

IN THE ESSENTIAL SERVICES COMMITTEE

Case No.: ES239

Investigation in terms of Section 71, read with 70B(1)(d) of the Labour Relations Act, 66 of 1995:

Whether services rendered by educators and support staff in basic education including Early Childhood Development should be designated as essential services

Designation

Introduction

1. The Essential Services Committee (“the ESC”) received a request from the Democratic Alliance of South Africa (“the DA”) in terms of section 70B(1)(d) of the Labour Relations Act, 66 of 1995 (“*the LRA*”) on 31 May 2018.
2. In its request, the DA sought that a minimum service level be established to ensure that:
 - School leaders are on hand to provide leadership during strike situations and to communicate with necessary authorities during emergency situations
 - Learners are supervised during the school day; and
 - The nutrition and health needs of learners are not compromised.
 - And to this end, the ESC to undertake a study regarding the safety and well being of school learners during strike action, with a view to ensuring a minimum standard of supervision and care that must be provided by school staff.

3. Woodridge College and Preparatory School (WCPS) also submitted a referral and in its referral it sought services rendered by House parents, Catering, Cleaning, Security and Sanatorium staff to be designated as essential services.
4. After consideration of the above requests, the ESC decided that the requests were reasonable and in view of the fact that the requests related to the same sector, the Committee decided to consolidate the two requests and conduct one investigation.
5. The gazetted terms of reference for the investigation in terms of section 71 are “...whether the following services are essential: ... Services rendered by educators and support staff in basic education including Early Childhood Development” (see Government Gazette No 41704 dated 15 June 2018). The Committee called upon written submissions and the submissions were received from the following parties:
 - * SADTU
 - * DA
 - * Woodridge College
 - * Western Cape Education MEC
 - * Equal Education
 - * Centre for Child Law (UP)
 - * Section 27
 - * Economic Research Southern Africa
 - * Kwa Zulu Natal Provincial Parliament
6. Notice was also given that the ESC would hear oral representations on the following dates and at the centres mentioned below:
 - 11 July 2018 CCMA Offices, 97 Govan Mbeki Avenue, Port Elizabeth
 - 13 July 2018 CCMA Offices, 275 Anton Lembede Street, 6th & 7th Floor, Embassy House

- 16 July 2018 CCMA Offices, 78 Darling Street, Cape Town
 - 17 July 2018 CCMA Offices, Corner Elizabeth & West Burger Streets, Bloemfontein.
 - 20 July 2018 CCMA Offices, 28 Harrison Street, 8th Floor, Johannesburg
7. Woodridge College and Preparatory School (WCPS) conducts business as an independent school and provides education from Grade 000 to Grade 12 for approximately 721 learners and operates a boarding hostel for approximately 261 of these learners. WCPS in its request submitted that the following services should be designated
- Catering Services
 - Sanatorium services
 - House Parents and;
 - And / or any other service declared essential by the ESC

Summary of the Submissions

8. A number of written submissions were received and a number of interested parties also made oral representations to the ESC, these submissions are dealt with below.
9. It is important to note that some of the people that made oral representations had not filed written submissions and the Committee decided to condone this non compliance as most of them indicated that they were not aware of the notice and given the importance of this investigation the committee was of the view that it would be in the interest of fairness to grant them an audience.

10. On behalf of the Democratic Alliance it was submitted that there was a need for the establishment of minimum service levels in the basic education sector relating to the safety, supervision, nutrition, and health/hygiene needs of learners. In particular, school leaders to be on hand to provide leadership during strikes and communicate with relevant authorities in emergency situations; supervision of learners during the school day; the provision of meals and cleaning services and supervision and care of learners in boarding facilities and special needs schools.
11. Parents were concerned at the risk to their children being dropped off at school and having to remain unsupervised until collected by their transport after school closing time due to the school being closed because of strike action. A school had a duty of care in the absence of parents / guardians in respect of its learners and it was necessary that a school leader with sufficient authority and experience remain on duty so as to communicate with the relevant authorities to ensure the safety of learners during strike action. The right of principals and deputy principals to strike should accordingly be limited or even prohibited.
12. The DA's position with respect to basic education was that generally learners should be supervised during breaks and at extra mural activities. Schools acted in loco parentis of learners during school hours and parents reasonably expected that adult staff members would supervise their children during school hours. It was necessary to supervise learners to prevent accidents and also given the escalating levels of violence at schools. Many learners benefitted from school transport and when learners arrived at school to find that the teachers had abandoned the school, they had little option but to walk home. It was reckless in such a situation not to make provision for the safety of such learners.
13. Children had a right to a safe, hygienic environment and to basic nutrition and those entrusted to ensure the protection of these rights should not

abandon their duties lightly. Staff who provided food and cleaning services played an essential role in ensuring that learners have access to a safe and healthy learning environment to which all learners were entitled, more so in boarding schools and in special needs schools where learners needed extra levels of care. The ILO had held that duties performed by staff responsible for the provision of school meals and cleaning of schools were essential services. In the circumstances, the right to strike of such support staff should be restricted or even prohibited.

14. Children in special needs public schools, because of their condition, were more vulnerable than learners at public schools. In the event of a strike in special needs schools, the children would be placed at risk because:
 - They were unable to take care of themselves or bath or feed themselves
 - There would be no one to administer their medication
 - Special needs staff received specialised training and could not simply be replaced or alternative services provided in the event of a strike, particularly with regard to:
 - The care giver function
 - The house parent function
 - Cleaning and hygiene
 - Persons in the kitchen (catering and diet requirements)
15. These submissions were supported by the DA in all the hearings, and in Johannesburg a further submission was made that there was a move in the Department of Basic education to integrate special needs school with main stream schools. The impact of this would be that in the event of industrial action these kids would have no one to take care of them and this could put their safety at risk. The application was also supported by parents.

The Submissions of Woodridge College & Preparatory School

16. 06 July 2017 Affidavit¹ by Craig Warner, Business Manager WCPS was submitted to the Committee.
17. Mr OH Smith of AHI made oral representations on behalf of WCPS to the following effect. Due to its location, approximately 40km from Jeffrey's Bay and Port Elizabeth, the school was relatively isolated from shops, hospitals and petrol stations.
18. The school had approximately 721 learners between the ages of 5 – 18 years, 261 of the learners were in the school hostel. During 2017 a fire destroyed buildings and other properties and had there not been a contingency plan in place (i.e. all staff trained in evacuation procedures), the evacuation most likely would not have been successful.
19. WCPS catered for local and international students and along with its employees, it was responsible for the custody of its learners and to ensure they remained in a safe and protected environment at all times. The service provided by its staff was essential and industrial action would potentially prejudice their learners as amongst other things, their safety and well being could be at risk.

