HIV/AIDS and Education: a study on how a selection of school governing bodies in Mpumalanga understand, respond to and implement legislation and policies on HIV/AIDS

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Abstract

Very little research has been done in South Africa on HIV/AIDS and education. This article is a small attempt to plug the gap. The purpose of the research is to investigate the legal and policy provisions and implications regarding HIV/AIDS for rural and township schools in the Mpumalanga district of South Africa. It seeks to answer three questions: (1) What is the status of policy and legislation on HIV/AIDS and Education in South Africa? (2) How do schools understand, respond to and manage issues of law and policy regarding HIV/AIDS? (3) What are the possible areas of conflict between legal and policy provisions and educational practices and behaviours? After examining the different laws relating to HIV/AIDS and education in South Africa a case study approach is used to explore the research questions in a number of rural and township schools. The findings highlighted a general ignorance of basic human rights issues, the right to confidentiality, the right to security from discrimination if it is known that a teacher or a pupil is HIV positive, the right to privacy and the right, under certain circumstances, to disclosure. The findings also reveal a distance between policy and practice so that schools need to develop vigilance with respect to any legal challenges that they might face at a local level. The findings also show that governing bodies should be made aware of the general legal issues surrounding the individual and HIV/AIDS before they can introduce fair and balanced policies.

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1. Introduction

The purpose of this research is to investigate the legal and policy provisions and implications regarding HIV/AIDS for rural and township schools in Mpumalanga, South Africa. This study on HIV/AIDS and Education is not concerned with the general bio-medical or psycho-social concerns related to HIV/AIDS but with the legislative and policy aspects as they apply to schools. It is both a study of formal law and policy on HIV/AIDS and an inquiry into the understandings, responses and practices of schools to these formal provisions of government, the Constitution and other legal provisions. The study thus seeks to compare the formal provisions (law and policy) with everyday practices in schools.

In pursuing this line of inquiry, therefore, the research objectives are multiple:

* to determine where schools stand in relation to their understandings and practices regarding
HIV/AIDS, compared to what is formally required in law and policy:
• to add new knowledge to an under-studied field of interest (i.e. HIV/AIDS) both in the local literature as well as in international scholarship;
• to generate new insights into educational law and policy regarding HIV/AIDS that will be useful and informative for practitioners (teachers, principals, governing bodies, department or government officials, parents, etc.) at all levels of the education and training system;
• to establish the "state-of-play" within formal legislation and policy regarding HIV/AIDS in South African education;
• to initiate a line of inquiry (education law and policy regarding HIV/AIDS) that will build a broader community of scholars and researchers that may sustain research activity in this critical area of need within the South African society and, especially, in relation to schools, and other educational institutions.

2. Rationale for this research project

In South Africa, there is very little research on HIV/AIDS and Education (Hartell, 2002). Much research has been done on HIV/AIDS in general as revealed by the database ERIC, but little research has been done on HIV/AIDS and Education. A review (Hartell, 2002) on the status of HIV/AIDS and Education research in South Africa reveals that very little empirical research has been done on the legal aspects of HIV/AIDS and Education. A nursery study of the comprehensive proceedings of the International Conference on AIDS held recently in Durban, South Africa, will reveal a preponderance of studies on the clinical and biomedical aspects of HIV/AIDS with very little on the attendant psychological, cultural, legal and policy concerns related to the pandemic. The few educational studies available tend to focus on "AIDS awareness" and "AIDS education" with very little empirical work on the broader social issues and concerns related to HIV/AIDS.

Perhaps understandably, in a pandemic where "time" is arguably the most important variable in determining the availability of subjects for study, and where the urgency of activism and intervention overshadows the need for disciplined and systematic research endeavours, it might be unreasonable to expect a deluge of long-term studies on education law and policy regarding HIV/AIDS. Yet, without a careful study of the rights of learners and teachers who are serum-positive, for example, educational institutions are not only vulnerable to legal action and discipline, they could undermine the human rights and dignity of such persons within South African society. It is important, therefore, not only to gain insight through inquiry into how schools understand and act on law and policy regarding HIV/AIDS in their daily routines and practices, but also to provide the kinds of information through careful study that could assist educational practitioners to act in accordance with their rights and obligations.

