

Learners' right to freedom of written expression

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Although the primary purpose of schools is to educate, it has long been understood that education consists of more than the development of academic skills and the accumulation of knowledge. One of the central purposes of schools in a democratic society is to encourage the critical and independent thinking necessary for effective participation as citizens. Schools have a further duty to teach respect for the rights of all members of society, as spelled out in the preamble to the Constitution of the Republic of South Africa. An important aspect of education about the rights and duties that underpin citizenship is to learn both the use of, and the appropriate limits upon, freedom of expression essential to a functioning democracy. In this article we look at problems that may arise in connection with written expression by learners in schools, including the publishing of school newspapers and the distribution of unauthorized publications on school premises. It is argued that school authorities should act proactively and develop a prior approval policy for publications that could be construed as representing the viewpoint of the school. However, such procedures may not be overly broad nor overly restrictive. A clear policy should be developed about the disciplinary consequences, for learners as well as school staff, of expression within the school or in the context of school-sponsored activities which are disruptive of the educational mission of the school or violates the norms established by section 16(2) of the Constitution.

Introduction

Although the primary purpose of schools is to educate, it has long been understood that education consists of more than the development of academic skills and the accumulation of knowledge. One of the central purposes of schools in a democratic society is to encourage the critical and independent thinking necessary for effective participation as citizens. This was emphasized 250 years ago by Montesquieu in *The Spirit of the Laws* (Montesquieu, 1989:35).

It is in republican government that the full power of education is needed? One can define this virtue as love of the laws and the homeland. This love, requiring a continual preference of the public interest over one's own, produces all the individual virtues; they are only that preference ... in a republic, everything depends on establishing this love, and education should attend to inspiring it.

Similarly, James Madison, one of the American 'Founding Fathers', pointed out that "Republican government presupposes the existence of these qualities [of civic virtue] in a higher degree than any other form" (Federalist, in Madison, 1993:207).

South African schools have a further duty to teach respect for the rights of all members of society, as provided for in the preamble to the Constitution of the Republic of South Africa (CRSA), Act 108 of 1996. An important aspect of education about the rights and duties that underpin citizenship is to learn both the use and the appropriate limits upon freedom of expression essential to a functioning democracy. The meaning of "freedom of expression" is defined in the CRSA as to include:

S16 (1)

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

In defining the concept of *expression*, it is necessary to accept that the word involves a wider concept than "speech" and includes activities such as painting and sculpting, displaying posters, dancing and the publication of photographs. Furthermore, symbolic acts such as flag burning, the wearing of certain "items of clothing" and physical gestures amalgamate under the right to freedom of expression. In this regard De Waal, Currie and Erasmus (2001:311) make the point that "every act by which a person attempts to express some emotion, belief or grievance should qualify as constitutionally protected 'expression'".

In this article problems are addressed which may arise in connection with written expression by learners in schools, including publishing of school newspapers and the distribution of unauthorized publications on school premises. More specifically, the article asks whether the right to freedom of expression protects the publication and distribution of material which may lead to disturbance of school order and discipline on the grounds of a fundamental right to critical thinking and expression in a democratic society. (Order and discipline at schools should be conducted in a harmonious way to create a school culture that is conducive to learning. Critical thinking is viewed as the prerequisite for a democracy and one's right to freedom of expression (section 16 of CRSA) is viewed as the core right in a democracy.) In addition, the paper concludes how, in both permitting and limiting written expression, school staff should exercise their educational mission.

Methodology

According to Russo (1996:34) the primary source of information when carrying out legal research is the law itself. The traditional method of law research is a systematic investigation involving the interpretation and explanation of the law. In this regard it is imperative that legislation and case law are analysed to determine how courts have interpreted statutory law in applying legal principles. On this basis we investigate in this article how courts have interpreted and balanced the right to freedom of expression and seek to identify the legal principles that have been used.

The context of South African law

School authorities have a duty to monitor unauthorized learner publications, especially if distributed on school premises or using the name of the school, thus giving to learners and parents alike the impression that the school has agreed to their content. However, school authorities — which include the School Governing Body (SGB) and the School Management Team (SMT) — who simply attempt to censor such publications must be aware of the legal boundaries that exist. Furthermore, the task of monitoring unauthorized learners' publications becomes increasingly more difficult in a technology-advanced society where web-based publications are an everyday occurrence.

