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Red flags

Disciplinary practices and 'school-to-prison' pathways in South Africa

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Testing positive for drug use at school turned into a horror story for four learners, who were channelled into the criminal justice system by their school and detained for months under 'compulsory residence orders' at child and youth care facilities. This occurred even though the referral of children to the criminal justice system following a school-administered drug test is explicitly prohibited by legislation. S v L M & Others draws startling attention to the failure of school officials, prosecutors and magistrates to comply with legislation, and the devastating impacts that a direct 'school-to-prison' pipeline can have on children. The case also raises red flags around broader punitive and exclusionary school disciplinary mechanisms, which – even where lawful – may also adversely affect children and potentially contribute to school-to-prison pathways in South Africa. We argue that S v L M highlights the need for restorative and preventative approaches to school discipline, which can transform not only learners and schools but society more broadly.

Introduction

On 31 July 2020, the High Court, Gauteng Local Division handed down judgment in the case of *S v L M and Others*.² The judgment

was widely publicised for decriminalising the possession and use of cannabis by *children* (an order which has yet to be confirmed by the

Constitutional Court).³ This is indeed a significant development, following the Constitutional Court's decriminalisation of the private possession and use of cannabis by *adults*.⁴ However, and perhaps less popularly reported, *S v L M* also raises red flags around 'school-to-prison' pathways in South Africa.

The case originally centred around four boys and a 'dagga cookie'.⁵ The children had tested positive for cannabis use through a school-administered drug test. Despite clear provisions to the contrary in the South African Schools Act, 1996 (Schools Act),⁶ the children were channelled directly from their school into the criminal justice system. Each of the boys was eventually sent to a Child and Youth Care Centre (CYCC) for an indefinite period of 'compulsory residence' under a diversion order. Following a referral of the matters for review, the High Court held that such an order was not provided for by the Child Justice Act, 2008⁷ and, considering the minor offence at issue, the order even amounted to a form of 'cruel, inhuman and degrading punishment'.⁸

The detention of children following a school-administered drug test is a clear example of a 'school-to-prison' pipeline in South Africa. While the Schools Act prohibits the direct referral of children to the criminal justice system following a drug test at school, *S v L M* offers cause for reflection on the effects of exclusionary and punitive school disciplinary practices more generally. In particular, it highlights the need for inclusive and supportive approaches to dealing with at-risk children in the education system.

***S v L M*: A direct 'school-to-prison' pathway**

In 2012, Pro-Practicum School (a public school for learners with special education needs) partnered with prosecutors at the Krugersdorp Magistrates' Court to implement the 'Drug Child Programme'. The programme, which had

been in existence for 15 years, was designed and run by a senior state prosecutor, a state advocate and volunteers in Krugersdorp (Gauteng).⁹ It was developed in response to a community member's complaint around the high incidence of drug abuse amongst school children in the area.¹⁰

Under the programme, children who tested positive for drug or substance abuse at their school would be referred to the criminal justice system for having committed an offence under the Child Justice Act.¹¹ Once referred, prosecutors would present a *pro forma* 'diversion agreement' to the learner's parents, which would ultimately be made an order of court by a magistrate. The diversion order required the child to comply with a laundry list of conditions for at least three months to avoid further prosecution.¹² If a learner complied with the conditions, the record would indicate that the programme had been completed successfully and the case was closed. If a learner failed to comply, then the prosecutor would seek a more onerous diversion option and refer the child to a probation officer for recommendations. In some cases, the recommendation was a sentence of compulsory residence at a CYCC for an indeterminate period.

For years, the Drug Child Programme was implemented by school officials, prosecutors and magistrates in Krugersdorp without question. However, when the case of the four Pro-Practicum learners (who had tested positive for cannabis use at school) came before the High Court, the court indicated that the very premise of the programme was unlawful as it flouted the express provisions of the Schools Act.¹³

The Schools Act unequivocally prohibits criminal proceedings from being instituted by a school against a learner found in possession of, or having tested positive for use of illegal drugs

through a school-administered drug test.¹⁴ This prohibition is reiterated by regulations relating to drug testing at school.¹⁵ Where a learner has tested positive for drug use, the learner's parents should be engaged and, where the parent requests, the learner should be referred to a rehabilitation institution for drug counselling.¹⁶ The results of the test must be kept confidential.¹⁷ The regulations explicitly state that '[n]o criminal proceedings may be instituted' against learners who test positive for illegal drug use.¹⁸

Despite the clear legislative prohibition against criminal referrals by schools, the Drug Child Programme was fully integrated into Pro-Practicum's Code of Conduct.¹⁹ Between 2014 and 2019 alone, 819 learners underwent drug testing at the school, 178 of whom were referred to the criminal justice system through the Drug Child Programme. At least 24 learners were ordered to complete periods of compulsory residential detention.²⁰ The school's social worker presented these statistics in an affidavit as a measure of the success of the programme, without any reference to prohibitions in the Schools Act.²¹