3. Critical research questions

For the purpose of this study the following three research questions were developed and refined as the intellectual basis for this study on HIV/AIDS and Education:
1. What is the status of policy and legislation on HIV/AIDS and Education in South Africa?
2. How do schools understand, respond to and manage issues of law and policy regarding HIV/AIDS and Education?
3. What are the possible conflicts between legal and policy provisions and educational practices and behaviours regarding HIV/AIDS?

4. The research strategy

Each research question was investigated through a particular complex of research methods and strategies to provide an in-depth exploration of the various issues, concerns and behaviours in educational law, policy and practice as it relates to the particular question.
• What is the status of policy and legislation on HIV/AIDS and Education in South Africa?
There appears to be very little in the legislation on HIV/AIDS and Education as a specific site of application. To address this question, the researchers began by an extensive exploration of the various kinds of documentation that speak directly or indirectly to HIV/AIDS and Education. This research task began with a descriptive account of "what is there" and then quickly moved on to an analytical and evaluative account of the legal and policy provisions on HIV/AIDS and Education. The documents that were identified, described and assessed include the Constitution, the various national policy documents on education and AIDS (such as the emergency guidelines for educators), the South African Law Reports, the Employment Equity Act, the Occupational Health and Safety Acts, and any and all official documents that directly or indirectly address the legal and policy issues concerning HIV/AIDS and Education. The second strategy was an examination of case law on HIV/AIDS and Education, where it exists. This angle required the search for, and unearthing of, other legal documents on HIV/AIDS and Education that may have been presented in provincial courts. In other words, the research task required a search for non-published yet significant legal challenges and disputes that do not appear in the Law Reports.

The analytical task for the researchers was to interrogate these documents so as to develop a sophisticated, nuanced and incisive narrative account on the status of policy and legislation on HIV/AIDS and Education. The research account is not only an in-depth description of what exists, but also a critical evaluation of the existing corpus on educational law in relation to HIV/AIDS.

* How do schools understand, respond to, and manage issues of law and policy regarding HIV/AIDS and Education?

The researchers sampled six schools in the Mpu- malanga Province for a series of focus group interviews based on case descriptions presented to each school. Four high schools and two primary schools were interviewed. Only schools with established governing bodies were selected for study.

The study involved three case descriptions, which have the following properties:

(a) The case description is based on an actual or hypothetical event regarding HIV/AIDS;
(b) the case description is intended to convey an underlying principle of educational law to be tested; and
(c) the case description is designed to solicit the reaction from the school governing body (SGB) as to its corporate understanding and operational policy on dealing with the "case" in the context of educational law and policy.

Data for this research were recorded on a tape recorder and notes were made during the interviews. This was done because, when the descriptions of interviews were done, we could compare our notes with the transcribed notes from the tape recorder.

The following case studies that were used in this research are included in this section so that the reader could get a bigger picture of the research report.

4.1. Case study 1

Your school has a forward-looking governing body that is really concerned about the spread of HIV/AIDS and you (the SGB) are determined to be an example to the community in providing AIDS education to the teachers and learners. As part of your campaign against the disease, you as a governing body decide to propose voluntary testing of all the teachers in the school, followed by a counselling and support programme. The teachers agree to participate, and 35 of the 40 teachers are actually tested (with full consent) for the HIV infection. The governing body receives the medical report that shows that 54% (n = 19) of the teachers in your school are HIV-positive. Nobody knows this, except the governing body that launched the study. Note that the governing body does not have the specific names of the teachers involved, only the overall testing results.
4.1. Questions for the interview with the governing body

- What would be the policy of the school in this case with respect to disclosure of the teachers' HIV status?
- Would you inform the teachers (as a group, tested and untreated) of these results?
- Would you inform the parents of these results?
- Would you inform the learners in your school of these results?
- What do you think the department of education expects from you as a governing body with respect to this particular incident in your school?
- What would you as a governing body do—if anything—to support teachers who are HIV-positive?

