. This results in a wise agreement.[416] Lastly, parties need to 'insist that results be based on some objective criteria'.[417] This creates a fair standard to be applied to results regardless of party tactics.[418] Following these ensure a wise and substantively fair outcome.[419]

With that said, fairness in mediation and fairness in litigation are not the same.[420] In litigation, the rules of fairness are standardised under common law and statutory law. There is an objective standard. Whereas in mediation they are determined by the parties to the mediation. What is fair will differ depending on the parties and the issues in the matter.[421] It may happen that what is determined to be fair in mediation would be found unfair by the court.[422] Conversely, what the court may deem fair may be unfair in a mediation.[423] Therefore even without set legal rules and precedent, fairness in mediation can still be ensured.

3.2 Mediation the solution to Disciplinary Proceeding Problems

As discussed in chapter two, the current disciplinary process at public high schools in South Africa has issues. The process is retributive and adversarial. The focus is on proving guilt and giving a punishment rather than unpacking the underlying problems between the parties and finding constructive solutions. Furthermore, suspensions neither provide for alternative learning measures nor are they in the best interest of the child - especially children with a right to basic education. As illustrated earlier in this chapter, mediation is different to disciplinary hearings. Meditation focuses on addressing parties' interests and on reconciliation. It identifies the harm or

[413] Ibid at 10-11
[414] Ibid at 10
[415] Ibid at 11
[416] Ibid at 11
[417] Ibid at 11.
[418] Ibid at 12.
[419] Ibid at 4.
[420] Shapira, O op cit note 409 at p292.
[421] Ibid at 291.
[422] Ibid at 292.
[423] Ibid at 292.

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point of conflict and then through brainstorming and discussions between the parties, an agreeable solution to repair the harm or resolve the conflict is determined.[424] Thus the question that this thesis considers is whether mediation could address and resolve the problems identified with the current disciplinary process at South African public high schools.

3.2.1 Mediation promote positive discipline

Reaching a settlement is not the only objective of mediation.[425] Mediation teaches parties how to improve their communication skills and how to understand another person.[426] It 'facilitates constructive learning'.[427] This confirms that mediation is in line with South Africa's education system and the purpose of the code of conduct.

Confidentiality and trust are important features within the mediation.[428] Generally, everything that is said and done during the mediation process is confidential and may not be shared with anyone that is not a party to the mediation.[429] This creates a safe space for parties to share freely and not to fear being exposed to the general public. This also allows for active participation and a flow of information.[430] I should state that personal attacks or hostile forms of communications should be cautioned against as these may affect trust and may even discourage the parties from reaching a resolution.

Through mediation, learners will be able to learn self-discipline and to take ownership of their actions in a few ways.[431] First, it would allow learners to learn to put themselves in another's position.[432] In order to reach a mutually agreeable solution, parties must look at more than their own positions.[433] Parties need to collaborate to find a solution that advances their shared interests while reconciling differing interests.[434] Secondly, Through mediation, learners are able to learn

[424] Varnham, S op cit note 401 at 90 and Fisher, R & Ury W op cit note 412 at 10-12.
[425] Anstey, M op cit note 328 at 254.
[426] Ibid at 254.
[427] General No 776 supra note 327 at guideline 1.4.
[428] Spencer, D & Brogan, M op cit note 330 at 85 and Goldberg, SB op cit note 371 at 368.
[429] Ibid at 85.
[430] Ibid at 86.
[431] Varnham, S op cit note 401 at 90.
[432] Ibid at 90.
[433] Fisher, R & Ury W op cit note 412 at 11.
[434] Ibid at 11.

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important life skills.[435] It teaches the learner about mutual respect and dignity.[436] As well the principle of reciprocity - to treat others how they would want to be treated. Thirdly, it allows learners to take control of their own conflict resolution.[437] Being able to learn and understand what you did wrong, and then being able to find a way to make amends is the basis of taking responsibility for your own actions. This is less effectively taught and learnt through processes where the learner is not in control.[438] In disciplinary hearings, the focus is on being disciplined by someone else.[439] Lastly, the consequences are constructive rather than punishment. In a disciplinary hearing, sentencing is a generic response to guilt with one size fits all sanction and does not consider the facts of each case.[440] Consequences in mediation are determined in lieu of all parties' concerns, interests and needs, and the outcome is tailored to the matter at hand and the people involved.[441] Thus allowing for a greater possibility of consequences that are constructive and not punitive.

3.2.2 Mediation and the best interest of the child

One major difference between adjudication and mediation is the approach taken to address conflict.[442] Adjudication takes a rights-based approach.[443] In criminal law, the defendant is accused of a crime that violated a victim's constitutional right- such right to life in a murder case. Furthermore, special rights are available to the accused to ensure the right to a fair trial is protected. The outcome will depend on whether the state can prove beyond reasonable doubt that their case has legal merit. Similarly, in a civil matter, the plaintiff, alleging a rights violation - such as the right to dignity in a defamation case. The defendant has the opportunity to raise a defence to show they did not violate the plaintiff's right. The outcome will depend on which sides' arguments have, on a balance of probability, legal merit. On the other hand, mediation takes an interest-based approach.[444] The mediator assists the parties to identify their underlying interest and needs in order

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[435] Varnham, S op cit note 401 at 90.
[436] Ibid at 90.
[437] Ibid at 89-90.
[438] Reyneke, JM & Pretorius, JL *Aligning School Discipline with the Best Interest of the Child: Some Deficits in the Legislative Framework* (2017) 35 Perspective in Education 1 at 117.
[439] Ibid at 117.
[440] Ibid at 123.
[441] Spencer, D & Brogan, M op cit note 330 at 105.
[442] Ibid at 105.
[443] Spencer, D & Brogan, M op cit note 330 at 105 and Anstey, M op cit note 328 at p104.
[444] Spencer, D & Brogan, M op cit note 330 at 105 and Anstey, M op cit note 328 at p104.