In section 16(1)(a) of CRSA, freedom of the press and the media receive special reference because of their special function in a democracy. The court stipulated in *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W) that journalists do not necessarily enjoy special

constitutional immunity beyond ordinary citizens; their right to expression can be limited in terms of section 16(2) or section 36. Such limitation would likely extend to instances where the "journalist" is a minor who still needs to be guided and nurtured, especially where other minors could be harmed by the abuse of freedom of expression.

According to Rautenbach and Malherbe (1999:345), rights can be limited "under specific circumstances and in a particular way for the protection of some public interest or the rights of others". No fundamental right is absolute. "Generally, it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights." (De Waal *et al.*, 2001:144). All fundamental rights can therefore be limited in terms of the general limitation clause in section 36 of CRSA which, according to Malherbe (2001:13), is a pivotal provision in the Bill of Rights. This general limitation clause applies to all the rights provided for in the Bill of Rights and is the most common form of limitation. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. There must thus be an appropriate balance between the limitation of the right and the purpose for which is being limited. All factors relevant to the issue must be taken into account which according to the CRSA include,

S36 (1)

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation; and
- (d) less restrictive means to achieve the purpose.

A balance must be found between the legitimate interest of the learner and the duty of the SGB to maintain proper order and discipline in the school. In other words, a learner's fundamental entrenched human right to freedom of expression is not absolute but can be balanced or limited "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom ..." (Section 36 of CRSA). Under section 8(1) of the South African Schools Act (SASA), Act 84 of 1996, every SGB must adopt such a Code of Conduct for learners. Section 8(2) of SASA clarifies that the aim of such a Code of Conduct should be to establish a "disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process." Schools need to be able to identify an appropriate balance and only censor or limit a learner's expression in instances where the legitimate interest of the school is at stake.

As school authorities work with students, SGBs should be proactive in addressing learners' publications as part of their Code of Conduct and developing a separate policy on this matter. Unauthorized learners' publications become a matter of concern for school authorities if they contain announcements or points of view and events detrimental to the school. In order to fulfil their duty to maintain proper order and discipline in the school, school authorities should be involved in reviewing and limiting learners' publications, keeping in mind the learners' right to freedom of expression.

Publications can only be censored if their distribution would pose a threat to the proper order and discipline of the school or to any other person's fundamental rights in terms of section 36 of CRSA. When authorities seek to limit free expression in a school in a particular instance they must act upon proof that such limitation is either "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?" (section 36 of CRSA) or is inherently limited by means of section 16(2) which is a specific and inherent limitation clause to section 16(1) of CRSA.

This balancing of constitutional rights must be exercised in accordance with the broader social interest in mind and certain questions as, for example, whether it would be consistent with the professional responsibilities of a history teacher to express racist views in a public forum outside the school, need to be considered. In such a situation the

interest of the school leadership in ensuring that the school is able to fulfil its educational mission in a way consistent with the Constitution would justify disciplinary action against that educator despite the educator's right to freedom of expression of an individual opinion. In this matter, the right to freedom of expression in section 16 of CRSA must be exercised consistently with section 16(2), which states,

S16 (2)

The right in subsection (1) does not extend to

- propaganda for war;
- incitement of imminent violence; or
- advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Similarly, a student's right to freedom of expression can be limited by section 16(2) of CRSA. The question remains, however, how school authorities can model respect for the right of free expression whilst ensuring that this right is not abused. Whilst the same problem can arise in any sphere of public life, it is especially difficult in schools, where vulnerable young people are under the care of educators, school managers and SGBs who are responsible for providing protection from hateful and harmful expression. The same young people — still 'green in judgment' — are learning what it means to be citizens of a free society where differences of opinion are respected. How can limits on expression be set without so restricting it to such an extent that the school becomes an anti-democratic environment? Based on the ability of South African courts to review decisions from other jurisdictions as a form of persuasive precedent, coupled with the substantial amount of litigation, it is worth examining key cases from federal courts in the United States. Such a review is of value because it addresses issues that are making their way to South African courts with increasing regularity.

Learner written expression in the United States

The First Amendment to the United States Constitution guarantees freedom of speech as well as freedom of the press as fundamental to an open and democratic society. In *West Virginia State Bd. of Educ. v Barnette*, 319 U.S. 624, 637 (1943) the Supreme Court noted that First Amendment Rights must receive protection in schools.

... if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes ... probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrines and whose program public educational officials shall compel youth to unite in embracing ... freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

That learners have a fundamental right to express their opinions was affirmed in *Tinker v Des Moines Independent Community School District* 393 U.S. 503(1969). This was a case in which learners who wore black armbands to school as a protest against the Vietnam War were suspended from school for violating a school district rule. The Court held that the school's action violated the learners' right to freedom of speech and that wearing the armbands — although controversial — did not disturb the harmony and order of the school, and that:

... the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.