4.2. Case study 2

Two learners (Y and Z) of your school have contracted AIDS. Because they were mindful and considerate of the implications of their children's state of health on others around them, the parents of Y and Z called on the doctor to disclose this information to the class teacher, Ms. X. (The learners were not informed by their parents that they are HIV-positive or that they should not donate blood. They were primary school learners.) Ms. X was requested to regard the matter as confidential. No one else at school or in the community was to be informed at all. At the end of the term, the principal and the governing body (not aware of any HIV-positive learners) of the school call on the learners and educators to donate blood at the school's blood donation rally without considering the possibility that some learners might be HIV-positive. Learners Y and Z—ignorant of their HIV status—are eager to contribute. The nurse collects their blood. Ms. X faces the fact that she had promised to keep quiet about the learners' health status.

4.2.1. Questions for the interview with the governing body

- Does Ms. X have a responsibility to disclose the information about learners Y and Z?
- What would you as a governing body expect from Ms. X with respect to disclosure?
- Who exactly should Ms. X inform, if anyone at all?
- What do you think the Department of Education would expect of Ms. X?
- What do you think the Department of Education would expect of you as a governing body in this case?
- Should learners Y and Z be expelled from the school for endangering the lives of others?
- Should learners Y and Z be allowed to participate in school sport activities?

4.3. Case study 3

A female teacher in a rural school appears for a medical check-up after feeling weak and ill. She discovers that she is HIV-positive. Fearing rejection by her colleagues as well as learners at her school, she decides not to disclose her status to anyone. Her work suffers, she loses concentration, and is absent from school on a regular basis. Her health deteriorates and she grows weaker and thinner by the day. The teacher decides to consult a social worker, who writes a report to the principal that she (the teacher) was undergoing psychological treatment. Upon receipt of the letter, the principal leaks this information and spreads the rumour (already rife in the school) that the teacher has AIDS. Due to the rumours and lack of knowledge on legal issues and sick leave regarding HIV/AIDS, the pressure becomes so intense that the teacher resigns from her post.

4.3.1. Questions for the interview with governing body

- Assuming your school knows that this teacher is HIV-positive, how would you deal with the fact that she was absent from school on a regular basis because of deteriorating health?
- What do you believe are the rights of the teacher in this case? Do you believe the teacher can claim that she has been discriminated against because of her HIV-positive status?
- Would you as governing body make any special provisions to cater for the needs of the teacher who is HIV-positive? If so, what special provisions would you make in your school?
- Should this teacher be allowed to continue teaching in your school?
What do you believe the Department of Education expects from you as a governing body with respect to the case of the teacher described in this case study?

A selection of stakeholders from the SGB was brought together for the interview sessions, which lasted for about 90 min. The stakeholder group composition, in the case of high schools, included at least the principal, two teachers, two parents and one learner. In the case of primary schools, learners were not part of the governing body. Learners were present at only three of the six schools that were interviewed.

The SGB members were presented with each of the case descriptions in sequence: one through three. After each case description, which was read to the group by the two researchers present, with copies in-hand for each respondent, there was a 10–15 min opportunity for the SGB to present its corporate view (as well as the individual views of SGB members) on how the school understands, responds to and would manage this particular “case”. The interviews were transcribed for detailed analysis and comparison of responses across the six schools.

This large-scale dataset (540 min of interview data) constitutes the first comprehensive portrait of school policies, behaviours and responses to issues of HIV/AIDS.

What are the possible conflicts between legal and policy provisions and educational practices and behaviours regarding HIV/AIDS?

This third research question allows for a comparison of data collected under the first question (the legal and policy requirements) and the second question (the institutional practices and behaviours). The analytical task was to carefully compare the data generated from schools’ practices and behaviours to compare this to legal and policy mandates. This qualitative form of inquiry generated major categories across school responses, which were constantly compared to the formal requirements in law and policy. In this way, the researchers were able to make estimates and judgments about the extent to which schools comply with or deviate from formal laws and policies, why they comply or deviate, and what, therefore, the major implications are for law, policy and practice in South African education.

As researchers we are aware of the need to consider the context of the study. The research did not give the SGB the necessary time to discuss or seek information on complex issues on legal aspects of HIV/AIDS. We imagine that if the SGBs had been given more time, complex issues on the legal aspects of HIV/AIDS might have arisen. However, this was restricted by the research objectives and the research strategy.

5. Legal aspects of HIV/AIDS and Education in South Africa

5.1. Introduction

All persons infected with HIV have the legal right to privacy. Consequently, no employee is legally required to disclose his/her HIV status to his or her employer or to other employees. However, if the employee chooses to disclose his/her HIV status to the employer or other employees, this information may not be disclosed to others without the employee’s express written consent. A written consent is necessary for record keeping. It is crucial to note that information is a prerequisite for consent [Leenen et al., 1993]. People cannot consent to things they know nothing about.