Catering

20. Employees in their catering service were required to provide meals at regular intervals and special provision had to be made for diabetic,

¹ Together with quotations from two separate catering businesses for the provision of breakfast, tea, lunch and dinner for one day

religious, vegetarian, vegan and gluten and lactose intolerant learners. Good nutrition and education went hand in hand and hence it was necessary to provide learners with their specific daily nutritional needs. In the event of Industrial action, learners would be placed at risk and given the location of WCPS, the cost of securing outside catering would be exorbitant and further they would not have the necessary training to ensure food standards were complied with and training in respect of safety and evacuation. Similar to older people in nursing homes, children in boarding schools were a vulnerable age group.

House Parents

21. WCPS assigned employees to act as house parents, who resided on the premises to act as foster parents and take responsibility of learners in the hostels. Given the relationship built up over time between learners and house parents, it would not be possible to simply replace a house parent should such employees embark on a strike.

Sanatorium

22. As WCPS was not close to any medical facilities, it employed sanatorium employees, specifically to assist with learners' medical needs on a daily basis. In the event of a strike, the interruption of this service would create severe repercussions for learners. In addition, the administering of medication had to be administered by the sanatorium.

General

23. All employees of WCPS possessed a sexual clearance certificate. In the event of allowing outside persons not in possession of such a certificate to attend to the duties of catering, sanatorium and house parents, learners' lives would be placed at risk.

24. In the circumstances, WCPS submitted that catering, house parents, and sanatorium services are declared an essential service and that its application found support in the following:
- The interruption of categories of employees, referred to above, would endanger the life, personal safety or health of the learners WCPS was required to protect
 - Support for its case in respect of the above categories of employees was to be found in the ESC Designation of catering services and nursing services under Welfare Registered Nursing Homes and that security in terms of the education sector has already been declared an essential service
 - The provisions of section 28 of the Constitution of the RSA.

The Submissions of the Parents

25. Parents made oral representations and submitted that, as parents they were concerned for the safety of their children inside and outside the classroom.
26. When a strike occurred at school:
- The principal and teachers either took cover or participated in the strike leaving the learners in the classrooms / school grounds unsupervised
 - Learners were coerced by teachers to join in toy-toying
 - Security staff did not attend to their duties resulting in gangs targeting and vandalising the schools
 - Where it was not known that there was to be a strike, the taxi dropped the children off at the school in the morning and would only return to collect them in the afternoon. The children would accordingly be left unsupervised for the whole day.
27. This resulted in their children, the learners, being placed at risk for their safety and given that every child had the right to be educated, the above

was unconstitutional and against the law. In their view, there was a need to protect children in and outside the classroom at all times and the principal, deputy principal and teachers should be declared an essential service and support staff be put in place to take care of the children.

28. It was submitted further that the absence of educators at school, whether ill or on strike, impacted on the safety of learners and their psychological development. It was submitted further that leaving learners unsupervised also put them at risk and exposed them to drugs.
29. An example was made of a school for the blind in Thaba Nchu where the children who are blind would cross a busy road without assistance and this put their lives in danger.
30. Another example was given of an incident in Eldorado park where a learner stabbed another at school and it was submitted that these incidents would require a person in authority to take charge and resolve the matter to ensure the safety of learners.
31. It was submitted that the blame for this was not only because of industrial action, as teachers were often absent or off sick. Further that there was a need for implementation of good school governance, presence of a full complement of teachers, adherence to time periods and the control / supervision of learners in the playground would partially resolve the problem.

The Submissions of SADTU

32. The written submissions made by SADTU are as follows:
02 July 2018: Written representation² by the SADTU General Secretary to make oral and written submissions to the ESC.
33. Mr CK Mdingi, SADTU Provincial Secretary for the Eastern Cape, made oral representations on behalf of SADTU to the following effect.
34. A blanket approach to declaring education an essential service was not possible as education comprised of many services or functions and the question arose as to which service or function should be declared an essential service, e.g. teaching performed by educators did not include providing security. The education sector comprised various components / services e.g.: Policy and planning, Administrative services and School based activities relating to the day-to-day activities in schools, in particular learning and teaching.
35. In the main, it appeared that the demand for the designation of education as an essential service was premised on the assumed risk to learners at school level. Supervision of young children was one of the critical activities at school, the absence of which, whether during a strike or not, would place their life, personal safety and health at risk. The question however was whether, in the event of a strike, the learners would be at risk.
36. Day learners spent an average of 6 hours at school. Any interruption would be confined to this period. Schools were required to have teaching and non-teaching staff and accordingly, any interruption by the educator/teaching staff would not constitute a full interruption in the service and non-teaching staff that opted not to strike could still provide the

² Together with SADTU Submission on the Declaration of Education as an Essential Service by the Essential Services Committee

necessary support. Any interruption in the service would accordingly be confined to those learners who were in school boarding facilities. However, these facilities had, or ought to have dedicated staff to provide the necessary supervision.

37. The law did not place the entire responsibility for the supervision of children in school on the staff but also on the parents. Parents via the school governing bodies could play a supervisory role during any interruption. During public and school holidays staff in education were not responsible for the supervision of children. Learners in higher grades needed less supervision than children in lower grades.
38. With regard to causation, it was necessary that the interruption must be the result of a strike and nothing else. Factors other than an interruption by a strike posed a greater risk to the life, personal safety and health of children in schools. Examples based on empirical evidence were violence in schools, poor infrastructure and lack of safety.
39. In terms of the LRA, a protected strike required advance notice to be given and accordingly the situation would not be different from where children are required to stay at home due to adverse weather or outbreak of disease. In the circumstances, SADTU argued that the life, personal safety and health of children attending schools was not entirely dependent on staff in schools and therefore they could not be endangered by an interruption where lawful procedures for such interruption had been complied with. The situation with regard to an unprotected strike was not relevant to the issue of an essential service and stood to be dealt with in terms of the remedies provided in the LRA. Likewise, in the event a protected strike ceased to be peaceful, this did not go to whether services rendered by educators was an essential service, but to their conduct during the strike in respect of which the LRA provided for disciplinary action, in respect of acts which constituted misconduct.