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to find resolutions that address each of their interests and needs.[445] The outcome is dependent on consensus.[446] Since parties have a better understanding of each other's position, they are better able to reach a resolution that benefits all of them. Therefore, it can be concluded that mediation is the best approach for the consideration of the best interest of the child. Mediation is focused on the parties interests which is what section 28(2) requires.

Additionally, consideration will be given to the interest of all children concerned and not only those of the transgressor learner. This is because mediation acknowledges that there may be multiple parties with a stake or interest in the conflict.[447] It allows them all an opportunity to actively participate in the mediation. This is not the same in a disciplinary process. Here the parties involved are the evidence leader, acting on behalf of the school as a whole, and the transgressor learner.[448] The victim's interest and those of the other stakeholders are not always given due consideration since the main focus is on the interest of the transgressor learner.[449]

3.3 Mediation within South Africa's Legal System

Over the years, there has been increasing incorporation of mediation into the South African legal system. Firstly, mandatory meditation was introduced through the Mediation in Certain Divorce Matter Act to address certain family law disputes[450]. As its name suggests it was enacted to provide for parties in certain divorce proceedings, where minor children are involved, an opportunity to reach a settlement, which safeguards the interest of the minors, in a non-adversarial setting.[451] Transformative mediation would work well in these disputes because emotions and relationships are major features in the conflict.[452] Resolving the relationship tension is important

[445] Ibid at 105.
[446] Fisher, R & Ury W op cit note 412 at 12.
[447] Spencer, D & Brogan, M op cit note 330 at 110.
[448] Smith, A et al *Experiences and challenges of evidence leaders in learner disciplinary hearings in public schools* (2015)18 Potchefstroom Elec LJ 6 at 2370-2371.
[449] Reyneke, JM & Pretorius, JL op cit 438 at 116.
[450] Mediation in Certain Divorce Matter Act 24 of 1987.
[451] Ibid and Mowatt JG *The Mediation in Certain Divorce Matters Act 1987: new but nothing new* (1987) De Rebus at 612, Memorandum on the objects of the Mediation in Certain Divorce Matters Bill 1986 at para 3.
[452] Spencer, D & Brogan, M op cit note 330 at 101-102.

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for the continued compliance with the settlement agreement. The second area of the law mediation has been incorporated into is Labour Law.

The Labour Relations Act[453] provides for the resolution of labour disputes- such as unfair dismissal and unfair labour practices[454] - through conciliation by the CCMA. In a CCMA conciliation, the commissioner can conduct a mediation, a fact-finding inquiry or an advisory arbitration to resolve the dispute.[455] Transformative mediation may be ideal because like family law, the employee-employer relationships matter a great deal.[456] The future of the relationship is perceived as highly important.[457]

Another example of statutory mediation can be found in the Magistrate Court Rules[458] and Superior Court Rules[459]. Court-annexed mediation is a relatively new concept in South Africa.[460] Courts may refer litigants, who volunteer, to attempt mediation before seeking the court's ruling. If the litigants reach an agreement, they would no longer need to institute or continue with court proceedings.[461] However, if parties are unable to reach a resolution, the mediator will refer the matter back to court.[462] It must be mentioned that the two rules do not have all the same provisions. The magistrate court rules are more detailed than the superior court rules. For example, where the

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[453] Labour Relations Act supra note 344.

[454] Ibid at s191 (1)(a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to-

… (ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within -

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."

[455] Ibid at s135.

[456] Spencer, D & Brogan, M op cit note 330 at 101-102.

[457] Shell, RB op cit note 373 at 121 and 124.

[458] Magistrate Court Rules supra note 332 at chapter 2.

[459] Rules Boards for Court of Law Act 107 of 1985: Amendment of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa ('Superior Court Rules') at URC41A.

[460] Magistrate court-annexed mediation came into force on 1 December 2014. Rule 41A court-annexed mediation in the High Court came into force on 9 March 2020.

[461] Magistrate Court Rules supra note 332 at chapter 2 and Superior Court Rules supra note 459 at URC 41A.

[462] Magistrate Court Rules supra note 332 at chapter 2 and Superior Court Rules supra note 459 at URC 41A.

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latter only explicitly provides for mediation prior to instituting proceedings, the magistrate court rules provide for both prior and post institution of court proceedings (but before judgment).[463]

In the next chapter, I will consider how mediation could be incorporated into South Africa's high school disciplinary system. In order to best determine this, I consider how mediation has been implemented in other countries and the lessons that can be learnt from them.

[463] Magistrate Court Rules supra note 332 at chapter 2 and Superior Court Rules supra note 459 at URC 41A.