As a result, consent without information is not valid. This means that any person who gives consent must be given information regarding disclosure and the consequences that will follow disclosure. Many legal provisions on consent therefore apply also to information. Our argument is that information is fundamental to disclosure. Teachers, parents and if necessary learners with HIV and/or AIDS should know the consequences of the disclosure. Therefore, information is a fundamental right. Rules on the management of disclosure information are derived from legislation such as:

- Employment Equity Act, No. 55 of 1998;
- Labour Relations Act, No. 66 of 1995;
• Occupational Health and Safety Act, No. 85 of 1993;
• Compensation of Occupational Injuries and Diseases Act, No. 130 of 1993;
• Basic Conditions of Employment Act, No. 75 of 1997;
• Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000;
• Medical Schemes Act, No. 131 of 1998; and
• Constitution Act, No. 108 of 1996.

Rules on the extent of information given to HIV-positive employees are general, and leave a lot of discretion to employers and doctors. The doctor is compelled to explain foreseeable risks, that is, those that are not exceptional according to current experience. With HIV/AIDS, the obligation to inform the patient is more stringent. The information must be adapted to the person who receives it and the doctor must verify the patient's comprehension of it. In recent years in South Africa, disregarding the obligation to inform the patient makes the doctor liable for damages. The form in which the information is given is very important. The information must be in writing and in the language of the patient for proper management and understanding. This is a requirement by law. The patient has the right to access medical records.

The right to information is entrenched in the South African legislation. This study will not deal with all the laws here, but will particularly refer to the Promotion of Access to Information Act of 2000. This Act is aimed at fostering a culture of transparency and accountability in public and private bodies, and actively promoting a society in which the people of South Africa have effective access to information which will help them to fully exercise and protect all of their rights.

For persons living with HIV/AIDS this Act has the potential to balance the rights of HIV-positive employees and those of the employers. For HIV-positive teachers, it provides greater access to personal information held by public and private bodies. It provides the employers with access to personal information that could be used for effective decision-making. It regulates the circulation of information. This is important in the management of HIV/AIDS in the workplace because it balances the rights of both parties. The right not to disclose one's HIV status is therefore not absolute (South African Law Commission, 1998). There are various reasons why the employer may want to know the HIV status of an employee. A precondition for disclosure was established as informed consent. Furthermore, authorised testing may be another reason compelling employees to disclose their HIV status by undergoing testing. For this, employers need to apply to the Labour Court for authorisation. For systematic analysis of disclosure reasons we will divide the reasons into the following.

5.2. Reasons in support of disclosure

It seems that disclosure of HIV status would promote trust among colleagues and between the teacher and the school manager (Department of Education, 1999). It would be impossible for professionals to act professionally if they are not in possession of crucial information. Disclosure may promote proper human resources management. For instance, if a teacher has a chronic illness, the principal may be able to adapt his or her recruitment and selection criteria, job classification, job assignment, employee assistance programmes, and some other relief mechanism. If the HIV status is not disclosed, it could lead to speculation and such speculation could be harmful to the teacher. Disclosure allows the school to offer support and understanding.

5.3. Reasons against disclosure

According to the Department of Education (1999), the current climate of discrimination against HIV-positive persons is not conducive to disclosure. We doubt whether all HIV-positive teachers who disclose their status may receive the required support in the current educational situation in South Africa. Lack of support is probably compounded by the stigma attached to HIV/AIDS. In some instances, the principal may lack the necessary knowledge to support the teacher. Stigma confounds the spirit of collectivism that is prevalent in South African Black communities. Those who disclose are not treated well because of denial. Denial is a major problem which is linked
to social exclusion. The following are other reasons as barriers to disclosure:

3.3.1. Discrimination

Teachers living with HIV/AIDS are a vulnerable group who need protection from discrimination. Hence, legislation is enacted to deal with discrimination. Vulnerability to discrimination emanates from the unequal power between the employer and the employee (Levy, 1992). To support this claim the South African Law Commission (1997) argues that:

Despite a widely accepted point of view that discrimination is ineffective at eliminating HIV from the workplace, there are increasing reports of discrimination against HIV-positive teachers in employment in the public and private sectors.