Far from a success, however, the Drug Child Programme established a clear 'school-to-prison' pipeline, funnelling children directly and unlawfully from schools into the criminal justice system. In the United States, the term 'school-to-prison pipeline' has been used to refer to 'education and public safety policies that push students into the criminal legal system'.²² Dutil explains that the pipeline is created through 'imposing suspensions, expulsions, and juvenile justice referrals on children in schools',²³ which has the effect of 'significantly decreasing their access to instructional time and school engagement while increasing their risk of interaction with the criminal justice system'.²⁴

Life course theorists have highlighted that a young person's early contact with the

criminal justice system can be a significant turning point,²⁵ which is linked to increased offending in the remainder of their school career and to later adverse outcomes like arrest and incarceration.²⁶ Events that act as transitions – short-term events in a trajectory – accumulate to either move someone towards continued delinquency or provide 'knifing off' opportunities²⁷ away from criminality. There is significant evidence that suggests that school disciplinary practices, which bring a learner into contact with the criminal justice system, serve as transitions, which create an antisocial turning point that negatively reshapes the learner's trajectory and may usher young people toward incarceration later in life.²⁸ Official sanctions (such as referral to criminal justice institutions) are particularly negatively linked to a young person's opportunities in adulthood and to their likelihood of long-term offending.²⁹

The Drug Child Programme serves as a striking example of learners having been directly routed from their school into the criminal justice system and highlights the negative impacts that such a direct school-to-prison pipeline can have on children. At least one of the four Pro-Practicum boys was reported to have been beaten and strangled by older children (some of whom had committed serious crimes such as rape and murder) in the CYCC to which he had been diverted.³⁰ The guardian of one of the boys said that the child had been deeply negatively affected by the period of detention at the facility:

He came out of there full of jail tattoos. He steals from me, taking money from my purse, and also stealing food from the house. I am just waiting for the police to come to my house for him.³¹

While the Child Justice Act has the noble aim of ameliorating the impact of criminal justice processes on children,³² the *S v L M* case illustrates how these protections are not always upheld once children are in the pipeline.³³ The

High Court found that the CYCC custodial order was not a competent diversion option for a minor offence,³⁴ and that the Child Justice Act was variously ignored or misapplied by prosecutors and magistrates.³⁵ Moreover, the court emphasised that CYCCs are not a 'soft option',³⁶ but are 'very structured institutions within fenced environments' and compulsory residence in such a facility 'involves the deprivation of liberty.'³⁷ Scholars have also highlighted that 'secure care facilities for young offenders face issues of rights violations, violence and poor conditions and operate as incarceration in all but name.'³⁸

Thus, despite a direct school-to-prison pathway being distinctly prohibited by the Schools Act and despite the protective mechanisms of the Child Justice Act, the four Pro-Practicum boys (and other learners) were unlawfully channelled from their school into the criminal justice system and placed under custodial detention. The case draws startling attention to the failure of school officials, prosecutors and magistrates to comply with legislation, and the devastating impacts this has on children.³⁹ The case also raises red flags around other forms of punitive and exclusionary mechanisms (such as suspension and even expulsion), which may be *lawfully* invoked by schools. These punitive and exclusionary mechanisms also serve to marginalise at-risk children and may contribute to indirect school-to-prison pathways in South Africa. The *S v L M* case thus draws attention to the need for 'identify[ing] school disciplinary practices that may retraumatise and criminalise youths'⁴⁰ and for policy reform to address these issues.

Red flags: punitive disciplinary practices and indirect school-to-prison pathways

The school-to-prison pipeline is not only created through direct contact with the criminal justice system. It also operates indirectly through punitive school discipline policies

that may result in suspension from school or periods of confinement at diversionary facilities.⁴¹ Although there has been little scholarly attention to the link between disciplinary measures at school and criminal justice interaction in South Africa, other jurisdictions have shown that punitive and exclusionary measures can further marginalise children.⁴² Learners who are removed from schools often experience barriers to re-entering school and fall behind academically, especially when they have returned from long suspensions and residential placements. These learners are consequently at significant risk of dropping out of school⁴³ and of coming into contact with the criminal justice system.⁴⁴ As Gonzalez points out:

It has been consistently documented that punitive school discipline policies not only deprive students of educational opportunities, but fail to make schools safer places. The presence of zero tolerance and punitive discipline policies within schools also have negative effects on the offending student, by increasing the likelihood of future disciplinary problems, and ultimately increasing contact with the juvenile justice system.⁴⁵

As was the case with Pro-Practicum, South African schools tend to make use of codes of conduct that apply punitive approaches to behaviour transgressions. Such punishments can range from detention to removal from the class, suspension and expulsion.⁴⁶ This traditional way of managing behaviour transgressions in schools is based on the deep-rooted belief that punishment is an effective way to ensure compliance with the behavioural norms of a school. However, this belief has been widely shown to be untrue.