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4. Peer Mediation: A Comparative Study

With this background, the question that remains is how mediation can be implemented in South Africa's public high school discipline system. This chapter will begin with a discussion of peer mediation in order to set the foundation for the comparative study. The comparative study will consider the peer mediation programmes of New Zealand and the United States. I will also discuss the peer counselling programme in Kenya before considering how peer mediation could be integrated in South Africa.

4.1 Understanding Peer Mediation

In peer mediation trained learners take on the role of mediators and facilitate disputes between fellow learners.[464] When a dispute arises and if the disputing learners agree to mediation, the wrongdoer and the wronged learner will meet with a peer mediator.[465] In the mediation both are given an opportunity to explain their side of the story as they see it.[466] Thereafter the peer mediator would guide the discussion and facilitate the resolution of the dispute.[467] If a resolution is reached, the learners will conclude and sign a mediation agreement.[468] The objective of this process is to empower learners to constructively take responsibility of their own discipline and to actively find resolutions to their disputes[469]. Thus, creating self-disciplined learners who are able to positively resolve their disagreements.

This form of mediation has many benefits. The first benefit is that there are no authoritative influences.[470] The disciplinary proceeding is authoritative in nature due to the powerful position the teachers, the principal and the school governing body hold.[471] They have the legal authority to

[464] Varnham, S *Seeing Things Differently: Restorative Justice and School Discipline* (2005) 3 Education and the law 17 at 89.
[465] Ibid at p90.
[466] Ibid at p90.
[467] Ibid at p90.
[468] Ibid at p90.
[469] Ibid at 89.
[470] Ibid at p89.
[471] Reyneke, JM & Pretorius, JL *Aligning School Discipline with the Best Interest of the Child: Some Deficits in the Legislative Framework* (2017) 35 Perspective in Education 1 at 117.

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control the disciplinary of learners at school.[472] This creates a power imbalance resulting in the learner feeling powerless compared to the school authorities.[473] In peer-to-peer mediation there is no power imbalance since the parties and the mediators are all learners. Thus, allowing learners to feel safe to actively participate and cooperate.

Following that, another benefit is that peer mediation empowers the learners. In the formal disciplinary process, the punishment process is the focus.[474] The learners' views and opinions are side-lined leaving them disempowered.[475] Conversely, in peer-to-peer mediation the learner has to actively participate in the process.[476] Allowing the learner to participate has allowed for open dialogue and helped some learn to accept responsibility.[477] Ultimately, empowering students and creating a positive change in the school culture.[478]

Furthermore, it reduces the number of disciplines that are referred to disciplinary hearings.[479] Where learners have a dispute, the dispute is first referred to peer mediation. If successful, there is no need to refer the matter on to formal mechanisms.[480] Research has found this system to be effective as it has reduced the number of disputes referred on to the formal mechanisms.[481]

4.2 Cool Schools programme in New Zealand

The New Zealand legal system has embraced mediation processes in areas such as residential tenancy and family law.[482] Mediation has also been embraced in the school discipline

[472] Guidelines for consideration of governing bodies in adopting a code of conduct for learners (GN 776 of 1998) ('Guidelines') at guideline 3 and Ibid at 117.
[473] Pitsoe, V & Letseka, M *Foucalt and School Discipline: Reflections on South Africa* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1526.
[474] Ibid at 1531.
[475] Foncha, JW et al *An Investigation into the Disciplinary Measures used in South African Schools: How Effective are they to the Learners?* (2014) 5 Mediterranean Journal of Social Sciences 23 at 1161.
[476] Varnham, S op cit note 464 at 89.
[477] Ibid at 90.
[478] Ibid at 89.
[479] Ibid at 90-91.
[480] Ibid at 89.
[481] Ibid at 90.
[482] Ibid at 89.

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system.[483] Peer-to-peer mediation was introduced in New Zealand, in 1991, through the 'Cool Schools' programme. [484] This programme aims to assist disputing learners to navigate their conflict and reach a resolution with the help of mediator-trained learners.[485] Senior learners are nominated by their teachers and trained to become mediators.[486] They mostly mediate friendship fallouts, common arguments and disagreements, bullying (cyber, verbal and physical) and harassment incidents.[487] Additionally, peace education has been integrated in school through social science curricula, school events such the National Schools' Peace Week in various leadership programmes.[488] The aim of this is to cultivate respect and a safe schooling environment.[489]

The programme began with 12 primary schools but its success has seen it now implemented in about two-thirds of primary, intermediate and secondary schools in New Zealand.[490] This programme has been said to have a 94% conflict resolution success rate.[491] There have been reports that the programme has resulted in a positive change in behaviour among the learners.[492] This could be due to the decreased rates of bullying at schools and improved levels of self-confidence and self-esteem among peer mediators.[493]

There have been several challenges despite the success of the 'Cool Schools' programme, namely encouraging school-wide involvement and ill-treatment of peer mediators.[494] Encouraging school-wide involvement has been a challenge as not all teachers have embraced the programme.[495] If the saying that a group is only as strong as its weakest link is true, then for the programme to succeed at a school, everyone one in the schooling environment needs to be involved. Teachers need to lead by example. The other challenge has been the ill-treatment of peer

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[483] Ibid at 89.
[484] Barnes, BE *Conflict resolution education in the Asian Pacific* (2007) 25 Conflict Resolution Quarterly 1 at 56.
[485] Varnham, S op cit note 464 at 89.
[486] Ibid at 90.
[487] Nissanka, N *Cool Schools peer mediation programme evaluation 2016* (2016) available at *https://www.academia.edu/30616958/Cool_Schools_Peer_Mediation_Programme_Evaluation_2016*, accessed 9 February 2022 at 9.
[488] Ibid at 10.
[489] Ibid at 10.
[490] Barnes, BE op cit note 484 at 56.
[491] Nissanka, N op cit note 487 at 10.
[492] Ibid at 1.
[493] Ibid at 5.
[494] Ibid at 15-16.
[495] Ibid at 15.