Discrimination occurs despite the legislation enacted to prohibit it. For instance, the Hoffman v South African Airways 2000 (2) SA 625 (W) demonstrates that employees may continue to suffer discrimination in several guises (Le Roux, 2000; Rycroft, 2000; Christianson, 1999).

The Constitution Act, No. 108 of 1996 entrenches the right to equality (section 9) and the right to be free from unfair discrimination based on disability. These rights are protected by national legislation regulating the education labour relations. In fact, the Labour Relations Act, No. 66 of 1995 protects teachers from discrimination in employment. Unfair discrimination on the basis of disability constitutes an unfair labour practice. Therefore, discrimination based on HIV status constitutes discrimination either on the basis of disability, or on the basis of an arbitrary ground. Equally, in terms of section 6(2)(b) of the Employment Equity Act, No. 55 of 1998, it is unfair discrimination to distinguish, exclude or prefer any person on the basis of his or her HIV status. However, employers may exclude disabled persons including those infected with HIV on the basis of the inherent requirements of the job.

We wish to argue that disclosure, if not done according to legal provisions, may constitute unfair discrimination. The grounds for unfair discrimination in section 6(1) of the Employment Equity Act, No. 55 of 1998 mirror those set out in the Constitution and the Labour Relations Act, but for the purposes of clarity, discrimination must be linked to employment policy or practice. When an employee is denied his or her employment rights because of his or her HIV status that would constitute unfair discrimination. This means that the Employment Equity Act of 1998 added HIV status to the traditional grounds listed in the above act. This accords special attention given to employees with HIV (Christianson, 1999). Therefore, forced disclosure will constitute unfair discrimination and is prohibited by the law.

3.3.2. The right to privacy

Disclosure is a personal decision that an individual is entitled to make autonomously and in private. It is rooted in the right to privacy. The right to privacy and secrecy are interrelated. Both are intended to protect citizens from disclosure of data that they have to provide in the context of medical assistance or employment. The modern concept of privacy is derived from secrecy (Leenen et al., 1993). Secrecy covers the relationship between the patient and the doctor, but also between the employer and the employee. From a management point of view, it is difficult to prevent data stored in offices from filtering out during processing. For this reason, the right to privacy and the right of access to information will be discussed. The protection of personal data is regulated by administrative legislation. This means that disclosure should be managed according to strict administrative codes as prescribed in the law, such as the Promotion of Access to Information Act, No. 2 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 3 of 2000. These provisions must be read together with the laws that protect individual rights.

The right to privacy is protected by our common law. The right to privacy protects personal information concerning an individual’s state of seclusion and is excluded from the knowledge of others. It is also for individuals themselves to decide on the extent and extent of their interests in their
privacy (South African Law Commission, 1998). A teacher is entitled to the same common law and constitutional rights in respect of the protection of his or her privacy as an adult. The school manager, to whom confidential information regarding the HIV status of a teacher is divulged, will be ethically and legally bound to keep that information confidential. As indicated above, the right to privacy was developed from secrecy as common law. In professions, it is formulated as a legal duty and in legal parlance it is often described as the right to confidentiality. Professional secrecy protects both the teacher and the public. This will be analysed from professional (educational labour relations) and medical perspectives.

5.3.3. The right to confidentiality from a medical perspective

The right to confidentiality when seen from medical perspectives entails that doctors, nurses, psychologists, dentists and other health-care workers are ethically and legally required to keep all information confidential. The concept of confidentiality presupposes a relationship of intimacy or trust between two or more people between whom private or secret information is shared on the understanding that this information will not be repeated to an unauthorised person or persons (Tombad, 2001). This means that any information about the teacher’s or learner’s HIV status may only be given to another person with the consent of the teacher or the learner’s parents/guardian (Achmat et al., 1997). Ethical guidelines on confidentiality are set in the South African Medical and Dental Council Act No. 56 of 1974. This Act establishes the South African Medical and Dental Council, and describes a doctor’s duty to keep information confidential. In terms of this Act, no doctor or practitioner may verbally or in writing divulge any information which ought not be divulged regarding the ailments of a patient except with the express consent of the patient or, in the case of a minor, with the express consent of his or her guardian, or in the case of a deceased patient, with the consent of his or her next of kin or the executor of his or her estate. In conclusion, the ethical guideline on confidentiality means that practitioners may generally not give out any information about a patient unless:

• the patient has agreed to it, or
• the information is about the illness or treatment of a child—then they can tell others with the permission of the child’s parents or guardian, or
• the patient is dead—then the doctor must get permission from the next of kin (Leigh-Taylor, 1976; Jayarama, 1988; Hassan, 1998).