40. Accordingly, in SADTU's view, the services provided by educators and support staff did not qualify to be declared an essential service.
41. In the light of the position taken by the International Labour Organisation on education, the pronouncements of the Constitutional Court, the application of the principles of legality and the rule of law, it was not possible for the ESC to declare education an essential service and such a designation could well constitute the exercise of a power not conferred on it. The ESC could not use the purpose of the LRA to declare services rendered by educators as essential for addressing what appeared to be complaints of misconduct regulated by another law.
42. SADTU submitted that one of the glaring problems affecting schools was the lack of proper and adequate resources, both human and infrastructural, and the ESC processes could not be used to address problems unrelated to collective bargaining of which the right to strike was an essential component.
43. It was necessary to ascertain exactly what services educators were required to fulfil, as they could not have their right to strike taken away for services that were not part of their duties. In addition, clarity would have to be obtained as to what services were performed by teaching and non-teaching staff respectively.
44. In the circumstances SADTU was of the view that:
- There was no basis in law to restrict or prohibit the right of educators and support staff to strike
 - The right to strike should not be undermined, rather a balance sought between the rights of teachers and learners
 - An analysis of the actual services provided by educators was required as it was clear that the decision on the designation of an essential

service would be based on non-teaching activities that educators might not be obliged to render.

45. SADTU would engage the employer to address public concerns regarding issues in education and may propose a protocol in this regard, to be concluded in the Education Labour Relations Council.
46. In the case of special needs schools, again it was necessary to understand fully their requirements and needs before deciding on what was an essential service. In principle however there could be no objection to the provision of required specialist services.
47. In all the provinces parents and members of SADTU made submissions and they can be summarized as follows:
 - There was no need to designate catering as essential as this service was provided by volunteers who received a stipend from the government and therefore they were not employees and would not strike.
 - This service is always interrupted as sometimes there are no funds for feeding projects.
 - During strike action learners do not come to school and therefore there is no one to feed
 - It was further submitted that cleaning in public and particularly rural schools this is done by learners and there is industrial action the children do not come to school.
48. The position of SADTU was supported by Section 27 and Equal Education. Economic Research south Africa also filed a research paper on the impact of strike action on Education and this did not take the inquiry any further as

there was a concession that services rendered by educators was not essential.

LEGAL FRAMEWORK

49. Basic education comprises the educational, cultural, recreational or social activity of a school³ in respect of learners from Grade R to Grade 12 and resorts under the Department of Basic Education as defined in the South African Schools Act, 84 of 1996 (SASA), Employment of Educators Act, 76 of 1998 and the General and Further Education and Training Quality Assurance Act, 58 of 2001⁴. See e.g. the following:
- *“school” means a **public school** or an **independent school**⁵ which enrolls learners in one or more grades from grade R (Reception) to grade twelve⁶*
 - *A **public school** may be—*
 - (i) *an ordinary public school;*
 - (ii) *a public school for learners with special education needs; or*
 - (iii) *a public school that provides education with a specialised focus on talent, including sport, performing arts or creative arts.⁷*

³ Section 1, South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

“school activity” means any official educational, cultural, recreational or social activity of the *school* within or outside the *school* premises;

⁴ The Minister of Basic Education may issue regulations to achieve the objects of the acts, see Section 61 of the South African Schools Act, 84 of 1996 as amended by Act 15 of 2011 and Section 35 of the Employment of Educators Act, 76 of 1998 and in the case of SASA may also make regulations to provide for safety measures at public and independent schools.

⁵ Independent schools may be established in terms of Chapter 5 of the South African Schools Act, 84 of 1996, as amended by Act 15 of 2011. No person may establish or maintain an independent school unless it is registered by the Head of Department (Section 46)

⁶ Section 1, South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

⁷ Section 12 (3)(a), South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

- **“learner”** means any person receiving education or obliged to receive education in terms of this Act;⁸
- **“school activity”** means any official educational, cultural, recreational or social activity of the school within or outside the school premises;
- **“department of education”** means—
 - (a) the Department of Basic Education, which is responsible for school education at national level;
 - (b) a department responsible for school education in a province; or
 - (c) the Department of Higher Education and Training, which is responsible for further education and training colleges and adult education and training centres at national level;⁹
- **“Department of Basic Education”** means the department established in terms of section 7 (2), read with Schedule 1, of the Public Service Act, 1994 (Proclamation No. 103 of 1994), responsible for basic education at national level;¹⁰
- **“educator”** means any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains¹¹ other persons or who provides professional educational services, including professional therapy and education psychological services, at a school;¹²

⁸ Section 1, South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

⁹ General and Further Education and Training Quality Assurance Act, 58 of 2001 as amended by Act 15 of 2011

¹⁰ Section 1, Employment of Educators Act, 76 of 1998 as amended by Act 15 of 2011

¹¹ The job description of Core duties and responsibilities of a Teacher, Senior Teacher, Master Teacher, Departmental Head, Deputy Principal, Principal and Office based educators are set out in Annexure A.2-Annexure A.8 respectively of Chapter A of the Personnel Administration Measures (PAM) published under Government Notice 170, in Government Gazette Vol. 608, No. 39684 dated 12 February 2016.

¹² Section 1, South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

50. The governance of every public school is vested in its **governing body** which may perform the functions¹³ and obligations and exercise only such rights as set out in the South African Schools Act, 84 of 1996. The composition of a governing body is made up of elected members, the principal and co-opted members. Elected members are elected from the school parents, educators, and non-educators at the school, and learners in the 8th grade or higher¹⁴
51. A **principal** is an educator appointed or acting as the head of a school¹⁵. The principal is responsible for the professional management of the school including inter alia the implementation of education and curriculum activities, management of all educators and support staff, implementation of policy and legislation and for a hostel and all related activities including staff and learners, if one is attached to the school¹⁶.
52. A **parent**¹⁷ is required by law to ensure that a child / children for whom they are responsible, attend at a school from the age of 7 years until the last school day of the year in which they reach 15 years or the ninth grade, whichever occurs first¹⁸ and the department of basic education has a

¹³ See e.g. Section 16(1) & 16(2) and section 20 of the South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

¹⁴ See section 23 of the South African Schools Act, 84 of 1996 as amended by Act 15 of 2011. The composition of the governing bodies of public schools for learners with special education needs is set out in section 24.

¹⁵ Section 1, South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

¹⁶ Section 16(3), 16A of the South African Schools Act, 84 of 1996 as amended by Act 15 of 2011, Annexure A.7, Chapter A of the Personnel Administration Measures (PAM) published under Government Notice 170, in Government Gazette Vol. 608, No. 39684 dated 12 February 2016. The responsibilities of a deputy principal include that of assisting the principal in his/her duties and to deputise for the principal in their absence (Annexure A.6).