Punitive approaches to discipline are not directed towards teaching appropriate and desirable behaviour, nor do they develop

the learner's awareness of and responsibility for the impact of their behaviour.⁴⁷ As a consequence, the possibility of changing a learner's future behaviour becomes more remote, with their compliance being mainly driven by 'fear of humiliation or pain.'⁴⁸ The overall result is that the problem for students and teachers is only made 'worse in the long term' as 'not only have the students failed to learn more appropriate patterns of behaviour, they also have missed out on instruction and fall further behind academically, becoming increasingly marginalised.'⁴⁹

Punitive approaches to behaviour transgressions (especially exclusionary disciplinary practices such as removal from the classroom, suspensions and expulsions) are also reactive rather than preventative. As Skiba, Arredondo and Williams have shown in the United States, punitive exclusionary practices do not, in fact, reduce or prevent future recurrence of similar transgressions. Instead, there is a causal link between 'removing a child or adolescent from school for disciplinary reasons through out-of-school suspension and expulsion' and increased 'risk for a variety of serious negative outcomes'.⁵⁰ Once students are removed from schools, they 'experience decreased academic achievement, further fuelling negative attitudes and leading to increased dropout rates.'⁵¹

In South Africa, a zero-tolerance approach to school discipline is sometimes explicitly reinforced by provincial education departments. A public 'warning' issued by the Western Cape Education Department (WCED) to learners in February 2020,⁵² serves as one example. Even though the WCED's statement mentions ongoing support programmes to 'promote positive behaviour in schools with a growth mindset and values-driven approach',⁵³ it urges schools to implement disciplinary action against learners who transgress school codes

of conduct. This punitive approach often leads to children being suspended or expelled from schools, even for minor infractions and sometimes without due process. As attorneys from the Equal Education Law Centre (EELC) have noted: '[d]espite provisions of the Schools Act, schools often suspend pupils as an automatic or default response to misconduct.'⁵⁴ In the case of a learner who was summarily suspended for being involved in an altercation at school, the attorneys commented:

In Chuma's⁵⁵ case, the school conducted a minimal investigation into the matter and did not afford him a chance to put his side of the story. This unlawful practice saw Chuma excluded from valuable class time and subjected him to a stigmatising situation.⁵⁶

In another case, the EELC intervened to secure a settlement agreement on behalf of a 14-year-old learner who was expelled from school as a result of testing positive for cannabis use.⁵⁷ Following the EELC's intervention, the learner was readmitted to their school and went on to successfully complete their final exams.⁵⁸

While the learners in these cases were able to challenge their exclusions, there are many learners who are suspended or expelled for minor infractions who do not have the benefit of legal assistance and are excluded from the schooling system for extended periods of time. Moreover, even though children who are expelled from school are required by law to be placed in another public school,⁵⁹ such learners are often stigmatised and viewed as troublesome. Constitutional Court cases like *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* have shown that schools 'tend to refuse' admission to learners with a record of learning difficulties or disciplinary issues.⁶⁰ As the Court has noted: '[s]chools would rather

have higher achieving learners and better results.⁶¹ Even provincial education officials have expressed frustration at the requirement that expelled learners be placed in another public school, suggesting that this may be simply 'transfer[ring] the problem from one school to another'.⁶² This outlook is particularly concerning in light of South Africa's soaring school dropout rates,⁶³ with suspensions and/or expulsions contributing, in part, to the permanent exit of some learners from the schooling system in some cases.⁶⁴

It is clear then that we need alternative approaches to punitive and exclusionary practices in order to ensure that at-risk children, like the four boys at Pro-Practicum school, are supported rather than merely penalised for challenging behaviour in school settings.

The need for inclusionary, restorative and preventative approaches to discipline

Intervention measures adopted by schools should aim to address the possible causes of disciplinary challenges and to create changed patterns of behaviour.⁶⁵ It is essential to understand why a learner behaves in a certain way to be able to determine the most appropriate disciplinary response. Unfortunately, however, punitive measures do not address the root causes of challenging behaviour. Moreover, punishment, which is aimed solely at the transgressor, also fails to factor in the complex school, family and community context in which inappropriate behaviour is rooted.