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mediators.[496] A 2016 Cool Schools peer mediation report[497] noted an incident where senior students have harassed peer mediators.[498] The matter was resolved with the help of a teacher.[499] This raises a concern about possible instances where peer mediators are party to the disagreement or where parties do not respect the learner's role as a peer mediator. These instances can be resolved by teachers since the programme also trains teachers.[500] In some schools, incidents of physical violence are mediated by trained teachers.[501]

It is important to highlight the limits of peer mediators so when integrating peer mediation into South African public schools, measures can be included to address possible concerns. One of the downsides that need to be addressed is its limited capability to only deal with student-to-student conflicts. A measure needs to be included to deal with student-to-teacher conflicts. It may not be ideal to have a learner mediator resolve these conflicts. Teachers may not want a child resolving their conflicts because of concerns about trust and independence. A solution to this could be to allow members of the disciplinary committee or the principal to take on the role of mediator. They would need to undergo training as the approach to conflict resolution of the disciplinary hearing and of mediation are different. Having trained adult mediators may also be helpful for other disputes- such as teacher-to-teacher disputes and parent-teacher disputes. After all, conflicts in a school environment may not always directly involve learners.

4.3 Community Board programme and another in the United States

Various peer mediation programmes have been implemented in thousands of schools in the United States.[502] It is estimated that half of the teachers in the United States are aware of peer mediation.[503] One of these programmes is the Community Board peer mediation programme in San Francisco,

[496] Ibid at 16.
[497] Ibid at 16.
[498] Ibid at 16.
[499] Ibid at 16.
[500] Barnes, BE op cit note 484 at 56.
[501] Nissanka, N op cit note 487 at 17.
[502] Haft, W & Weiss, ER *Peer Mediation in Schools: Expectations and Evaluations* (1998) 3 Harvard Negotiation Law Review 213 at 213.
[503] Ibid at 213.

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which has been implemented since 1982.[504] The Community Board had initially used mediation to address community conflicts.[505] That mediation model was then adapted for peer mediation at schools.[506] The peer mediation programme aims to empower learners to resolve their own conflicts and to educate learners on constructive ways of resolving conflicts.[507] Another one is the New Mexico Center for Dispute Resolution (NMCDR) peer mediation programme in Albuquerque.[508] This programme was first established in 1984 with the goal of teaching learners life skills and reducing violence.[509]

Standard practice among these peer mediation programmes in the United States is to train teachers on the basics of mediation, train learners to be peer mediators and include conflict resolution education into the school curriculum.[510] Learners with leadership qualities are typically nominated by their teachers or their peers to become peer mediators.[511]

Research evaluating several different peer mediation programmes was conducted and the results show that these programmes have been successful.[512] There has been a 90% compliance rate to mediate and a 95% settlement rate of mediated matters.[513] There was also a noticeable positive change in the school culture and the attitude toward conflict resolution.[514] As well as an improved understanding and sensitivity to the needs of others.[515]

Another lesson that South African public schools can learn from these peer mediation programmes is the integration of conflict resolution education into curricula. In terms of the former, conflict education could be incorporated into the South African Life Orientation curricula. Since this is a compulsory subject, this would ensure that all learners would have to learn conflict resolution skills and have an understanding of the peer mediation process. This would also help to promote a disciplined school environment and encourage school-wide involvement. School-wide

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[504] Ibid at 224.
[505] Ibid at 224.
[506] Ibid at 224.
[507] Ibid at 224-225.
[508] Ibid at 226.
[509] Ibid at 226.
[510] Ibid at 214 and 223.
[511] Ibid at 236-237.
[512] Ibid at 243.
[513] Ibid at 243.
[514] Ibid at 2243 and 250.
[515] Varnham, S op cit note 464 at 90.

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involvement is needed for the long-term success of the programme.[516] Moreover, teaching learners about mediation will only increase awareness of dispute resolution amongst parents, grandparents, guardians and eventually the rest of South Africa. And who knows, maybe in a few years we will see fewer people seeking litigation over mediation.

4.4 Peer Counselling in Kenyan Schools

Corporal punishment was banned in Kenyan schools in 2001.[517] However, indiscipline escalated with increased reports of student unrest, violent strikes, and other violent behaviour.[518] Thus an alternative disciplinary method in the form of peer counselling was implemented in an effort to address this problem.

Peer counsellors are fellow learners who are trained to help learners address problems they have - be it at home or at school.[519] They assist school counsellors to help identify the challenges a learner has.[520] Peer counselling is aimed at positively changing the learner's behaviour.[521] Although counselling and peer mediation are not the same mechanisms, these alternative disciplinary methods share the same goal. Thus, lessons can still be taken from this method.