¹⁷ (a) The biological or adoptive *parent* or legal guardian of a *learner*, (b) the person legally entitled to custody of a *learner*; or (c) the person who undertakes to fulfill the obligations of a person in (a) and (b) towards the *learner's* education at school. Section 1 South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

¹⁸ Section 3(1), South African Schools Act, 84 of 1996, as amended by Act 15 of 2011.

3 Compulsory attendance. —(1) *Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.*

In addition, in terms of the section 18 read with the definition of *care* in section 1 of the Children's Act, 38 of 2005, as amended by Act 41 of 2007, parental responsibilities and rights include the responsibility and the right to care for a child, which in turn amongst other things includes:

reciprocal duty and Constitutional obligation to provide such education.

53. In terms of the Regulations for Safety Measures at Public Schools Regulations¹⁹, subject to applicable law, no person may cause any form of violence or disturbances, which can negatively impact on any public school activities.²⁰ In terms of Regulation 5, a principal may take such steps as are necessary for the safeguarding of the public school premises, as well as for the protection of the people therein and no person may enter the public school premises without permission. In addition and in terms of Regulation 5(3), a principal may remove a person that enters without the necessary permission. This does not apply, amongst others, to members of the police who are required to enter the premises in the performance of their functions and who produce the necessary authority²¹.

Early Childhood Development

54. Chapter 6 of the Children's Act, 38 OF 2005 as amended by Act 41 of 2007²² makes provision for early childhood development and the emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school-going age.

-
- (b) *safeguarding and promoting the well-being of the child;*
 - (c) *protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;*
 - (d) *respecting, protecting, promoting and securing the fulfillment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;*
 - (e) *guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;*
 - ...
 - (j) *generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;*

¹⁹ By the Minister of Education in terms of section 61 of the South African Schools Act, 1996, Promulgated by GN 1040 in GG 22754 of 12 October 2001 as amended by GN R1128 in GG 29376 of 10 November 2006 and applicable to all public schools. The Minister of Education has promulgated similar regulations relating to safety measures at independent schools. See GN 975 GG 26663 of 20 August 2004

²⁰ Regulation 4(2)(f) Safety Measures at Public Schools Regulations

²¹ Regulation 4(6) Safety Measures at Public Schools Regulations

²² Sections 91-103. The Children's Amendment Act 41 of 2007 was published in GG Vol. 513 No. 30884 of 18 March 2008 (Government Notice No. 313)

Provision is made for early childhood development programmes, offered by early childhood services, intended to promote early childhood development by a person, other than a child's parent or caregiver on a regular basis to children up to school going age²³

Rights of the Child including that of Education

55. Everyone has the right to a basic education²⁴. Every child²⁵ has the right to basic nutrition, shelter, health care services and social services²⁶ to attend school from the age of 7 until they reach the age of 15 or the ninth grade²⁷, whichever occurs first, to be protected from maltreatment, neglect, abuse or degradation²⁸ and a child's best interests are of paramount importance in every matter concerning the child²⁹.
56. Section 6 of the Children's Act³⁰ sets out general principles, which serve as a guide to the implementation of all legislation dealing with a child or children in general. These principles are also applicable to all proceedings, actions and decisions by any organ of state in any matter concerning a child or children. Section 6(2)(a) requires that all proceedings, actions or decisions concerning a child must, amongst other things, respect, protect, promote and fulfil the child's rights in the Bill of Rights and the best interests of the child standard set out in section 7 and the rights and principles set out in the Children's Act³¹. Section 9 provides *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*. Section 7 lists various factors whenever the best interests

²³ Section 91(2) & (3) of the Children's Act, 38 of 2005, as amended by Act 41 of 2007

²⁴ Section 29(1)(a), Constitution of the RSA 1996

²⁵ A person under the age of 18 years. See section 28(3), Constitution of the RSA 1996.

²⁶ Section 28(1)(c), Constitution of the RSA 1996

²⁷ Section 3(1) South African Schools Act, 84 of 1996 as amended by Act 15 of 2011

²⁸ Section 28(1)(d), Constitution of the RSA 1996

²⁹ Section 28(2), Constitution of the RSA 1996. Section 9, Children's Act 38 of 2005 as amended by Act 41 of 2007

³⁰ Act 38 of 2005 as amended by Act 41 of 2007

³¹ Section 6, Children's Act 38 of 2005 as amended by Act 41 of 2007

standard is to be applied, and includes:

- (i) *the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
- (ii) *the need to protect the child from any physical or psychological harm that may be caused by-*
- (iii) *subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
- (iv) *exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;*

Employees Right to Strike/ Picket

57. The right to freedom of association, entrenched in section 18 of the Constitution of the RSA, is regulated in respect of employees and employers in sections 4 and 6 of the LRA respectively. Section 69(1) of the LRA, in line with section 17 of the Constitution of RSA (the right to assembly, demonstration, picket and petition), provides that any person has the right to picket,³² the purpose being to peacefully encourage non-striking employees / members of the public to oppose any lockout / support strikers involved in a protected strike. Only pickets with the purpose of opposing / supporting any lockout or any protected strike respectively are protected by the LRA³³. A registered trade union must authorise a picket, only members and supporters of the trade union may participate in a picket. The purpose must be to peacefully demonstrate in support of any *protected strike* or in opposition to any lockout. A picket may be held in any place to which the public has access, but outside employer's premises or inside with employer's permission³⁴.

³² See also Item 3 of the Code of Good Practice on Picketing

³³ S 69(1)(a) LRA, Item 1(7) of the Code of Good Practice on Picketing.

³⁴ S 69(2) LRA & Item 1 (5)(a)-(d) of the Code of Good Practice on Picketing

58. Section 64 of the Labour Relations Act³⁵ (LRA), in line with section 23(2) and 23(3) of the Constitution of the Republic of South Africa 1996, provides that every employee has the right to strike and every employer has recourse to lockout. This however is subject to the dispute having been referred to the CCMA or a Bargaining Council, the issue of a certificate to the effect that the dispute remains unresolved and a period of 30 days, or longer period if agreed, has elapsed since the referral was received by the CCMA or Bargaining Council, and in the case of a proposed strike or lock out **48 hours notice** of the commencement thereof has been given to the relevant parties. Where the State is the employer, **at least 7 days written notice** of the commencement of the strike or lock out is required³⁶.
59. A strike / lock out is unprotected (if it does not meet the procedural requirements of S 64) or is in breach of the limitations in S 65 (1) in terms of which no person may take part in a strike or lockout where:
- There is a binding collective agreement that prohibits a strike or lockout in respect of the issue in question³⁷
 - There is a binding arbitration agreement in terms of which the matter must be referred to arbitration³⁸
 - The issue in dispute can be referred to arbitration or to the Labour Court in terms of the provisions of the LRA³⁹
 - The person is engaged in an Essential Service or Maintenance service⁴⁰
60. There is no general limitation, on the right of public sector employees, to embark on a strike. The definition of essential services, see below,