It is evident from *Tinker* (1969) that the Court held that fundamental rights, such as the right to freedom of expression, do not end when learners enter the school gate. "Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate".

In *Bethel School District No.403 v Fraser*, 478 U.S. 675, 682 (1986), however, the Court recognized that there are limits to the exercise of the rights to freedom of expression. In this case a student was disciplined for a school assembly nomination speech involving "an elaborate, graphic, and explicit sexual metaphor." The Court pointed out that the public school system

... must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation ... The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audience ... The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order ... The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

Weir and Gervais (2001:5) pointed out that United States "courts have assumed that schools have the authority to regulate students' publications where the failure to do so would risk disorder or violence, interrupt classes and class work, interfere with the rights of other learners or teachers or materially and substantially interfere with appropriate discipline in the school". The right of learners to freedom of expression can be limited if it would disrupt classes and other school activities. These rights can also be limited if vulgar or indecent language is used.

In *Awakening*, an underground learners' newspaper published and distributed off school property and after hours but which identified with the school, topics such as drug laws, birth control and venereal diseases were discussed in a provocative manner. In *Shanley v Northeast Independent School District*, 462 F. 3d 960 (5th Cir. 1972), the five learners responsible for this paper were suspended from school because they circumvented the school board's prior approval scheme. In this instance the Fifth Circuit Court set out some principles with respect to limits on the learners' First Amendment rights:

1. As in *Tinker*, expression by high school students can be prohibited altogether if it materially and substantially interferes with the rights of other students or teachers, or if the school administration can demonstrate reasonable cause to believe that the expression would engender material and substantial interference;
2. expression by high school students cannot be prohibited solely because other students, teachers, administrators or parents may disagree with its content;
3. efforts at expression by high school students may be subjected to prior screening under clear and reasonable regulations; and
4. expression by high school students may be limited in manner, place, or time by means of reasonable and equally applied regulations.

With these principles, the Court determined that it would not be unconstitutional to have a prior approval policy for learners before allowing them to disseminate their point of view. American courts have, therefore, clarified the fact that freedom of speech in the school's context should be weighed against the need of the school to protect its educational mission.

In the most important case involving an 'official' secondary school publication, the Court held that schools could control content of all

"expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." In *Hazelwood School District et al. Petitioners v Cathy Kuhlmeier et al.* (1988) two pages of a student newspaper were censored on the grounds that the article unfairly impinged on the privacy rights of pregnant students and others. This newspaper was written and edited by a journalism class as part of their school's curriculum. The court held that school sponsored newspapers or forums to disseminate freedom of speech are not public forums and must serve its educational purpose. It gave school authorities great latitude in controlling the content of student publications (Dvorak, 1992:3). As such, the court distinguished *Hazelwood* from *Tinker*. In *Hazelwood* the issue was not the right of students to speak on a particular matter. Rather, this dispute involved the right of school authorities not to promote particular student speech and their authority over school-sponsored publications and other expressive activities that could reasonably be perceived to bear a school's approval. To this end, the Court upheld the action of the school officials in reasoning that "... educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." In this case, the newspaper written by learners was not a 'public forum' for free expression but part of the school's curriculum (*Hazelwood School District v Kuhlmeier*, 484 U.S. 260 (1988)). A school facility may be deemed "public forum" for the purpose of the First Amendment only if school authorities have, by policy or practice, opened the facility for indiscriminate use by the general public or by the same segment of the public, such as student organisations.

The distinction between a "public forum" for the expression of opinions and the "limited forum" offered within the context of the school is crucial. Written and oral expression in school is subordinate to the educational mission of the school; neither educators nor learners have a protected right to say whatever comes into their heads on any subject whatsoever. That said, the educational process — particularly at the secondary level and in certain subjects and on certain occasions — does legitimately invite the expression, in an appropriate manner, of personal views. To unduly restrict such expression out of a desire to keep all aspects of school life under complete control would be harmful to the democratic educational mission of the school. The *Hazelwood* court held that educators are entitled to exercise greater control over school-sponsored student expression than over students' personal speech in order to assure that participants learn whatever activity is designed to teach, that readers of listeners are not exposed to material which may be inappropriate for their level of maturity, and that views of individual speakers are not erroneously attributed to the school.