While there must be consequences for problematic behaviour these interventions should help the learner understand why the behaviour was inappropriate, encourage them to take responsibility for the impact that their behaviour has had on others and facilitate learning appropriate behaviour for the future. Gonzalez argues that alternative models, such as restorative approaches, can contribute to

these aims 'by emphasizing accountability, restitution, and restoration of a community'.⁶⁶ As she notes, restorative practices function to 'reintegrate the student into the school community, rather than removing the student and increasing the potential for separation, resentment, and recidivism'.⁶⁷

Notably, the Western Cape government has introduced amendments to provincial legislation providing for the potential diversion of children, who are considered as having behavioural problems, out of schools and into 'intervention facilities'.⁶⁸ A child may, with the consent of their parents, be referred to such a facility as an alternative to expulsion. It is envisaged that these facilities, which may include 'residential care', will provide 'therapeutic programmes' and 'intervention strategies', in addition to curriculum delivery, for a period of up to 12 months.⁶⁹ Thereafter, pupils must be readmitted to the same public school they attended prior to referral.⁷⁰ While intervention facilities may, on the face of it, appear to provide a useful alternative to expulsion, in our view the legislated model still maintains the character of an exclusionary practice, which may lead to discrimination against and stigmatisation of the learner, despite intentions to the contrary. As Equal Education⁷¹ has argued in a High Court challenge to the legislation:

By excluding and segregating learners who exhibit behavioural or other problems from the formal education system, and referring them to institutions set up specifically and solely for young wrongdoers, learners sent to such an institution are at risk of being labelled a "delinquent", and subjected to intense stigma and ostracization.⁷²

There is also no requirement in the legislation that intervention facilities must undertake an in-depth examination or assessment of the social environment or culture of the learner's school, which is essential to facilitating behaviour

change in the returning learner.⁷³ Indeed, following a pilot programme, which included a facility-based model and an outreach model,⁷⁴ the WCED itself concluded that the outreach model 'yielded greater success ... mainly due to the programme collaborating and incorporating the people and the systems that are in the immediate life-space of the learners.'⁷⁵

Many learners in South Africa come from violent, traumatised communities or dysfunctional home environments.⁷⁶ Learners are likely to return to the same school and community after attending an intervention, and, without the appropriate mechanisms in place to support them in the medium or long term, are bound to struggle to maintain behaviour change.⁷⁷ Facilitating positive behavioural changes at school is more likely to be achieved where there is a whole-school commitment to creating a values-based, instructional and restorative approach to discipline. For such an approach (which emphasises prevention, values relationships and connectedness, and avoids exclusion) to succeed, all the role-players in the school community including the school governing body, senior management team, educators, parents and learners should partake and contribute.⁷⁸ A whole-school approach to preventative and restorative discipline should also include forging partnerships between communities, schools, surrounding support networks and even law enforcement that aim at prevention rather than punishment. This ensures that children are protected and supported without placing the full burden on schools alone.

In relation to drug abuse programmes, Chetty argues that an 'enabling, caring and supportive methodology' can ensure that the police, school and community can focus on prevention instead of tackling the aftermath of addiction and a punitive approach.⁷⁹ Similarly, Reyneke and Reyneke describe restorative discipline approaches as being 'characterised

by collaboration between all the parties to find mutually acceptable solutions to solve the problems and to address the harm caused.'⁸⁰ In this model, transgressions are viewed as 'teachable moments' where the learner develops the skill to behave in more socially acceptable ways in future. For example, detention is typically viewed as a punishment for any number of minor transgressions such as disrupting the class, forgetting homework or tardiness. Time in detention has often been used as a purely punitive measure where learners undertake administrative or other time-wasting tasks like writing out lines or cleaning blackboard dusters. Using consequences for transgressions, such as detention, as a 'teachable moment' means using this time constructively to engage with the learner and help them to understand why their behaviour is not acceptable and how they could behave differently in future.⁸¹

Mofokeng argues that 'the current legal system does not embrace a restorative approach to discipline.'⁸² Having analysed the South African legal framework on school discipline, he concludes that 'it should be a concern that education legislation is more explicit and meticulous on how to suspend and expel a learner from a school, whereas, on the other hand, it is silent on how to provide support, intervention and help to a learner.'⁸³ While some policy frameworks have sought to emphasise the need for supportive interventions, including in the context of drug use,⁸⁴ cases such as *S v L M* demonstrates that these are not always effectively implemented. For example, the Screening, Identification, Assessment and Support Policy (SIAS),⁸⁵ applicable to all schools in South Africa, aims to standardise a process to 'identify, assess and provide programmes for all learners who require additional support to enhance their participation and inclusion in schools'⁸⁶ including in the domain of behaviour and social skills. The process of planning

support for the learner, coordinated by the school-based support team, should involve both the learner and parent/caregiver. Unfortunately, however, there is little to suggest that this policy, particularly as it relates to behaviour support, is effectively implemented in South African schools. The prevailing discourse remains one of zero-tolerance and punishment.