A study was done in Kenya, looking at the effects of peer counselling in addressing school indiscipline.[522] The results of the study, showed that 73.3% of school principals found peer counselling to have a positive effect on learner behaviour.[523] Another 3% said it teaches learner responsibility and reformation[524] It has been said that one of the reasons for these positive results was the age relatability factor of peer counselling as learners felt safer and comfortable speaking to their age mates about their problems than teachers who would struggle to understand

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[516] Haft, W & Weiss, ER op cit 502 at 225.
[517] Mulwa, JK *Effects Of Principals' Alternative Disciplinary Methods On Students' Discipline In Public Secondary Schools In Kitui County, Kenya* (2014) unpublished: Department of Educational Administration and Planning, University of Nairobi at 7.
[518] Ibid at 7-8.
[519] Ibid at 12.
[520] Ibid at 34.
[521] Ibid at p14.
[522] Ibid.
[523] Ibid at 111.
[524] Ibid at 111.

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generations' struggles of the learners.[525] The study concluded that peer counselling does promote positive behaviour and as a consequence of positive behaviour, there was an improvement in academic performance.[526] Thus implementing an alternative disciplinary measure in South Africa would help learners learn self-discipline and responsibility.

An important point to highlight from this study is the general preference from Kenyan learners to seek peer assistance over teachers.[527] Similarly to peer counselling, peer mediation employs learners to assist their fellow peers.[528] Thus disputing learners may benefit from having a trained learner, who understands the struggles of their generation, to facilitate the mediation.

4.5 Integrating Peer Mediation into South African Schools

The guideline prohibits the school's authority to discipline from being delegated to learners. Since they are not in charge of the school.[529] Peer mediation does not amount to a delegation of that authority. All it is enabling learners to seek the help of a trained learner to resolve their dispute without engaging in the formal school disciplinary process. The meeting is between the learners. However, where it proves unsuccessful, teacher and formal processes may be called on. This reduces the number of matters that enter the formal process.[530] As well as allows teachers to focus on teaching and feel empowered again among their disciplined learners.[531]

In Addition to integrating conflict resolution education, mediation training can also be done through extracurricular clubs. At my high school, there was a first-aid club. Learners in this club were taught the basics of first aid such as treating wounds and performing CPR. A similar training programme could be created for a mediation club. In keeping with the peer mediation programmes in New Zealand and the United States, senior learners who possess leadership qualities could be

[525] Ibid at 12 and 44.
[526] Ibid at 156.
[527] Ibid at 12 and 44.
[528] Varnham, S op cit note 464 at 89.
[529] GN 776 of 1998 at guideline at 7.4
[530] Varnham, S op cit note 464 at 90
[531] Ibid at 90; Graham, T & Cline, PC *Mediation: An Alternative to Discipline* (1989) 72 The High School Journal 2 at 74-75and Segalo, L & Rambuda, AM *South African public school teachers' views on right to discipline learners* (2018) 38 South African Journal of Education 2 at 4.

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nominated to join the club.[532] Club members would complete training which may include assessments before being allowed to mediate disputes.

It seems the implementation of peer mediation within South African public schools has already begun in the Western Cape.[533] Quaker Peace Centre, a non-profit organization, has introduced peer mediation programmes into six high schools in the Cape Flats.[534] They have had great success and even found neighbour primary and high school's starting their own peer mediation programs.[535] The South African Development and Reconstruction Agency is also training learners in high schools in Nyanga, Cape Town, to be peer mediators.[536] Those who graduate the training program will be able to help their peers resolve conflicts.[537] Other organisations such as the Southern African School Mediation Initiative and Catholic Institute of Education have also implemented similar programmes in and around South Africa.[538]

Consideration must also be given to remote or online dispute resolution. The COVID-19 pandemic has accelerated the need for alternative mechanisms to the traditional face-to-face mediations. School's need to be able to provide remote disciplinary hearings and mediations. It exposed the issues with the available online mechanisms. Issues include impaired channels of communication (such as body language and tone), the lack of access to the internet and the increased possibility of misunderstanding. However, it also highlighted the positives. With no travel, venue and hospitality costs, online dispute resolution is cheaper than face-to-face – and by that fact much cheaper than litigation. It is also more convenient. Parties are able to meet from the comfort of their own home (or safe space). Email mediations allow parties to respond when it is

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[532] Haft, W & Weiss, ER op cit note 502 at 236-237and Varnham, S op cit note 464 at 90.
[533] Quaker Peace Centre Annual Report 2016/2017 available at *http://www.peacecentre.org.za/wp-content/uploads/2019/08/Annual-Report-2017.pdf*, accessed on 18 January 2022
[534] Ibid
[535] Ibid
[536] Ntseku, M *Peer mediators trained to tackle conflict* (27 January 2020) accessed at *https://www.pressreader.com/south-africa/cape-argus/20200127/281603832437543*, accessed on 18 January 2022
[537] Ibid
[538] SAMI peer to peer conflict management available at *https://www.backabuddy.co.za/champion/project/school-mediation-for-change*, accessed on 18 January 2022; Catholic Institute of Education's Building peaceful Schools programme available at *https://www.backabuddy.co.za/champion/project/school-mediation-for-change*, accessed on 18 January 2022

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most convenient to them. Thus, more research needs to be conducted to determine how best to conduct online dispute resolution.