The development of policies for South African schools

Although South African courts have not been called upon to determine issues respecting freedom of expression and learner publications, the education department should take pro-active action by supplying guidelines to schools to develop prior approval policies for learner publications that bear the imprimatur of the school.

This section examines one court case and two critical incidents that happened in South African schools with regard to the freedom of expression to see how the legislation was interpreted by the courts. 'Critical incident' refers to a happening at school which could, but did not, result in a court case. Although none of these concerns freedom of expression nor learner publication, one can determine the legal principles that the court used to balance the right to freedom of expression.

South African Case Law

In *Antonie v Governing Body, Settlers High School, and others* 2002 (4) SA 738 the applicant (a 15-year-old Grade 10 female learner) embraced the principles of the Rastafarian religion. She, in line with this religion, grew her hair in dreadlocks and covered her hair. Although she had asked permission several times from the principal to wear this

to school, permission was refused. Believing that her right to freedom of religion (also expression) was infringed upon, she attended school with a black cap (matching the prescribed school colours) covering her dreadlocks. She was suspended from school for five days for serious misconduct because she disobeyed the Code of Conduct for Learners and disrupted the school.

The Code of Conduct for Learners at this school contained a basic rule that hair must be neat and tidy and this was very specifically embroidered into ten subsections. However, not one of these prohibited the growing of dreadlocks or the wearing of headgear. One could argue that no misconduct had legally occurred.

When dealing with the Code of Conduct for Learners, one should have regard to a schedule, issued by the Ministry of Education (Department of Education, Notice 776 of 1998, Ministry of Education) which deals with guidelines for consideration of SGBs in adopting a code of conduct for learners. (Section 8(1) of SASA provides that an SGB must adopt a code of conduct for learners after consulting with all the stakeholders.) The focus in the schedule is on positive discipline (sections 1.4 and 1.6 of Notice 776 of 1998) and the need to achieve a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all schools (section 2.3 of Notice 776 of 1998).

All of the above is underpinned by the democratic values of human dignity, equality and freedom, as enshrined in section 1 of CRSA.

Freedom of expression is specifically mentioned in Section 4.5.1 of the schedule:

S4.5.1

Freedom of expression is more than freedom of speech. The freedom of expression excludes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learner's rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities of the rights of others, this right can be limited, as the disruption of schools is unacceptable.

The court held that the growing of dreadlocks was prohibited by the Code of Conduct (even if hypothetically). Yet, to assess this prohibition in a rigid manner is in contrast with the values and principles set forth in the schedule. Adequate recognition must be given to the offender's need to indulge in freedom of expression, and this cannot be seen as "serious misconduct". The court set this aside. This principle determined by the court is in line with the principles used in American court cases. The right to freedom of expression is protected by the Constitution. This right can only be limited if it results in disruption at school or refutes the educational mission of the school. Freedom of expression, however, cannot be limited only because school authorities disagree or dislike the expression.

South African case studies

In view of the absence of specific provisions on the freedom of expression and learner publications in SASA, it is important to consider two critical incidents that occurred in schools to see how legislation concerning human rights in South African democracy is balanced when implemented at school level.

Layla Cassim

The first critical incident is that of Layla Cassim, a 14 year old Muslim teenager in Grade 10 at Johannesburg's exclusive Crawford College who wrote an essay that espoused a Palestinian viewpoint of the conflict with Israel and then pinned it on the school notice board in October 1998. She did this to give her viewpoint (the Palestinian) after an article expressing an Israeli viewpoint had been put on the notice board. Layla's school is predominantly attended by Jewish pupils, and she was suspended the next month for "escalating behavioural problems".

The Cassims took the matter to the Human Rights Commission (hereafter HRC), claiming that several of Layla's human rights had been violated, one of which was her right to freedom of expression. They also argued that her suspension was unprocedural because the *audi alteram partem* (the other side must be heard) principle had not been applied. After the HRC had revealed its findings to the Cassims and the school, an interdict was granted, preventing the Cassims and the HRC from disseminating their findings. According to the Sunday World (Sukhraj, 1999:6) the HRC found that Layla's essay was not racist, anti-semitic or anti-white. It found that the reaction by the college exhibited a lack of respect for her right to freedom of expression. In this case, there is clear evidence that one's freedom of expression includes one's freedom to religion, belief and opinion (section 10 of CRSA). Whilst exercising one's fundamental right to freedom of religion, belief and opinion, there also needs to be a fundamental right to freedom of expression.

