CHAPTER 8
PREGNANCY
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Punishing learners because they are pregnant is against the law and the Constitution.

The Constitution affords everyone the right to equality, human dignity, and a basic education. These fundamental rights, together with various national and provincial laws and policies, have made positive and significant changes towards ensuring access to a basic education and promoting gender equality in schools. South Africa has also signed a number of international and regional treaties and conventions that have helped strengthen the state’s responsibility to protect and support learners and to promote action geared towards achieving universal access to basic education. In practice, however, gender inequality is still prevalent in South African schools, and pregnant learners still experience gender-specific barriers to basic education in a way that decreases their learning opportunities. The promotion of gender equality in the case of pregnant learners means that the State must take more steps to ensure that these learners will complete their education rather than dropping out.

One of the strongest indicators that pregnant learners are not receiving the support they need to re-enter the education system after giving birth and remain in school is the low rate of attendance (or high drop-out rate) of female learners due to pregnancy. A second indicator that pregnant learners face barriers that affect their access to education is the increase in reports of discriminatory practices. Pregnant learners often face reluctant teachers who are not willing to support them with access to books, notes, and homework while they are at home for the period necessary before giving birth, or for recovery afterwards. Catch-up classes are often not provided for either. Pregnant learners are increasingly also being requested to provide the school with money, in case they need medical assistance while at school. Others have been forced to have a guardian accompany them to school at all times, with schools reasoning that the guardian and not the school would then be liable in case of a medical emergency. These practices generate stumbling blocks and cause great distress for pregnant learners. There may be a number of reasons why discrimination against pregnant learners takes place in schools and communities. However, the most common reasons include stereotypes concerning the role of females at home and in the community. Females are often considered to be caregivers, or more suited for domestic work, while less emphasis is placed on their educational needs. Recent data confirms the existence of this view, and shows that females are more likely to stay home due to family commitments such as housework and childminding. Prejudicial and judgmental attitudes are also common, and in some cases principals and teachers have adopted a punishing attitude towards pregnant learners, rather than providing them with the support and understanding they desperately need. Often this happens even though some principals and teachers know what the law and the Constitution say about how they must help pregnant learners. However, many do not know that punishing learners because they are pregnant is against the law and the Constitution.

Discriminating against pregnant learners may have far-reaching effects on both the learner and society. Research shows that when a girl falls pregnant at a young age, her chances of completing formal schooling and higher education decrease. In addition, a learner who has not completed schooling has a stronger chance of unemployment, and may experience difficulties in finding a high-paying job. Pregnant learners are clearly a vulnerable and marginalised group, often associated with immorality and shame. The South African government is obliged to take positive measures to make sure that they stay in school and complete their education.
1. WHY MUST SOUTH AFRICA DECREASE THE DROP-OUT RATES OF FEMALE LEARNERS?

Under international law, South Africa must take steps to decrease the number of children dropping out of school, especially females. Two United Nations Conventions say so. South Africa has signed and ratified both.

South Africa has also signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13 of which protects everyone’s right to education. The Committee on Economic, Social and Cultural Rights adopted General Comment 13, which explains Article 13 of the ICESCR in more detail, and states that education must be accessible to all, without discrimination. General Comment 13, paragraph 6 (b) ‘Accessibility – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.’

What obligations do African legal mechanisms impose on South Africa to protect pregnant learners? The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) requires all African member states to take measures to promote keeping girls in schools.

The African Youth Charter requires signatory states to eliminate discrimination against girls, and states must make sure that there are no barriers in the education system that block pregnant learners from attending school. The African Charter on the Rights and the Welfare of the Child also places an obligation on signatory states to take ‘appropriate measures’ to ensure that children who fall pregnant have a chance to continue their education. Only the African legal mechanisms speak specifically about supporting pregnant girls. South Africa has signed and ratified all of these mechanisms. The government therefore has an obligation to make sure that pregnant learners, and learners who are mothers, are not unlawfully denied access to school. Importantly, these legal mechanisms show that the government has a responsibility to make sure that pregnant learners are surrounded by a supportive and understanding environment in which their needs and circumstances are accommodated.

2. HOW IS THE GOVERNMENT FAREING ON ITS INTERNATIONAL AND REGIONAL OBLIGATIONS?

Part II (10) of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that South Africa must: ‘Take measures to encourage regular attendance at school and the reduction of drop-out rates.’

The Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) was introduced to prevent and prohibit unfair discrimination and to promote the achievement of equality in South Africa. Section 6 of the Equality Act provides that no-one, including the State, may unfairly discriminate against any person. Section 8 of the Equality Act makes it illegal to discriminate on the basis of gender. In particular, Section 8(f) prohibits discrimination on the basis of pregnancy and 8(g) prohibits discrimination where the result is to limit women’s access to social services, or benefits such as health and education.

Section 10 of the Constitution states that everyone has the right to dignity and to have their dignity respected and protected. Closely related to the right to dignity is the right to a basic education, which the Constitution guarantees to everyone, in Section 28(1)(a).