Lastly, I will discuss whether it would be best to incorporate peer mediation into the public school disciplinary process as an alternative to a disciplinary hearing or rather as an addition to the process.

4.5.1 Mediation as an addition

In this school discipline model disputing parties would first refer their dispute to mediation. If the mediation is successful and parties reach an agreement, the process will end there. However, if the dispute is unsuccessful, the matter could then be referred to a disciplinary hearing in terms of the code of conduct and the South African Schools Act.

This is the model used in the Labour Relations Act.[539] Where for instance an employee alleges unfair dismissal, they may refer their matter to the CCMA.[540] The matter is to be conciliated within the prescribed days from the date of referral, unless an extension is requested.[541] If the conciliation succeeds, the commissioner will issue a certificate of resolution indicating that the matter has been resolved.[542] If the conciliation fails, a certificate of non-resolution will be issued instead.[543] Thereafter, depending on the reason for the dismissal, the matter may be referred to arbitration or adjudication[544]. For instance, if the reason was discriminatory, the matter would usually be referred to the court for adjudication.[545] Typically, the reasons for the dismissal would be revealed during the conciliation but if it is unknown, the matter may be referred to arbitration[546].

An objection can be made to the inclusion of mediation. Participation in mediation should be voluntary.[547] In instances with court-annexed mediation, civil litigants have the opportunity to mediate before seeking out the court's judgment. If they choose not to or they fail to reach a

[539] Labour Relation Act 66 of 1995 at chap 7.
[540] Ibid at s191(1)(a)(ii).
[541] Ibid s191(1)(b).
[542] Ibid at s135(5).
[543]Ibid at s135(5).
[544] Ibid at s191(5) and *Association of Mineworkers and Construction Union and Others v Ngululu Bulk Carriers (Pty) Limited* (In Liquidation) and Others 2020 (7) BCLR 779 (CC).
[545] Labour Relations Act supra 539 at s191(5)(b) read with s187.
[546] Ibid at chap 7.
[547] Spencer, D & Brogan, M *Mediation Law and Practice* ed (2006) at 85.

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resolution the matter will be remitted back to the court.[548] If parties have a choice not to mediate what then would be the reason as to why the learner and the evidence leader, acting on behalf of the school, would willingly want to mediate. The evidence leader could have the freedom to elect not to mediate, with the intention of referring the matter to a disciplinary hearing.

The answer cannot be cost-effectiveness or expeditiousness. There is no cost associated with disciplinary hearings. Neither can it be said that it costs more to hold an internal mediation – mediated by a fellow student or a member of the school governing body's disciplinary committee. Also, it cannot be said that it takes a long time for parties to appear before the discipline committee. The South African Schools Act requires a hearing to be held within 7 days from the learner receiving a hearing notice[549] which would be an extraordinary situation in a court of law, where it takes much longer to appear before a judge.

Thus, a reason why a transgressor learner may elect to participate would be to resolve the matter in a positive environment. The disciplinary hearing may seem hostile or accusatorial.[550] There exists a power imbalance present between the powerful evidence leader and the weak transgressor learner.[551] While attending a few disciplinary hearings as a representative of transgressor learners, I noticed that the separation (or independence) between the evidence leader, 'the school' and the school governing body were at times blurred. Making it feel like 'them' versus the learner. In mediation, the aim is to create a constructive environment for problem-solving.[552]

Possible reasons for the evidence leader electing to mediate may include wanting to try an alternative disciplinary method. Research shows that punitive disciplinary measures neither deter learners from committing bad behaviour nor do they teach learners responsibility or self-discipline.[553] They may also want to protect their reputation and public image. In today's digital

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[548] *Rules Board for Courts of Law* Act 107 of 1985: Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa ('Magistrate Court Rules') at chapter 2.
[549] Regulation relating to disciplining, suspension, and expulsion of learners at public schools in the western cape (Provincial Notice 365 of 2011) ('Regulation') at reg 2.
[550] Reyneke, JM & Pretorius, JL op cit note 471 at 115.
[551] 'The evidence leader is also known as the "prosecutor" in disciplinary hearings, and is expected to manage an unprejudiced disciplinary process at school.' '[T]he work of an evidence leader is specialised and additional to the core duties and responsibilities of educators.' - Smith, A et al *Experiences and challenges of evidence leaders in learner disciplinary hearings in public schools* (2015)18 Potchefstroom Elec LJ 6 at p2370-2372 and Pitsoe, V & Letseka, M op cit note 1526.
[552] Varnham, S op cit note 464 at 89.
[553] Foncha, JW et al op cit note 475 at p1163.

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era, improper conduct at school is easily brought to the public's attention.[554] No school wants to be in the headlines for something negative. It damages the school's reputation. Preventing a learner from accessing justice through a mediation process would negatively affect their reputation.

5.2 As an alternative

Meditation as an alternative would mean replacing adjudication with mediation. Having it be the main avenue to resolving conflict. In a school disciplinary setting, disciplinary hearings will be replaced with mediation. In the same way that disciplinary hearings replaced the abolished corporal punishment. This practice of using 'alternative dispute resolution' as the main avenue instead of litigation has been adopted in a few areas of law such as cross-border and international contracts. Parties to these contracts prefer to make use of mediation and arbitration to settle any dispute arising from the contract. Since parties come from different jurisdictions, which may even have different laws, it would be more efficient and expeditious to settle the matter outside of court.