The school authority raised no concerns when the religious point of view of the majority of the learners was pinned on the notice board, but when Layla, as a member of a minority group among the learners, did the same, her right to freedom of expression was violated. This incident demonstrates that, at times, school authorities in South Africa find it "difficult" to accept the freedom of expression of those whose views differ from their own and as a result fail to act in accordance with South African legislation. The legislation protected Layla's right to freedom of expression, and she should have been allowed to pin her point of view on the notice board when other learners in the school had been allowed to do so. Nonetheless, under section 16(2) (c), the material that Layla had posted could have been prohibited if it engaged in anti-semitic statements because this letter would then be extended to advocacy of hatred that is based on religion. It would violate the right to dignity (section 10 of CRSA) of Jewish learners. In the latter case it would be prohibited in terms of the general limitation clause in section 36 of CRSA. If one bears in mind that Crawford College has experienced tension between Islamic and Jewish learners, one can argue that the school authority could prohibit the pinning of the material on the notice board on the basis of a concern that such an action might lead to disruption in the school. In this case, however, the other point of view should then also be prohibited for the very same reason. One can therefore argue that Crawford College has been biased and inconsistent in respecting Layla's fundamental right to freedom of expression.

Yusuf Bata

The second critical incident was that of Yusuf Bata, another Muslim teenager who attended Hoërskool Vorentoe, also in Johannesburg. Acting according to his religion, he never shaved his beard as a sign that he knew the Koran by heart, and as a result was refused admission to school in 1998. Although this was mainly viewed as an infringement of his right to freedom of religion (Anon., 1998:8) or the right to attend a school of his choice (section 18 of CRSA), it could also be seen as an infringement of his right to freedom of expression. Growing a beard was, from his perspective, a symbolic act to express his fundamental and protected right to religion, belief and opinion and expression. In terms of section 16 (1) (b) everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas.

In this case the SGB could also be sued since their admission policy had not been implemented in accordance with the relevant legislation. In terms of section 5 (1) of SASA

... a public school must admit learners and serve their educational requirements without unfairly discriminating in any way." According to Section 9 of CRSA, everyone is equal before the law and may not, *inter alia*, unfairly be discriminated against on grounds of race, ethnic or social origin, religion, conscience and belief. The fact that Yusuf was denied admission merely because of his beard as part of his religious expression, boils down to an infringement of his fundamental rights to equality (section 9 of

CRSA), freedom of religion, belief and opinion (section 15 of CRSA) and freedom of expression (section 16 of CRSA).

How should SGBs manage freedom of expression?

It seems that SGBs and school managers are eager to manage schools and learners according to principles contained in legislation because these give them a clear guideline on how to manage. However, in the process, they easily forget the values which underpin the Constitution as this is still a vague area for them to implement.

School authorities have a duty to educate and to encourage tolerance and democratic values, but they also have an interest in limiting activity that undermines these goals. Nonetheless, a policy should be developed that impairs a learner's rights as little as possible. It must be kept in mind, however, that vague policies will be difficult to justify in court. It is also important to apply policies consistently, since inconsistent application of any policy can be considered unconstitutional.

Policies should include a mission statement, which clearly states distribution of materials that interfere with proper order and discipline in schools is unacceptable. The process of submitting materials must clearly be stated and the period of time during which the process will be conducted must be mentioned. A policy must also include details of appeal processes. It might even indicate when and where material can be distributed. It should also state briefly what types of material would be prohibited (making clear the reasons for that prohibition) and should also state the consequences for violating the policy.

Based on US case law and emerging South African principles, a model policy on prior approval of applications could serve as a guide to ensure that school authorities act appropriately. Such a policy might read:

1. It is the mission of this school to have an environment where learners can learn and develop to their fullest potential in an orderly and disciplined way.
2. The distribution of materials that interfere with proper order and discipline in the school is unacceptable.
3. The distribution of materials that infringe upon the fundamental rights of any stakeholder is unacceptable.
4. The principal must approve all materials disseminated on school property. A copy of the text must be submitted to the principal for prior approval. The principal will comment on this submission within three school days.
5. The text can only be distributed after being finally approved by the principal.
6. An appeal on the principal's decision can be made within twenty-four hours to the executive management committee of the SGB, which will hear the appeal in the presence of the applicant in accordance with the principles of due process.
7. Distribution on the school property by learners or staff of materials which interfere with proper order and discipline in the school or infringe upon the fundamental rights of any member of the school community will lead to appropriate disciplinary action, which may include temporary or permanent separation from the school.

Factors for the school managers or SGBs to consider when approving unauthorized publications would be the age of the learners; the specific audience (or readers) of the publications; the nature of the publication and the possible impact that it might have on the school or any learner.