Substantial changes are needed across the school ecosystem. Codes of conduct should be revised to move from a punitive to a preventative focus, and educators and learners should be trained on restorative discipline and the importance of altering the climate in the school. Resources in the education system need to be more effectively directed towards establishing a restorative positive behaviour culture in schools, which has the primary aim of prevention, rather than punishment. These kinds of interventions require significant time and effort, often without immediate results and have therefore faced some resistance in South African schools.⁸⁷ However, these approaches have been shown to be successful in ‘reduc[ing] office disciplinary referrals, improvements in perceived school safety, reduced rates of exclusionary disciplinary practices (suspension and expulsion) and improvements in student academic performance.’⁸⁸

Conclusion

S v L M is a disturbing example of direct school-to-prison pathways being implemented in some South African schools despite legislation prohibiting such practices. We have argued that the case also raises red flags around punitive and exclusionary school disciplinary mechanisms more broadly, which – even where lawful – can also serve to marginalise children and potentially increase their risk of coming into contact with the criminal justice system. Traditional punitive approaches to school discipline not only have the potential to steer children towards the criminal justice system,

but also fail to demonstrate what accountability, restoration and healthy social interaction looks like. In our view, the *S v L M* case serves as an important reminder of the need for active efforts to shift school disciplinary practices away from punitive mechanisms and towards an embrace of restorative and preventative approaches, which can serve to transform not only learners and schools but society more broadly.



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Notes

- 1 Nurina Ally is a lecturer in the Faculty of Law at the University of Cape Town and former Executive Director of the Equal Education Law Centre, a public interest law organisation based in Cape Town, South Africa. Robyn Beere is he Deputy Director of the Equal Education Law Centre. She is the former Director of Inclusive Education South Africa, a civil society organisation specialising in advocating and building capacity for the implementation of inclusive and supportive school environments. Kelley Moutl is an Associate Professor of Criminology at the Centre of Criminology at the University of Cape Town. The authors are grateful to Lithalethemba Stwayi of the Centre for Child Law for sharing relevant court documents.
- 2 *S v L M* [2020] 4 All SA 249 (GJ).
- 3 The High Court declared s 4(b) of the Drugs and Drug Trafficking Act (140 of 1992) invalid insofar as it criminalises the use and/or possession of cannabis by a child. In terms of s 172(2) of the Constitution of the Republic of South Africa (1996), the High Court’s declaration of invalidity has no force until confirmed by the Constitutional Court.
- 4 *Minister of Justice and Constitutional Development v Prince (Clarke Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC).
- 5 “Teen Detained in Juvenile Centre for Eating Dagga Cookie,” *ENCA*, 7 August 2019, www.enca.com/news/teen-detained-juvenile-centre-eating-dagga-cookie.
- 6 South African Schools Act (84 of 1996) (hereafter, Schools Act).
- 7 Child Justice Act (75 of 2008).
- 8 *S v L M* para 112.
- 9 Heads of Argument on behalf of the DPP in *S v L M*, 21 February 2019, paras 3-5 read with *S v L M* para 93.
- 10 Heads of Argument on behalf of the DPP in *S v L M*, paras 3-5.
- 11 As footnote 46 in *S v L M* indicates, the High Court made use of the term ‘referred’ as it was ‘unclear from the parts of the record whether the children concerned were arrested in terms of s 20 of the Child Justice Act, summoned in terms of s 19 of the Child Justice Act, or issued with a written notice to appear in terms of s 18 of the Child Justice Act’.