However, this approach does raise a potential objection as to whether it denies a transgressor learner their day in court. To answer this, we need to consider why people want their day in court. If the reason is based on the ingrained notion that going to court is the only solution, then the answer must be in the negative. Alternative forms of dispute resolution are as capable as adjudication of resolving conflicts. And in some cases, they may be the best way of resolving disputes.

However, an argument could be made for the need to develop the law or to determine what the law is. Courts have a law-making power through the development of common law[555] and the doctrine of precedent. A disciplinary hearing is a quasi-judicial proceeding[556]. The disciplinary committee only makes pronouncements on guilt based on the school's code of conduct. They have no law-making power. Thus, it cannot be said that mediation would deny a learner their day in

[554] Nombembe, P 'Court allows EFF to protest at Brackenfell High School' Times Live (23 December 2020) available at *https://www.timeslive.co.za/news/south-africa/2020-12-23-court-allows-eff-to-protest-at-brackenfell-high-school/* ,accessed 20 December 2021 and Shange, N & Nombembe, P 'Sans Souci teacher and student open assault cases against each other' Times Live (6 February 2019) available at *https://www.timeslive.co.za/news/south-africa/2019-02-06-sans-souci-teacher-and-student-open-assault-cases-against-each-other/*, accessed 20 December 2021.
[555] Constitution of the Republic of South Africa, 1996 at s173.
[556] Smith, A et al op cit note 551 at 2372.

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court. Moreover, this does not preclude a party from instituting proceedings in court to challenge the decision of the disciplinary committee.[557]

Another concern could be raised as to the situation where the parties are unable to reach a settlement in mediation. The mediator may set a new meeting date. Sometimes allowing the parties to step away from the table for a moment is necessary. This may help parties to refocus and to re-examine the situation. Thus, allowing for a new attempt at reaching a solution. Additionally, there is nothing stopping the parties from entering a new mediation process with a new mediator. It may mean the parties may need a mediator with a different approach. For example, if the first mediator took a facilitative approach, the second mediator, who takes a transformative or an evaluative approach might be in a better position to help the parties reach an outcome.

5.3 Which is best?

I believe the incorporation of mediation into the high school disciplinary system is best as an addition to the process. There are way more positives to adding another voluntary level to the disciplinary system than to replacing one for another. It only strengthens the school disciplinary system. This two-part model has the benefit of not only allowing the transgressor learner and the victim to actively participate and have control over decision-making but also allowing the school to maintain some level of authority to discipline. The authority that has been legally bestowed.[558] Despite the issue with the disciplinary hearing, it still has a place in school discipline. Mediators have no adjudicating authority[559] and thus it's important to have safeguards still available for a disciplinary hearing.[560] Where a body with adjudicative power can make a decision.

Mediation, as an alternative to a disciplinary hearing, may affect the voluntary nature of mediations. Parties no longer have an option of whether or not they want to engage in mediation. This would have the potential consequence of parties not actively engaging and trying to find a resolution. This is a similar argument made against statutory mediation. The purpose of incorporating statutory mediation is to alleviate the backlog on courts and to 'facilitate an

[557] *Phillips v Manser and Others* 1998 JDR 0882 (SE) at 1.
[558] General No 776 supra note 472 at guideline 3.
[559] Anstey, M *Managing Change: Negotiating Conflict* 3ed (2012) at 245.
[560] McMasters, J *Mediation: New Process for High School Disciplinary Expulsions* (1990) 84 Northwestern University Law Review 2 at 760.

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expeditious and cost-effective resolution of a dispute between litigants or potential litigants'.[561] However, a concern arises whether voluntariness still exists where mediation is mandated.[562] For instance, under labour law where employee and employer are forced to seek conciliation before seeking out the court's judgment.[563] This contradicts the notion of voluntariness.[564] However, voluntarism is not lost solely because the choice to participate is coerced.[565] Parties still have control over the outcome and the choice whether to agree to the settlement agreement or not.[566]

Even if this was true, it would still raise the question of what happens if parties cannot or choose not to reach an agreement. If the statute, or the code of conduct, does not make provision for enforcement of participation, we are left to rely on ethics as a form of enforcement. Rely on concepts such as reciprocity and respect. However, it is not ideal to rely solely on ethics since people may have different ethical views. Thus, by keeping disciplinary proceedings, this would not be an issue. Where parties do not want to actively participate or agree to a resolution, they can refer the matter to the disciplinary committee.

[561] Magistrate Court Rules at rule 71(d).
[562] Spencer, D & Brogan, M op cit note 547 at 87.
[563] Labour Relation Act supra note 539 chap 7.
[564] Spencer, D & Brogan, M op cit note 547 at 87.
[565] Ibid at 88.
[566] Ibid at 88.

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5. Conclusion

5.2 Summary

The first chapter began with a look into discipline in the context of the home and of the school. Historical, physical forms of discipline were not only acceptable but also encouraged in order to raise well-behaved children. However, that changed with the advent of democracy promoting and protecting human rights. Physical forms of punishment were deemed to violate children's constitutional rights. In the home, parents could no longer use reasonable chastisement as a defence for assault. At school, teachers could no longer use corporal punishment to correct indiscipline. Thus, alternatives to disciplining children need to be established.