It is important to note though, that it would not be appropriate for school authorities to withhold approval of a publication simply because they disagree with opinions expressed, so long as these opinions do not advocate or tend to disruption of the educational process or infringe upon fundamental rights. One of these rights, after all, is the freedom to hold and express opinions, which differ from those of the majority and of the authorities. Determining when particular opinions should not be expressed in school involves a delicate act of judgement on the part of school authorities.

If such a policy were implemented fairly in order to maintain a well-disciplined school environment, a SGB or principal will be justified in restricting the distribution of unauthorized learner publications in the school.

Conclusion

The matter of limiting learners' publications is not an easy one. Whilst school authorities can act pro-actively and develop a prior approval policy for publications that could be construed as representing the viewpoint of the school, such procedures may not be overly broad nor overly-restrictive. In the final analysis, what is needed is clear policy about the disciplinary consequences, for learners as well as for school staff, of expression within the school or in the context of school-sponsored activities (such as sporting events) which is disruptive of the educational mission of the school or violates the norms established by section 16(2) of CRSA. Neither learners nor educators are free to abuse their freedom of expression by using it for "propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

References

- Anon. 1998. 'n Geloofsak ("A matter of faith"). *Beeld*, January 20.
- Ask Sybil Liberty About Your Right to Free Expression. [Online] Available url: <http://www.aclu.org/students/slfree>
- Bray E 2000. *Human Rights in Education*. Pretoria: CELP.
- Department of Education 1998. *Guidelines for the consideration of governing bodies in adopting a code of conduct for learners. Notice 776 of 1998*. Pretoria: Government Printer.
- De Waal J, Currie I & Erasmus G 2001. *The Bill of Rights Handbook*. 4th edn. Cape Town: Juta.
- Dvorak J & Dilts JP 1992. Academic freedom vs Administrative authority. *The Journalism Educator*, 47:3-12.
- Gregory GH 2000. *Desk Reference on Significant U.S. Supreme Court cases affecting Public Schools*. Alexandria, VA: NSBA
- Joubert HJ & Prinsloo IJ 2001. *Education law: A practical guide for educators*. Pretoria: JL van Schaik.
- Madison J 1993. *Federalist 55 [1788]*. In *The Debate on the Constitution, II*. New York, NY: The Library of America.
- Malherbe EFJ 2001. Draft chapter for an Education Law Handbook.
- Montesquieu 1989. *The Spirit of the Law*. Cohler AM, Miller BC & Stone HS (trans. eds). Cambridge: Cambridge University Press.
- Rautenbach IM & Malherbe EFJ 1999. *Constitutional Law*. 3rd edn. Pietermaritzburg: Interpak.
- Russo CJ 1996. Legal research: The "Traditional" method. In: Schimmel D. *Research that makes a difference: Complementary methods for examining legal issues in education*. NOLPE Monograph Series Kansas, No. 56. National Organisation on Legal Problems of Education.
- Students' Rights Legal Pointers for Public Schools 2001. School Law Primer 2001. Unpublished. Alexandria, VA: NSBA.
- Sukhraj P 1999. Pupil endured abuse for right to speak her mind. *Sunday World*, September 26.
- Weir R & Gervais BL 2001. Freedom of Expression and Unauthorized Student Publications. Paper presented at *CAPSLE Conference* in Vancouver, British Columbia.
- Legislation**
- Republic of South Africa 1996a. The Constitution of the Republic of South Africa. Act No. 108 of 1996. *Government Gazette, Vol. 378, No. 17678*. Cape Town: Government Printer.
- Republic of South Africa 1996b. South African Schools Act. Act No. 84 of 1996. *Government Gazette, Vol. 377, No. 17579*. Cape Town: Government Printer.
- United States of America. *Constitution of the United States of America*, Amendment I.
- Case Law**
- Antonie v Governing Body, Settlers High School, and others 2002 (4) SA 738.
- Bethel School District No. 403 v Fraser, 478 U.S. 675, 682 (1986).
- Hazelwood School District et al. v Kuhlmeier et al. 484 U.S. 260 (1988).
- Holomisa v Argus Newspapers Ltd 1996 6 BCLR 836 (W).
- Shanley v Northeast Independent School District, 462 F.3d 960 (5th Cir.1972).
- Tinker v Des Moines Independent Community School District, 393 U.S. 503 (1969).
- West Virginia State Bd. of Educ. v Barnette, 319 U.S. 624, 637 (1943).