- 12 As set out in para 107 of *S v L M*, the conditions included, amongst others, completion of community service, attending school and counselling, submitting to random drug tests, submitting to parent and teacher instructions including adherence to 'family time', improving school marks by 10 percent, and participating in sport or cultural activities.
- 13 *S v L M* paras 89–94. The Centre for Child Law, appointed by the court as *amicus curiae*, requested the court to grant the following declaratory order: 'That section 8A of the South African Schools Act 84 of 1996 absolutely prohibits the referral of any child subjected to a drug test and/or drug search conducted in terms of the provisions of SASA to the criminal justice system.' The court, regrettably in our view, declined to provide such a declaratory order. While the reasons for not doing so are not entirely clear, it appears that the Court considered it unnecessary to grant a declarator regarding the interpretation of certain statutory provisions where such interpretation had not been disputed (*S v L M* para 131).
- 14 Section 8A(14) of the Schools Act provides: 'No criminal proceedings may be instituted by the school against a learner in respect of whom – (a) a search contemplated in subsection (2) was conducted and a dangerous object or illegal drug was found; or (b) a test contemplated in subsection (8) was conducted, which proved to be positive.' For reflections on the constitutionality and implementation of school search and drug testing provisions, see: Rika Joubert, Jennifer Sughrie and David M Alexander, "Search and Seizure of Learners in Schools in a Constitutional Democracy: A Comparative Analysis Between South Africa and the United States," *De Jure* 46, no. 1 (2013): 114–131, <http://ref.scielo.org/28twdn>; and R Chetty, "Social Complexity of Drug Abuse, Gangsterism and Crime in Cape Flats' Schools, Western Cape," *Acta Criminologica* (2015): 54–65, <https://hdl.handle.net/10520/EJC183381>.
- 15 "Devices to be Used for Drug Testing and the Procedure to be Followed," published under GN 1140 in *Government Gazette* 31417 of 19 September 2008 (hereafter, Drug Testing Regulations).
- 16 Annexure B to the Drug Testing Regulations paras 10 and 11.
- 17 Drug Testing Regulations para 12.
- 18 Drug Testing Regulations para 10.4.
- 19 *S v L M* para 93. Despite the judgment being handed down, Pro-Practicum's Code of Conduct remained unchanged on its website at the time of writing. See Pro-Practicum, "Code of Conduct, 2019", <https://propracticum.co.za/wp-content/uploads/2019/05/Code-of-Conduct-Pro-Practicum-2019.pdf>.
- 20 *S v L M* para 93.
- 21 Affidavit of school social worker in *S v L M*, 25 February 2019, para 8.
- 22 "School-to-Prison Pipeline," New York Civil Liberties Union, www.nyclu.org/en/issues/racial-justice/school-prison-pipeline.
- 23 Stacey Dutil, "Dismantling the School-to-Prison Pipeline: A Trauma-Informed, Critical Race Perspective on School Discipline," *Children & Schools* 42, no. 3 (2020): 171, <https://doi.org/10.1093/cs/cdaa016>.
- 24 Dutil, "Dismantling the School-to-Prison Pipeline", 1. For a detailed summary of the various ways in which the school-to-prison pipeline concept has been used, see Russell Skiba, Mariella Arredondo and Natasha Williams, "More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline," *Equity & Excellence in Education* 47, no. 4 (2014): 548, <https://doi.org/10.1080/10665684.2014.958965>.
- 25 For a description of life course models see, for example, Robert Sampson and John Laub, "A General Age-Graded Theory of Crime: Lessons Learned and the Future of Life-Course Criminology," in *Advances in Criminological Theory: Testing Integrated Development/Life Course Theories of Offending*, ed. David Farrington (New York: Routledge, 2005), 165–182.
- 26 Thomas Mowen, John Brent and John Bowman, "The Effect of School Discipline on Offending Across Time," *Justice Quarterly* 37, no. 4 (2020): 739–760, <https://doi.org/10.1080/07418825.2019.1625428>.
- 27 Terrie Moffitt, "Adolescent-Limited and Life-Course-Persistent Antisocial Behaviour: A Developmental Taxonomy," *Psychological Review* 100 (1993): 674–701, <https://doi.org/10.1037/0033-295X.100.4.674>.
- 28 Paul Hemez, John Brent and Thomas Mowen, "Exploring the School-to-Prison Pipeline: How School Suspensions Influence Incarceration During Young Adulthood," *Youth Violence and Juvenile Justice* 18, no. 3 (2020): 235–255, <https://doi.org/10.1177/1541204019880945>.
- 29 Robert Sampson and John Laub, "Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70," *Criminology* 41, no. 3 (2003): 555–592, <https://doi.org/10.1111/j.1745-9125.2003.tb00997.x>.
- 30 "Teen Detained in Juvenile Centre for Eating Dagga Cookie".
- 31 Jeff Wicks, "How a School Pushed 178 Kids into the Criminal Justice System," *Sunday Times*, 13 August 2020, <https://select.timeslive.co.za/news/2020-08-13-how-a-school-pushed-178-kids-into-the-criminal-justice-system/>.
- 32 See, for example, Mariëtte Reyneke, "Realising the Child's Best Interests: Lessons from the Child Justice Act to Improve the South African Schools Act," *Potchefstroom Electronic Law Journal* 19 (2016): 22, <https://doi.org/10.17159/1727-3781/2016/v19i0a1228>, where the author argues that 'restorative justice processes are explicitly included in the Child Justice Act and contribute towards the realisation of the best-interests-of-the-child right.'
- 33 See, for example, Lisa Marqua-Harries, Grant Stewart and Venessa Padayachee, "Towards Transforming a System: Re-thinking Incarceration for Youth (and Beyond)," *South African Crime Quarterly* 68 (2019): 34, <https://doi.org/10.17159/2413-3108/2019/v0n68a5632>, where the authors note that the Child Justice Act has 'not been sufficiently resourced and has faced challenges in implementation.'
- 34 *S v L M* paras 7 and 117. The Criminal Justice Act sets out 'Level 1' diversion options for s 1 offences and 'Level 2' diversion options for ss 2 and 3 offences (ss 53(2)-(4) of the Child Justice Act). Both Level 1 and Level 2 diversion options include 'compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose', however only Level 2 includes the possibility of 'a period or periods of temporary residence' at such facility (ss 53(3)(k) and 53(4)(b) of the Child Justice Act).