³⁵ Act 66 of 1995

³⁶ Section 64(1) of the Labour Relations Act, 66 of 1995

³⁷ Section 65(1) (a) of the Labour Relations Act, 66 of 1995

³⁸ Section 65(1) (b) of the Labour Relations Act, 66 of 1995

³⁹ Section 65 (1) (c), unless the issue dispute is about any matter dealt with in sections 12 to 5 (Section 65(2) of the Labour Relations Act, 66 of 1995

⁴⁰ Section 65 (1) (d) (i) & (ii) of the Labour Relations Act, 66 of 1995. Essential services, agreed minimum services and maintenance services are regulated in sections 71 to 75 of the Labour Relations Act, 66 of 1995.

supports this with the exception of the Parliamentary service and the South African Police Service⁴¹.

Essential Service

61. In terms of section 213 of the LRA, **essential service** means:

- (a) ***a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population;***
- (b) ***the Parliamentary service;***
- (c) ***the South African Police Services;***
(Emphasis added)

62. The essential services committee may conduct investigations⁴² and make determinations as to whether or not the whole or a part of any service is an essential service⁴³. Section 71 provides for the process of giving notice, making representations and publications of ESC designations in the Government Gazette. The Parliamentary service and the South African Police Service shall be deemed to have been designated an essential service in terms of section 71⁴⁴.

63. Before the ESC may designate any service as essential, it must be satisfied that:

- ***It is a service, or part thereof, that is essential. It is not employees, or a business or industry that is essential (see SAPS v. POPCRU and Others supra);***

⁴¹ In *South African Police Service V Police and Prisons Civil Rights Union and Another* 32 ILJ 1603 (CC), the Constitutional Court adopted a restrictive interpretation to the meaning of the South African Police Service as an essential service and held that only members of the South African Police Services appointed in terms of the South African Police Services Act, 68 of 1995 as opposed to SAPS employees appointed in terms of the Public Service Act, 1994, were prohibited from striking.

⁴² By way of a panel appointed in terms of section 70C of the Labour Relations Act, 66 of 1995

⁴³ Section 70D(1)(b) of the Labour Relations Act, 66 of 1995

⁴⁴ Section 71 (10) Labour Relations Act 66 of 1995. Note that the Labour Relations Act, 66 of 1995 does not apply to members of the National Defence Force and the State Security Agency, (section 2 of the Act)

- *There must be an interruption, irrespective of whether it is partial or complete. If industrial action is unlikely to interrupt the service, or if the interruption can be avoided, for example by outsourcing the service or using replacement labour, the service may not be designated as essential*
 - *The interruption of the service must endanger life, personal safety, or health. Endanger means “putting at risk”, “imperil” or “jeopardise”. ... This implies that the conditions prevailing at the time that the designation ... is made, must be considered, and not the circumstances that may obtain at some stage in the future; and*
 - *The endangerment must impact on the population, namely humans⁴⁵.*
64. Furthermore, in making any determination, the ESC is required, in line with the Constitution of the RSA, to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation ⁴⁶. The ESC is bound by applicable legislation as guided by relevant case law. The legislative context within which the ESC must make its determination is as follows:
65. **The Constitution of the Republic of South Africa. 1996** (Constitution of the RSA):
- Limitation of Rights***
- (1) *The rights in the Bill of Rights may be limited only 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, taking into account all relevant factors, including:*
- (a) *the nature of the right;*

⁴⁵ See D Pillay *Essential Services under the new LRA* (2001) 22 ILJ 1 and the ESC designations in the matter of the Road Traffic Management Corporation and Others vs. NEHAWU and Others & ESC Designation ES31 on whether certain services provided by privately owned old age homes and nursing homes and institutions that care for assisted and frail care patients are essential services

⁴⁶ Section 39(2) of the Constitution of the Republic of South Africa, 1996

- (b) *the importance of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose; and*
- (e) *less restrictive means to achieve the purpose.*

...

Interpretation of Bill of Rights

- (1) *When interpreting the Bill of Rights, a court, tribunal or forum –*
 - (a) *Must promote the values that underline an open and democratic society based on human dignity, equality and freedom;*
 - (b) *Must consider international law;*
 - (c) *May consider foreign law*
- (2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights.*
- (3) *The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.*

Customary International Law

- (1) *Customary international law is law in the Republic of South unless it is inconsistent with the Constitution or an Act of Parliament.*

Application of international law

- (1) *When interpreting any legislation. Every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*

The Labour Relations Act, 66 of 1995 (LRA)

66. Section 1 and 3 of the LRA sets out the primary objects and manner of interpretation of the LRA. The purpose of the LRA is to advance the primary objects as set out in Section 1:

- 1 ***Purpose of this Act.*** – *The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the work place by fulfilling the primary objects of this Act, which are –*
- (a) to give effect to and regulate the fundamental rights conferred by Section 23 of the Constitution⁴⁷.*
 - (b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;*
 - (c) to provide a framework within which employees and their trade unions, employers and employers' organizations can –*
 - i. collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
 - ii. formulate industrial policy; and*
 - (d) to promote-*
 - i. orderly collective bargaining;*
 - ii. collective bargaining at sectoral level;*
 - iii. employee participation in decision-making in the workplace; and*

⁴⁷ Section 23 which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights:

- (1) Every person shall have the right to fair labour practices.*
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organizations.*
- (3) Workers and employers shall have the right to organize and bargain collectively.*
- (4) Workers shall have the right to strike for the purpose of collective bargaining.*
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33 (1).*

iv. *the effective resolution of labour disputes.*

67. Section 3 of the LRA provides that it must be applied and interpreted as follows:

Interpretation of this Act

Any person applying this Act must interpret its provisions-

- (a) to give effect to its primary objects;*
- (b) in compliance with the Constitution; and*
- (c) in compliance with the public international law obligations of the Republic.*

International Law

68. *South Africa ratified both Convention 98 on the Right to Organise and Collective Bargaining and Convention 87 on Freedom of Association and Protection of the Right to Organise on 19 February 1996⁴⁸. These conventions confirm, amongst other things, the rights of workers to organize into trade unions and to strike⁴⁹ and are applicable to South Africa⁵⁰. The Freedom of Association Committee (ILO Committee) of the International Labour Organisation (ILO) has stressed that where an independent national body issues a decision or determination, such determination made by that body cannot dispense the Government of its international obligations⁵¹.*

69. The International Labour Organisation (ILO) has defined essential services as those the interruption of which would endanger the life, personal safety

⁴⁸ Education and Essential Services; ESC presentation to Parliament

⁴⁹ See e.g. Paras. 209, 218 & 523

⁵⁰ Note further that when interpreting the Bill of Rights, a court, tribunal or forum must *inter alia* consider international law, (section 39 of the Constitution of the RSA, 1996) and in terms of section 233 when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

⁵¹ Report no. 356, March 2010; Case No 2606 (Bulgaria) Complaint date 15 February 2009 at Par 307

or health of the whole or part of the population⁵² and that *the criterion which has to be established is the existence of a clear and imminent threat to the life, personal safety or health of the whole or part of the population*⁵³.