The Bill of Rights also makes special provision for children, in Section 28(2). This section states that the best interest of the child is the top-most priority in every matter concerning the child. Similarly, Section 9 of the Children’s Act states that ‘in all matters concerning the care, protection and well-being of a child, the standard that the child’s best interest is of paramount importance must be applied.’

The African Youth Charter on the Rights and Welfare of the Child (AYC) gives effect to the right to education guaranteed by the Constitution. In terms of Section 3(1) of the Schools Act, anyone whose child is due to turn seven in a given school year must
make sure that their child attends school. There is currently no national policy that provides for the making and applying of national education policy regarding schools. Section 3(4)(o) of the Constitution makes and applying of national education policy. Some provincial education departments, such as the Western Cape Education Department (WCED), do have a pregnancy policy for their province. The WCED’s Policy sets out guidelines for their schools in managing learner pregnancy. The guidelines say that pregnant learners are to be considered learners with ‘special needs’, and must be given counselling. It also says that School Governing Bodies (SGBs) are accountable for every learner’s right to education – this includes enrolling expecting learners and learners who are parents. Learner pregnancy is dealt with in different ways across provinces because there is no national policy. SGBs have been left to determine their own learner pregnancy policies without any guidance as to what is lawful. In many instances, these policies have been highly discriminatory. Pregnant learners are being subjected to unlawful practices at schools, which include being threatened with suspension or expulsion, or being refused a catch-up plan for missed lessons. Some learners are not allowed to return to school for at least a year after giving birth. The effect of the lack of a national policy can be seen in a case brought by two Free State schools, Welkom and Harmony High (the schools), against the DBE, and specifically the Head of Department (HOD) in the Free State. The SGBs of the schools adopted pregnancy policies that provide for the automatic exclusion of pregnant learners. In particular, learners who fall pregnant may not be readmitted into school in the year in which they give birth. The effect of these policies was that pregnant learners would be forced to repeat their current grade, should they decide to return. These unfair policies were in line with a 2007 DBE national policy titled ‘Measures for the Management and Prevention of Learner Pregnancy’. This policy encouraged discriminatory conduct by promoting the view that a pregnant learner takes a leave of absence of up to two years to ‘exercise full responsibility for parenting’. The Welkom and Harmony policies were applied even though both schools were aware of a national circular titled ‘Management and Governance Circular’. This circular states that learners may not be expelled because they are pregnant, and that pregnancy policies and interventions must not punish learners, but be ‘rehabilitative and supportive’. The circular also encourages learners to return to school as soon as possible. Both schools had forced a learner to leave as a result of pregnancy. After being told of this, the HOD ordered the principals to allow the learners back immediately. The SGBs refused, and took the HOD to court to stop him from interfering with their policies.

In the judgment, the Constitutional Court stated that the political policies differentiate between learners on the basis of pregnancy and sex (because male learners are not negatively impacted by these policies). This differentiation amounts to unfair discrimination. The Court also stated that the policies infringe on a pregnant learner’s right to basic education by requiring them to repeat up to an entire year. The policies violated the learners’ rights to human dignity, privacy, and bodily and psychological integrity, by obliging other learners to report their pregnancy to school authorities, thus stigmatising them even more. It is clear that the 2007 DBE pregnancy policy on which the schools acted when drafting their policies is against the law and the Constitution.

The Constitutional Court also stressed the importance of co-operative governance between HODs and SGBs, meaning they should work together to make sure that all learners can enjoy a quality education. The Welkom judgment highlighted the importance of SGBs and educators drafting policies that do not discriminate and do comply with the Constitution. The Welkom judgment again shows the importance need for a national learner pregnancy policy, to ensure a uniform standard that at its core has the best interests of the learners at heart. The DBE released their ‘Draft Policy on HOD, SGBs and TB’ in May 2015. The Draft Policy states that all learners must be educated about sex, as well as sexual and reproductive health rights. However, the Draft Policy needs to be revised to ensure that all learners are provided with easy and discreet access to condoms in schools. While this type of policy is welcomed, it is strange that the word ‘pregnancy’ does not appear in the Draft Policy, despite the link between unprotected sex, teenage pregnancy and STIs. The DBE’s own statistics show that learner pregnancy is a huge problem, and should be addressed. This reality should be taken into account when a policy is made on age learners ought to be allowed to access condoms in a way that is easy and discreet. The chances of achieving the aims of the Draft Policy are significantly diminished if learner pregnancy is not addressed as an additional policy or law with an aligning, cohesive and supportive framework. The DBE has said that the Draft Policy was approved on 20 May 2016. The department is in the process of developing and costing an implementation plan. The Draft Policy has been submitted to the Department of Planning, Monitoring and Evaluation for review before it is gazetted (made official).