In the main, medical information about a person is protected by the codes of professional conduct under which most of the health-care team, to whom confidential information is given, operate (Harris and Haigh, 1990). Therefore, it is a doctor’s duty, except in exceptional circumstances, strictly to observe the rule of professional secrecy by refraining from voluntarily disclosing to any third party any information he or she learnt directly or indirectly in his or her professional capacity as a registered medical practitioner. The death of the patient does not absolve him or her of his obligation.

5.3.4. The right to confidentiality from a professional perspective

In professional perspectives, the right to confidentiality is based on legal rules. The Constitution Act, No. 108 of 1996 section 14 guarantees the right to privacy that is relevant for the protection of the rights of HIV-positive teachers and learners. The right to privacy includes the negative right— namely, the right not to have one’s communications infringed. It guarantees the right of a person to have control over the use of private information (De Waal et al., 1999). This right regulates the communication of HIV status to another person. Hence, disclosure can be regarded as privileged communication (Tischer and Sorensen, 1985), and should thus be handled with care and respect to the teacher’s or learner’s civil liberties. Privileged communication encourages detailed discussion between HIV-positive teachers or parents whose children are HIV-positive and the principal or whoever is responsible for disclosure. The protection is for the teacher or parent and child, who could choose to disclose the communication with the
principal, in this way waiving the privilege. There is a criterion for privileged communications and it includes:

1. The communication must originate in confidence that it will not be disclosed.
2. The confidentiality must be essential to full and satisfactory maintenance of the relationship between the parties.
3. The relationship must be one which, in the opinion of the community, should be sedulously fostered.
4. The injury to that relation, caused by disclosure, would be greater than the benefit gained by the process of litigation.

Privileged communication happens if three conditions are present. Firstly, one party in the relationship must be legally certified as a lawyer, doctor or minister; secondly, as the time of the communication in question he or she must have been acting in a professional capacity; and thirdly, the person making the communication, if in possession of his or her faculties, must have regarded the professional person as his or her lawyer, doctor, or minister (Fischer and Soeterson, 1985).

The legal and ethical duty of confidentiality is not absolute, as there are other interests which may be more important and which may justify or necessitate the breach of confidentiality. In general, disclosure can be justified if the individual gives his or her informed consent thereto; if legislation requires that the information be disclosed; if a doctor or school principal is ordered by court to disclose the information; or if disclosure would be in the overriding public interest (South African Law Commission, 1998; Crubb and Pent, 1990). In the case of Jansen van Vuuren and another NNO v Kruger 1993 (4) SA 842 (A), the plaintiff's HIV status was disclosed without consent to another doctor and a dentist without any reasonable justification. The court awarded R5000 in damages. This case illustrates the importance of observing the law regarding disclosures.

5.5. The right of access to information

The limitation on the right to privacy means that access to HIV information may be obtained, but only through legal procedures. The Constitution Act, No. 108 of 1998, section 32 provides that:

1. Everyone has the right of access to

(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.

In terms of this provision, the question arises whether a school principal can divulge medical records of a teacher suffering with HIV/AIDS, and secondly, who should have access to the records? Before addressing these questions it is important to note that the right of access to information is a basic requirement in a democratic state that strives for openness, participation, transparency and accountability ( Bray, 2000; Malherbe, 2001). Access to information is regulated by the Promotion of Access to Information Act No. 2 of 2000. This Act protects third parties affected by disclosure of information. It prescribes procedures to access information. As for the first question one can say that a principal is not allowed to divulge information to other teachers; neither can a teacher reveal information to others. However, the South African Schools Act No. 84 of 1996 section 19(2) requires SCIDs of public schools to make information available to the provincial Head of Department, and section 59 places a duty on the public school to make information available for inspection by any person in so far as such information is required for the exercise and protection of such person's rights ( Bray, 2000).