Chapter two began with a focus on school discipline - looking at the laws governing disciplinary proceedings in South African public schools. The chapter opened with a look at the rights of the transgressor learner. It also focused on learners' right to education. This right is protected under the South African Constitution, the Convention and the Charter. Furthermore, transgressor learners have the right to a fair hearing. The right to a fair hearing includes the best interest of the child, the right to be heard and the right to procedural and substantive fairness. Thus, the laws relating to school discipline must be in accordance with these constitutional and international rights. These rights must be protected, promoted, respected and fulfilled by the State and the school. Concluding that although it does consider those rights, more could and should be done. Thus, leaving the code of conduct the task of adding the necessary nuance to the law. However, it is not fair to assume that all SGBs will know where the gaps in the law are and what needs to be included in their code of conduct to address those gaps.

The rest of the second chapter analysed the laws relating to school discipline. Two big problems we raised. The first was the retributive and adversarial nature of the disciplinary hearings. The aim of this approach is to determine what rule of the code of conduct has been broken, who broke the rule and what the appropriate punishment would be for breaking such a rule. The converse approach is the restorative approach. The focus here is to determine what the harm is, who was harmed, how the damage can be repaired and how to address future harms. This constructive way of addressing conflict or justice is what the Schools Act calls for. It calls for positive and constructive ways of disciplining.

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The second problem dealt with the best interest of the child. I argued that suspension, to the extent that it prevents those with a right to basic education from continuing to learn, is not in the best interest of the child. The best interest standard is to be given paramount importance in all matters involving the learner unless it is justifiable limited. There are no statutory provisions for alternative learning or 'child-care' where a learner is suspended. That cannot be in the best interest of the suspended learner. More so for poor, black learners who are statistically and historically at a disadvantage as compared to their more well of white counterparts.

The third problem, briefly addressed, is the continued use of corporal punishment, despite its ban. The feeling among teachers is that corporal punishment is more effective than the current process at addressing learner indiscipline.

The third chapter discussed mediation. The chapter began with a conceptualisation of mediation and discussed the mediation process. As well as considering the benefits and drawbacks of mediation. With these in mind, it was necessary to determine whether the problems identified in chapter two could be resolved by mediation. The answer being in the affirmative. Not only does mediation take a restorative and positive approach to discipline, but it also takes an interest-based approach which ensures that the interest of the child is given paramount importance. The chapter ended with a look at how mediation has been incorporated within various areas of South African law. Thus, it would not be strange or new to incorporate it in a school discipline context.

A comparative study was concluded in chapter four. Peer mediation has been successfully implemented in New Zealand and the United States. Schools in these countries have reported that their learners have gained conflict resolution skills and the discipline at school has improved. Similar positive results have been reported with peer counselling in Kenya. Thus, implementing peer mediation in South African public high schools could be achieved. Conflict resolution education could be integrated into the Life Orientation curriculum. A peer mediation club could be formed where learners could be trained as mediators. Non-profit organisations, such as Quaker Peace Centre, have already begun programmes in schools in the Western Cape training learners to be peer mediators.

Lastly, the chapter considered where mediation would be best implemented as an addition to the current disciplinary process or as an alternative, replacing the disciplinary hearings. Both have their merits but ultimately, incorporating mediation as an initial stage to the current process,

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best improves the school discipline process. Since in some instances, it may be best to go before a disciplinary hearing.

5.2 Reflection

During my representative work at disciplinary hearings, in that role, I noticed another challenge with the disciplinary process. There is a lack of knowledge of the laws relating to the high school disciplinary process. This was evident in not just the learners, and the parents, but also the teachers and school governing body ('SGB'). Before joining the organisation, I had not known that one could have representation (legal or not) at a disciplinary hearing.[567]

In reflecting on the research question that is whether the disciplinary process in public high schools achieves the purpose envisioned by its legislators, it can be said that the disciplinary process misses the mark. The purpose has been to use positive and constructive measures to teach learners self-discipline and to take responsibility for their behaviour. examining the laws relating to school discipline, it was evident that the laws are not sufficient to achieve the intended purpose. However, by incorporating meditation into the process, the problems with the school discipline process are addressed. Thus, placing school discipline at South African public schools on the right path to achieving the Schools Act's purpose.

With the ban of corporal punishment to bring school discipline in line with the Constitution schools needed to find new ways of disciplining learners. The objective of this paper was to open readers' minds up to considering more alternative disciplinary measures. More positive, restorative measures that can help transgressor learners. If such measures exist for children in the criminal justice system, then similar measures should be made available for children in the school disciplinary system [568] These improper behaviours typically stem from other underlying issues. By unpacking these underlying issues, schools and other stakeholders will be in a better position to support these learners in resolving conflict. Through mediation, learners are empowered to take

[567] South African Schools Act 84 of 1996 (School's Act') at s8(6).

[568] '*[E]xpand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed… [and] creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases*' - Child Justice Act 75 of 2008 at preamble.

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ownership of conflict resolution. Thus, enabling them to be able to take responsibility for their actions. Ultimately learning self-discipline. Where disciplinary hearing only addresses the action committed, mediation goes further by addressing that action and future actions.

This paper also aimed to inspire more teachers and schools to implement peer mediation as non-physical forms of punishment do produce positive results. The ultimate aim is for more high schools in South Africa to implement peer mediation.

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