70. The Freedom of Association Committee of the Governing Body of the ILO (the ILO Committee) has held that the right to strike may only be restricted or even prohibited in three cases i.e. during an acute national emergency, in the public service and in essential services⁵⁴.

National emergency

71. *A general prohibition of strikes can only be justified in the event of a national emergency and for a limited period of time* (Par. 570⁵⁵) and the decision should lie with an independent body which has the confidence of all parties (Par. 571)⁵⁶.

The public service

72. In the public service, *the right (to strike) may be **restricted only for public servants exercising authority in the name of the State*** (Par. 574 & 576). E.g., *officials working in the administration of justice and the judiciary are officials who exercise authority in the name of the State and whose right to strike could thus be restricted or even prohibited* (Par. 578).

⁵² Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), International Labour Conference, 69th Session, 1983, Geneva. Cited in the Equal Education submission of 6 July 2018 to the ESC. See also Paras. 541, 576, 581 & 582 Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, International Labour Office, Fifth (revised) edition, 2006

⁵³ Par. 581, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, International Labour Office, Fifth (revised) edition, 2006

⁵⁴ Ch 10, in particular Paras. 541, A Acute national emergency 570, 571, B Public service 574, 576, 578, C Essential services 581-590

⁵⁵ Reference to Par Nos. are those in the Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva, International Labour Office, Fifth (revised) edition, 2006

⁵⁶ See section 37 of the Constitution of the RSA, 1996

73. *The right to strike may be restricted or prohibited:*
- (1) *in the public service only for public servants exercising authority in the name of the State; or***
 - (2) *in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population)***
- (Par. 576)

Essential services

74. The right to strike may be restricted or prohibited *in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety, or health of the whole or part of the population* (Par. 576). An essential service in the strict sense of the term may vary between countries depending on circumstances and it also may be that a non-essential service becomes essential e.g. where a strike extends beyond a certain time or scope, thus endangering the life, personal safety or health of the whole or part of the population (Par. 583).
75. The ILO Committee has held that it would not be *appropriate for all state-owned undertakings to be treated on the same basis in respect of limitations of the right to strike, without distinguishing in the relevant legislation between those which are genuinely essential and those which are not* (Par. 584).
76. The ILO Committee has in the cases before it held that the following may be considered essential services (Par. 585):
- *the hospital sector*
 - *electricity services*
 - *water supply services*
 - *the telephone service*
 - *the police and the armed forces*

- *public or private prison services*
- *the provision of food to pupils of school age and the cleaning of schools⁵⁷*
- *air traffic control*

77. And that the following do not constitute essential services in the strict sense of the term (Par. 587):

- *radio and television*
- *the petroleum sector*
- *ports*
- *banking*
- *computer services for the collection of excise duties and taxes*
- *department stores and pleasure parks*
- *the metal and mining sectors*
- *transport generally*
- *airline pilots*
- *production, transport and distribution of fuel*
- *railway services*
- *metropolitan transport*
- *postal services*
- *refuse collection services*
- *refrigeration enterprises*
- *construction*
- *automobile manufacturing*
- *agricultural activities, the supply and distribution of foodstuffs*
- *the Mint*
- *the government printing service and the state alcohol, salt and tobacco monopolies*
- ***the education sector⁵⁸***

⁵⁷ See 324th Report, Case No. 2037, Para. 102 as listed at Par. 585

⁵⁸ References to the cases before the ILO Committee on whether education is an essential service are numerous (see the 1996 Digest, Para. 545; 310th Report, Case No. 1928, Para. 172, and Case No. 1943, Para. 226; 311th Report, Case No. 1950, Para. 457; 320th Report, Case No. 2025, Para. 405;

- *mineral water bottling company*

78. The ILO Committee has held that the possible long-term consequences of strikes in the teaching sector do not justify their prohibition (Par. 590). Although the ILO Committee has found that the education sector is not an essential service, it has held that principals and vice principals can have their right to strike restricted or even prohibited (Par. 588).
79. *The ILO Committee [has] commented that in previous decisions it had stated that education was not an essential service, neither did it meet the definition of the “exercising the powers of public authority”. It was only school principals and deputy principals who could be considered to exercise such authority and whose right to strike could therefore be limited. The Committee therefore requested the government to amend the legislation to provide teachers in the public and private sectors with the right to strike⁵⁹.*
80. The ILO Committee has stated that minimum services may be established in the education sector, in full consultation with the social partners, in cases of strikes of long duration (Par. 610 and 625) and has recorded that it *feels obliged to recall that education is not an essential service in the strict sense of the term. It points out, however, that minimum services may be established in certain sectors in accordance with the following principles: A minimum service may be set up in the event of a strike, the extent and duration of which might be such as to result in an acute national crisis endangering the normal living conditions of the population. Such a minimum service should be confined to operations that are strictly necessary to avoid endangering life or normal living conditions of the whole or part of the population; in addition, workers’ organizations should be able*

327th Report, Case No. 2145, Para. 302, and Case No. 2148, Para. 800; 329th Report, Case No. 2157, Para. 191; and 330th Report, Case No. 2173, Para. 297), as listed at Par. 587)

⁵⁹ Case No 2569 (Korea, Republic of) - Complaint date: 20-MAY-07. Report No351, November 2008 as cited in Education and Essential Services; ESC address to Parliament

*to participate in defining such a service in the same way as employers and the public authorities*⁶⁰

81. The ILO Committee *has repeatedly confirmed that education cannot be considered an essential service whatever the circumstances. The ILO Committee's decisions make it clear that declaring education an essential service – and thus outlawing strikes by teachers – is neither “reasonable” nor “justifiable”*⁶¹.
82. In the circumstances, in so far as the education sector is concerned, the position at International law as developed by the ILO Committee is that:
- Education is not an essential service and does not meet the criterion of exercising the powers of public authority
 - The provision of food to pupils of school going age and the cleaning of schools may be an essential service
 - Only school principals and vice principals may be considered to exercise authority in the name of the State and have their right to strike limited or even prohibited
 - Minimum services, *confined to operations that are strictly necessary to avoid endangering life or normal living conditions of the whole or part of the population*, may be established in the education sector, in full consultation with the social partners, in cases of strikes of long duration
83. The right of government employees / public servants to strike, apart from the Parliamentary service and the South African Police Services⁶² (SAPS), is not the subject of any general legislative restriction and in particular no provision⁶³ is made restricting the right to strike of public servants exercising authority on behalf of the state.