- 35 *S v L M* paras 95–114. As the court noted: ‘A concerning feature of the matters on review is the apparent disregard by the decision makers for the constitutional imperatives that should guide the decisions of the stakeholders and the statutory processes outlined by the Child Justice Act.’ (*S v L M* para 95).
- 36 *S v L M* para 125.
- 37 *S v L M* para 125.
- 38 Marqua-Harries, Stewart and Padayachee, “Towards Transforming a System,” 34.
- 39 While the Schools Act, if properly implemented, would disrupt a direct school-to-prison pathway in cases of children testing positive for cannabis use at school, the decriminalisation of cannabis use and possession by children also plays a significant role in disrupting such pathways. See for example Tess Nicol, “Legalisation: the Chance to Right Wrongs,” *Matters of Substance*, March 2019, 10.
- 40 Dutil, “Dismantling the School-to-Prison Pipeline,” 1.
- 41 Hemez, Brent and Mowen, “Exploring the School-to-Prison Pipeline”.
- 42 See, for example, Sheryl Hemphill, John Toumbourou, Todd Herrenkohl, Barbara McMorris and Richard Catalano, “The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States,” *Journal of Adolescent Health* 39, no. 5 (2006): 736–744, <https://doi.org/10.1016/j.jadohealth.2006.05.010>.
- 43 Johanna Wald and Daniel Losen, “Defining and Redirecting a School-to-Prison Pipeline,” *New Directions for Youth Development* 99 (2003): 9–15, <https://doi.org/10.1002/yd.51>.
- 44 See, for example, Abigail Novak, “The School-to-Prison Pipeline: an Examination of the Association between Suspension and Justice System Involvement,” *Criminal Justice and Behavior* 46, no. 8 (2019): 1165–1180, <https://doi.org/10.1177/0093854819846917>; and Jason Nance, “Dismantling the School-to-Prison Pipeline: Tools for Change,” *Arizona State Law Journal* 48, no. 2 (2016): 321–23, <http://scholarship.law.ufl.edu/facultypub/767>.
- 45 Thalia Gonzalez, “Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline,” *Journal of Law & Education* 41, no. 2 (2012): 282, <https://heinonline.org/HOL/P?h=hein.journals/jle41&i=285>.
- 46 Section 9 of the Schools Act provides for processes relating to suspension and expulsion from public schools.
- 47 As Reyneke and Reyneke explain: ‘A punitive approach is often characterised by physical, emotional or psychological violence. Many learners comply with the rules due to fear of humiliation or pain. Therefore, their internal locus of control or self-discipline does not overlap. They will behave as long as an educator or somebody else is in the class to ensure compliance with rules.’ Mariëtte Reyneke and Roelf Reyneke, “Restorative Discipline,” in *Restorative School Discipline: The Law and Practice*, eds. Mariëtte Reyneke and Roelf Reyneke (Cape Town: Juta, 2020), 87.
- 48 Reyneke and Reyneke, “Restorative Discipline”.
- 49 Jeffrey Sprague and C. Michael Nelson, “School-Wide Positive Behavior Interventions and Supports and Restorative Discipline in Schools,” Monograph for the Office of Specialised Education Programmes, 2012, 3.
- 50 Skiba, Arredondo and Williams, “More than a Metaphor,” 588.
- 51 Gonzalez, “Keeping Kids in Schools,” 294.
- 52 Western Cape Education Department, “WCED Warning to Learners Regarding Discipline in Schools,” *Media Statement*, 19 February 2020, <https://wcedonline.westerncape.gov.za/news/wced-warning-learners-regarding-discipline-schools>.
- 53 Western Cape Education Department, “WCED Warning to Learners”.
- 54 Tarryn Cooper-Bell, Pila-sande Mkuzo and Asiphe Funda, “Schoolchildren Know Your Rights,” *Daily Maverick*, 11 September 2010, www.dailymaverick.co.za/article/2010-09-11-schoolchildren-know-your-rights/.
- 55 Not the learner’s real name.
- 56 Cooper-Bell, Mkuzo and Funda “Schoolchildren Know Your Rights”.
- 57 *Nathan Savage v MEC, Western Cape Education Department (WCHC)*, case number 18155/13.
- 58 Equal Education Law Centre, “Affirming the Right to a Fair Disciplinary Process,” *Annual Report 2012/2013*: 13.
- 59 Section 9(5) of the Schools Act provides: ‘If a learner who is subject to compulsory attendance in terms of section 3(1) is expelled from a public school, the Head of Department must make an alternative arrangement for his or her placement at a public school.’
- 60 *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* 2016 ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) para 32.
- 61 *FEDSAS v Member of the Executive Council for Education* para 32.
- 62 James de Villiers, “Western Cape Education Department to Establish ‘Intervention Facilities’ for Expelled Students,” *News24*, 4 July 2017, www.news24.com/news24/southafrica/news/western-cape-education-department-to-establish-intervention-facilities-for-expelled-students-20170704. See also Siso Naile, “Lesufi: We’ve Expelled Over 150 Learners for Misconduct,” *Rooodepoort Record*, 16 April 2018, <https://roodepoortrecord.co.za/2018/04/16/lesufi-weve-expelled-over-150-learners-for-misconduct/>.
- 63 See, for example, Nicola Branson, Clare Hofmeyr and David Lam, “Progress Through School and the Determinants of School Dropout in South Africa,” *Development Southern Africa* 31, no. 1 (2014): 110, <https://doi.org/10.1080/0376835X.2013.853610>, who report that almost 40 percent of the 2008 cohort of Grade 11 learners dropped out of school before completing matric in 2010. See also Zero Dropout Campaign, “Learning Brief: School Dropout Preventions Strategies”, July 2020, <https://zerodropout.co.za/wp-content/uploads/2020/07/Zero-Dropout-Final.pdf>.
- 64 Branson, Hofmeyr and Lam, “Progress Through School,” 114.
- 65 Sprague and Nelson, “School-Wide Positive Behavior Interventions,” 4–5.
- 66 Gonzalez, “Keeping Kids in Schools,” 285.
- 67 Gonzalez, “Keeping Kids in Schools,” 286.
- 68 Western Cape Provincial School Education Act (12 of 1997), as amended.