Regardless of when the Draft Policy is gazetted, there remains an urgent need for a step-by-step policy, or legal regulations, specifically concerning learner pregnancy. This policy, or these regulations, should inform schools on how to lawfully manage learner pregnancy, and should clearly set out the roles and responsibilities of everyone involved. This includes the obligation on schools to make sure that pregnant learners are provided with support to help them return to school and finish their studies.
PRACTICAL STEPS THAT PREGNANT LEARNERS MAY TAKE TO ADDRESS ANY DISCRIMINATION THEY MAY EXPERIENCE AS A RESULT OF THEIR PREGNANCY

Should you as a pregnant learner or a learner with children experience any unlawful actions, there are certain steps you should follow to ensure that you are able to attend school and complete your education.

Examples of unlawful actions against pregnant learners or learners returning to school after giving birth include:

- being suspended from school by the SGB
- being recommended for expulsion by the SGB
- being forced to go home without being told when you may return
- if a school refuses to provide you with homework or tasks while you are away
- not being allowed to write exams
- told to pay a deposit to the school in case of a medical emergency
- told that you cannot attend school without a parent or someone responsible for you
- told to be at school until the day you give birth to your baby
- returning to school after giving birth, and the school refusing to provide a catch-up plan
- not being allowed to return to school, or only allowed to return some time after giving birth.

South Africa has clear constitutional and international obligations that require the state to ensure that Angela is able to attend school for as long as possible, to return to school as soon as she can, and to get the support that she needs as a young teenage mother.

Lawyers were approached by a mother, Ms Andiswa Motsepe,* whose daughter, Angela,* was in Grade 12 at Slovo High School*. The mother needed help, because the principal had forced Angela to leave school after discovering that she was five months pregnant. Days earlier, the principal had handed a letter to Angela and told her to give the letter to her mother. The letter stated that the mother needed to contact the school. Ms Motsepe visited the school the following week and met with the principal and his deputy. The principal told her that he did not want pregnant girls at Slovo High because they were an embarrassment to his school, and he handed Ms Motsepe a copy of the school’s pregnancy policy.

Slovo High’s pregnancy policy states that pregnant learners must pay a R200 deposit for use in case of emergencies, including phoning an ambulance or parents. If the learner does not pay a deposit, she must stay home until she pays. The policy also states that a learner must leave school at the end of her fifth month of pregnancy, and will only be allowed back three months after giving birth. A learner will not be allowed to write exams during her last trimester. When the learner is back at school, she will not get time off to help her look after her newborn. For example, she cannot say ‘My child is sick’, or ‘I had to take my child to hospital’. The learner will not be allowed to have any contact with the father of the child on school premises, even if the father is also attending Slovo High. Even though the Welkom and Harmony cases make it clear that a school can have its own pregnancy policy, it also says that the policy cannot discriminate against a learner because she is female or pregnant. Slovo High’s policy is clearly aimed at punishing Angela because she is pregnant, and therefore discriminates against her. Far from supporting her, the policy makes it difficult for Angela to stay in school, because there is no understanding if she has to take time off when her baby needs her. It is in Angela’s best interests to return to school as soon as she can and to get her education, so that she can become a productive member of society and are able to financially support her child.

*Names have been changed
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CASES

Head of Department, Department of Education, Free State Province v Welkom High School and Another 2013 (9) SA22A(TC) [2013] ZACC 25.

Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC) [2013] ZACC 25.

CONSTITUTION AND LEGISLATION


Children’s Act 38 of 2005.


South African Schools Act 84 of 1996.


POLICY AND GUIDELINES

Department of Basic Education ‘Draft Department of Basic Education National Policy on HIV, STIS and TB’, 2015.


INTERNATIONAL AND REGIONAL INSTRUMENTS


SOURCE MATERIAL AND FURTHER READING


STEPS TOWARDS ENSURING THAT YOUR RIGHT TO EDUCATION IS PROTECTED IF YOU SHOULD FALL PREGNANT

1. Document your experience at school. Make notes of any conversations with the school principal or teachers.

2. Consider informing your parents/guardian about what is going on, and ask that they come with you to school for a meeting with the principal. You do not have to tell your parents/guardian if you are not comfortable with doing so.

3. You can – by yourself or with your parents – set up a meeting with the principal to discuss things. In that meeting, you are, or your parent/guardian is, entitled to ask that you be:

   a. allowed to remain at school until the time that your medical doctor or nurse says that it is no longer safe for you to be there;
   b. allowed to return to school as soon as you have given birth;
   c. provided with a catch-up plan;
   d. sent homework and tasks while you are at home.

4. Ask the principal that any agreement reached is written and signed.

5. If you or your parent/guardian is unable to reach an agreement with the school, you should approach your local education district office for assistance.

   a. Visit the national Department of Basic Education’s website at www.education.gov.za to locate your provincial office, who will be able to provide you with the relevant district office’s contact details. The district office is responsible for all schools in your area. The office is run by the District Director.

   b. If the district office is unable to assist you or your parent(s), or fail to solve the problem, you or your parents can approach the civil society organisations as set out on page 388 of this book or approach your Provincial Education Department.

   c. Ask the principal that any agreement reached is written and signed.

   d. If you or your parent/guardian is unable to reach an agreement with the school, you should approach your local education district office for assistance.