⁶⁰ Par. 308, Case No 2696 (Bulgaria) Complaint date: 15 February 2009: Report No 356, March 2010

⁶¹ Education and Essential Services; ESC presentation to Parliament

⁶² Section 213 of the Labour Relations Act, 66 of 1995. Note that the Labour Relations Act, 66 of 1995 does not apply to members of the National Defence Force and the State Security Agency, (section 2 of the Act)

⁶³ Other than the Parliamentary service and the South African Police Service

Decisions of the Constitutional Court

84. The Constitutional Court, in the matter of *South African Police Services v Police and Prisons Civil Rights Union and Another*⁶⁴ (SAPS v POPCRU), held that ***a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike***⁶⁵. This is in line with the approach of the ILO Committee that the right to strike may be prohibited, *in essential services in the strict sense of the term*⁶⁶. In *SAPS v POPCRU* the Constitutional Court applied a restrictive interpretation to the meaning of the South African Police Services in the definition of essential service and held that the employees of SAPS hit by the essential service strike prohibition in terms of section 65(1)(d)(i) of the LRA, were those members appointed in terms of the South African Police Services Act, 68 of 1995 (SAPS Act) together with those deemed members in terms of section 29 of the SAPS Act and did not include SAPS employees appointed under the Public Service Act, 103 of 1994.

Analysis of the submission

Basic Education:

85. The issue that the panel has to decide is whether the services rendered by educators and support staff at basic education and early child hood.

⁶⁴ 32 ILJ 1603 (CC)

⁶⁵South African Police Service V Police and Prisons Civil Rights Union and Another 32 ILJ 1603 (CC), [30]-[39]. See also *Chirwa v Transnet Limited and others* 29 ILJ 73 (CC), [101]

⁶⁶ (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population)

86. The position at International law that education should not be designated an essential service, that the possible long term consequences of strikes in the teaching sector do not justify their prohibition and that the ESC can not override the SA Government's international obligations⁶⁷
87. The approach of the ILO Committee that the right to strike may only be prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population)
88. That as a corollary of a child's right to education, the department of basic education is mandated to provide basic education to children from the age of 7 years until they reach the age of 15 years or the ninth grade whichever comes first.
89. The duty to provide for children's rights to basic nutrition, shelter, health care services and social services⁶⁸, vest in a parent / guardian / care giver at law. There is a multiplicity of institutions, organizations and services concerned with the protection and care of children, (private and public sector), to designate education / educators an essential service will not address the concerns related to the care, safety and security of children while at school.
90. That although education (teaching) is essential, it is not an essential service⁶⁹.

⁶⁷ South Africa has ratified both Convention 98 and 87 of the ILO. The findings of the ILO Committee on education vis a vis an essential service. In its Report no. 356, March 2010; Case No 2606 (Bulgaria) Complaint date 15 February 2009: the ILO Committee noted at Par 307 that although Decision No. 205 of 2 October 2008 was issued by an independent national body, the Committee wishes to stress that the determinations made by that body cannot dispense the Government of its international obligations.

⁶⁸ Section 28(1)(c), Constitution of the RSA 1996

⁶⁹ Teaching Is Essential But Teaching Is Not An Essential Service. Equal Education Position Paper on teaching as an essential service-February 2013

91. That there is no provision in the definition of essential services in the LRA or any other law to the effect that public servants exercising authority in the name of the State, other than the Parliamentary service and South African Police Service, fall within the designation of essential service.
92. That in terms of our case law, a restrictive interpretation must be given to the meaning of essential services so as not to impermissibly limit the extent of the right to strike. It follows that there is no scope in law for the ESC to designate basic education as an essential service or that the right of principals and deputy principals to strike be limited / prohibited. In addition, any legislation, let alone an ESC designation, declaring basic education an essential service may well be challenged in the Courts and the ILO.
93. As indicated the applicant focused on Principals, Deputy Principals and HODs. It was submitted these employees are in authority at schools and in the event of a strike they would exercise the necessary authority to ensure the safety of the learners. Based on this argument it is clear that the applicant's argument is not that these employees exercise authority on behalf of the state. The argument is that the safety of the learners is paramount and therefore if the principals are there it would be ensured. Whilst the Panel agrees that the safety of learners should be protected, the panel is not persuaded that senior management team (SMT) would be in a position to safeguard the learners. The number of learners at a school is such that the team would not be able to manage and ensure the safety of the learners.
94. The panel further accepts that in the event of protected strike, notice would have been given and arrangements would have been made for learners not to attend.
95. Most of the examples that were referred to during the public hearings related to unprotected strike action. In such instances a designation of a

service as essential is not a solution and other methods of fostering compliance should be considered.

96. Further it is trite that the panel should designate services in circumstances where there is no alternative and the panel find that in relation to protected strike action there is an alternative as parents who are part of school governance would have the responsibility to ensure that proper arrangements are made in order to ensure the safety of the learners or rather to deal with the potential risk to learners.

The designation of the provision of food to pupils of school age and the cleaning of schools as an essential service

97. There is considerable legislative protection afforded children, in particular the provisions of the Children's Act, 38 of 2005, see above, and that a child's best interests are of paramount importance in every matter concerning the child. The ILO Committee has held that the provision of food to pupils of school age and the cleaning of schools may be considered an essential service.
98. Generally speaking, in the normal course of events:
- Catering / cooking food is not an essential service as other persons or alternative arrangements can be made in the event of an interruption of the service.
 - The catering service or kitchen staff are not required to determine the nutritional or dietary requirements of the children, this is done by an appropriately qualified person, which may include dietary specialists under control of the principal and or principal and school governing body.
 - Given the process required to be followed and notice to be given in the event of a protected strike, alternative arrangements can be made for such services under the direction of the principal, in the

event of a strike of kitchen staff.