- 69 Western Cape Provincial School Education Act, s 12E read with s 45(5)(b)(i).
- 70 Western Cape Provincial School Education Act, s 45(14B).
- 71 Equal Education describes itself as a 'member-based mass democratic movement of learners, post-school youth, parents and community members striving for quality and equality in South African education, through activism and analysis', see <https://equaleducation.org.za/our-movement/>.
- 72 Founding affidavit in *Equal Education v Provincial Minister for Education: Western Cape Province*, Case number 12880/19, 24 July 2019, para 169.15. In an answering affidavit, the WCED denies that stigma will attach to intervention facilities and 'certainly no more than expulsion' (Answering affidavit in *Equal Education v Provincial Minister for Education: Western Cape Province*, 18 September 2020, para 593.1).
- 73 In response to EE's application, the WCED has indicated that 'Norms and Standards' will be published in due course clarifying that intervention facilities are meant to complement existing behaviour support programmes and that reintegration of the returning learner to their home school will be supported. (Answering affidavit in *Equal Education v Provincial Minister for Education: Western Cape Province*, 18 September 2020, paras 242-246 and para 593.2).
- 74 In the outreach model, '[l]earners would remain based at their home school, and the behavioural support team would travel to the learners' home school and conduct their interventions there.' (Answering affidavit in *Equal Education v Provincial Minister for Education*, 18 September 2020, para 211).
- 75 Answering affidavit in *Equal Education v Provincial Minister for Education*, 18 September 2020, para 216.
- 76 Roelf Reyneke, "Trauma Sensitive Schools: Understanding Troubled Learners Through the Neuroscience Lens," in *Restorative School Discipline*, 210-213.
- 77 Mariëtte Reyneke and Roelf Reyneke, "The Restorative Discipline Model," in *Restorative School Discipline*, 119-120.
- 78 Gonzalez, "Keeping Kids in Schools," 302.
- 79 Chetty, "Social Complexity of Drug Abuse," 62.
- 80 Reyneke and Reyneke, "Restorative Discipline," 91.
- 81 Reyneke and Reyneke, "Restorative Discipline," 89-90. The use of 'Response Ability Pathway' processes, which 'considers challenging behaviour as opportunities for learning' is also described by Charles Coetzee, "The Circle of Courage: Restorative Approaches in South African Schools," *Reclaiming Children & Youth* 14, no. 3 (2005): 185, <http://ezproxy.uct.ac.za/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=18872159&site=ehost-live>. Coetzee also notes the use of the 'Circle of Courage' model, which 'calls for creating opportunities for young people to experience Belonging, Mastery, Independence. See also Roelf Reyneke, "Increasing Resilience, Lowering Risk: Teacher's Use of the Circle of Courage in the Classroom," *Perspectives in Education* 38, no. 1 (2020): 156, <https://doi.org/10.18820/2519593X/pie.v38i1.11>, for recommendations on strengthening the use of the Circle of Courage model 'within the context of the restorative philosophy'.
- 82 Thabo Mofokeng, "The Role of the DBE and PED's in School Discipline," in *Restorative School Discipline*, 446.
- 83 Mofokeng, "The Role of the DBE and PED's", 446.
- 84 For example, the "National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions", published in GN 3427, *Government Gazette* 24172, 13 December 2002, 5 provides: 'All learning institutions should have clear policies on both prevention and intervention, underpinned by a restorative supportive orientation.'
- 85 Department of Basic Education, *Policy on Screening, Identification, Assessment and Support*, Pretoria: Department of Basic Education, 2014.
- 86 Department of Basic Education, "Policy on Screening," 11.
- 87 Reggie Govender, "My Journey Towards Restorative Discipline," in *Restorative School Discipline*, 22-26.
- 88 Sprague and Nelson, "School-Wide Positive Behavior Interventions," 3-4.