99. In the circumstances, the evidence suggests that the interruption of such a service will not cause harm to the learners and does not support the designation of catering / provision of food at a school / hostel as an essential service.
100. In relation to catering, particularly at public schools the committee was advised that this is offered by volunteers and it was not consistently provided. Whilst the committee understands that in cases of feeding schemes this is a vital service. It is clear that this service is interrupted from time to time when there are no funds.
101. Further in the event of a protected strike children would not be at school and therefore there would be no need to provide this service at school. The Committee is therefore not persuaded that this service should be designated as an essential service.
102. In relation to cleaning services the committee is of the view that whilst hygiene is important at schools in many of the public schools this service is done by the learners themselves. Where the cleaning staff embark on strike action there are alternatives. It is trite that where there is an alternative the committee should not interfere with the constitutional right of employees to strike. Accordingly, the Committee is of the view that there was no cause shown as to why this service should be designated as an essential service.

Special needs public schools

103. Children / learners in special needs schools because of their condition, are more vulnerable than learners at public schools. In addition, and because

of their condition, additional services are provided e.g. dispensing of medication, psychological and behavioural therapy, occupational therapy, education therapy, hostel and boarding facilities including cleaning, laundry and hygiene. Given their situation, in the event of a strike in special needs schools, the children would be placed at risk because:

- They would be unable to take care of themselves, clean or feed themselves
- There would be no one to administer their medication
- Special needs staff receive specialised training and could not simply be replaced or alternative services provided in the event of a strike, particularly with regard to:
 - Therapy and medication
 - The care giver function
 - Cleaning and hygiene

104. The challenge with the submissions made before this committee is that, the committee was informed that the Department is in the process of integrating these schools with the main stream school. Based on this situation it is difficult to understand the role of the that any staff member would be paying during industrial Action. This is compounded by the fact that special needs of children differ from school to school.

105. Whilst it may be that an interruption in the services, offered at a special needs school, by way of strike may endanger the life and health of learners in special needs schools, it is recommended that further information must be obtained e.g. inter alia relating to:

- the exact nature of services offered in special needs schools at a main stream school.
- the qualifications and expertise required of personnel in such schools
- the number of special needs schools with boarding facilities
- whether alternative arrangements can be made in the event of a strike, e.g. the transfer of learners by way of ambulance to an appropriate state

medical facility.

106. During the current investigation there was no information provided as none of the special schools participated in this investigation. The only submission was from the Democratic alliance and it was not as detailed.

Appropriate machinery to resolve educators' disputes

107. The recommendation of the ILO Committee, given the complex societal issues and multifaceted nature of services involved in relation to the provision of basic education, is apposite and is strongly recommended, namely that: *Appropriate joint machinery should be set up to deal with the settlement of disputes between the teachers and their employers arising out of terms and conditions of employment. If the means and procedures established for these purposes should be exhausted or if there should be a breakdown in negotiations between the parties, teachers' organizations should have the right to take such other steps as are normally open to other organizations in the defence of their legitimate interests*⁷⁰.

In the event of a strike of long duration in the education sector

108. The ILO Committee has stated that minimum services may be established in the education sector, in full consultation with the social partners, in cases of strikes of long duration⁷¹. Such an agreement or mechanism could form part of any agreement reached in respect of the above dispute resolution mechanism.

Woodridge College and Preparatory School:

Sanatorium / Dispensing of medicines to learners at WCPS

⁷⁰ UNESCO, Understanding and using the ILO/UNESCO Recommendation concerning the status of teachers (1996 recommendation) and the UNESCO Recommendation concerning the Status of Higher Education Teaching Personnel (1997), page 34. Cited Education and Essential Service, ESC address to Parliament and in the Equal Education submission of 6 July 2018 to the ESC

⁷¹ (Par. 625)

109. A Professional Nurse is required by law to dispense prescribed medication. The fact that a learner on prescribed medicines, depending on the nature of the affliction or condition, may suffer relapse or injury if not given their medication regularly, supports that an interruption of the service to dispense and give learners their medication, will cause harm to learners staying in a school hostel.

House Parents at WCPS

110. Given the following:

- That WCPS is located in an area that is not close to any amenities such as shops, hospitals, clinics, petrol stations and the like and situated approximately 40km from both Port Elizabeth and Jeffreys Bay
- That WCPS caters for South African and international students
- That of its 721 students, 261 reside in boarding accommodation on the school premises and that these students vary in age from 5 to 17 years with a minority of 18 years of age
- That House Parents, who live on the premises, have been assigned by WCPS, to care for, including the supervision, personal support, medical care, emotional support, and personal hygiene, (in short to act as foster parents) for children in the boarding houses, while they are at the school.

111. The evidence suggests that children, in particular the younger children and those from international destinations, will not be able to care for themselves alternatively to make other arrangements, in the event of an interruption in the provision of the House parent services by way of strike and supports the designation of the House Parent service, offered at WCPS, as an essential service as the interruption of this would endanger the life and health of such children.

112. Based on the above submissions the ESC is of the view that the services

rendered by house parents and Sanatorium services / Dispensing of medicines to learners at boarding schools should be designated as essential services.

Catering Services at boarding schools

113. Catering / cooking food, generally speaking, is not an essential service as other persons or alternative arrangements can be made in the event of an interruption of the service. The caterers or kitchen staff are not required to determine the nutritional or dietary requirements of the children, an appropriately qualified person, which may include, staff from the sanatorium or the House Parent, does this.
114. In the event of a strike of kitchen staff, given the processes required to be followed and notice to be given in the event of a protected strike, alternative arrangements can be made for such services under the direction of the House parent alternatively the principal or governing board of WCPS. The fact that such service may be expensive, does not serve to make it an essential service.
115. In the circumstances, the evidence suggests that the interruption of such a service will not cause harm to the learners and does not support the designation of catering / provision of food at the school / hostel as an essential service.

Early Childhood Development

116. No submissions were made in respect of early childhood development and accordingly no recommendation on a designation can be considered in this regard.

Designation

117. Having considered the submissions, the Committee has decided to designate the following services as essential services

- (a) The services provided by House Parents at boarding schools
- (b) Sanatorium services / Dispensing of medicines to learners at boarding schools.
- (c) Security at boarding schools

118. The following services are not designated as essential services:

- (a) The services rendered by the Principals, Deputy principals and Heads of Departments at schools.
- (b) The catering services at schools including boarding schools
- (c) Cleaning Services at schools including boarding schools
- (d) Any services within basic education in respect of special needs schools.
- (e) Any services rendered in respect of early childhood development.

Done and signed on this 5 November 2018



Mamokaeseng Joyce Nkopane
ESC Deputy chairperson