5.3.6. The right to human dignity

The right to human dignity is regarded as the foundation of all other rights (Rautenbach and Malherbe, 1998). The protection of human dignity requires that a subject of the state should enjoy first-generation, second-generation and third-generation human rights (see Bray, 2000 for the grouping of rights), because of the simple fact that human dignity demands that a person should not merely be free from oppression or discrimination emanating from disclosure, but also free from deprivation of life necessities (Basson, 1994). This
right entails recognition of individual autonomy, that is, that all persons should be able to make individual choices. This was upheld in *S v Makanwane* 1995 (6) BCLR 655 (cc) where the court maintained that:

Recognising a right to human dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights.

Respect for individual human dignity entails recognising that all persons are able to make individual choices. This includes the choice to disclose or not to disclose one’s HIV-positive status. Cardinal in our democracy is a belief in human dignity: that people have the moral right—and moral responsibility—to confront themselves, answering to their own consciences and convictions, the most fundamental questions regarding the meaning and value of their own lives.

The most important argument that we raise is that a teacher’s or learner’s disclosure of their HIV status must be protected under the right to human dignity. It means that there must not be any unfair discrimination—that is, treating HIV-positive teachers or learners differently in a way that may impair their fundamental dignity as human beings.

6. Findings: SGBs’ response to, understanding and implementation of legislation and policies on HIV/AIDS

6.1. School sampling

Rural and township schools in Mqumalanga were interviewed. By rural we refer to schools that are located in remote, tribal villages and are situated far from modern towns. Four rural schools were sampled, two high schools from Bushbuckridge and one high school and one primary school from Sibikaziwane.

The sample also includes schools from the townships around Witbank. One secondary and one primary school were interviewed. All schools were public schools catering for black learners.

6.2. Findings

We found that SGBs are all aware of HIV/AIDS but have different perspectives of legislation and policy on HIV/AIDS and Education. Because of the differences we categorised the schools’ responses into three categories, namely:

- Progressive, open-minded schools
- Cautious, image-conscious schools
- Unaware and unsupportive schools

6.3. Cautious, image-conscious schools

Four schools, one primary and three high schools, are categorised as cautious, image-conscious schools. The overall outstanding characteristics that consistently surfaced throughout the interviews were that these schools are protective, supportive, very confidential and non-discriminatory.

6.3.1. Case study one

Questions in case study one were based on the principle of policy action and disclosure. SGBs were expected to explain what their school’s policy would be in terms of disclosure and what action they would implement to address the infected teachers and affected staff, learners and parents.

None of the four schools had any official policy documents that directly or indirectly addressed the legal and policy issues concerning HIV/AIDS and Education. Only one rural primary school had its own HIV/AIDS policy, which had been drafted from their personal experience of HIV/AIDS.

However, this document does not have any direct resonance with the Department of Education’s (1999) provisions on premises, non-discrimination and equality with regard to learners, students and educators with HIV/AIDS; and it is also silent on aspects of disclosure. Nevertheless, it addresses issues of safety in the school.

Three of the four schools revealed that it would be in the interest and protection of the educators that the school’s policy would not allow the dis-
closure of anybody’s HIV status. This is in line with the provisions of the Department of Education (1999) paragraph 6. It is incorrect for them to point out that no person should be compelled to disclose his or her HIV status. Other reasons for non-disclosure were that educators would be discriminated against, the HIV status of a person is confidential and that it is the Department of Education’s requirement that there should be no disclosure. Only one school felt that the status of an infected educator should be disclosed, but only with the consent of the infected person. However, disclosure, in this case, it seems will be carried out according to legislative provisions discussed above. For instance, when disclosure is made the person’s rights such as non-discrimination, the right to privacy, equality, and human dignity must be respected.

The schools agreed that all educators should only be informed of the percentage of educators infected with the virus. This stance is correct when evaluated on the basis of the Department of Education (1999) paragraph 2.5 which provides that:

Compulsory disclosure of a learner’s, student’s or educator’s HIV/AIDS status to school or institution authorities is not advocated as this would serve no meaningful purpose. In case of disclosure, educators should be prepared to handle such disclosures and be given support to handle confidentiality issues.

SGB members further mentioned that the educator’s consent should also be asked to disclose the information and they should be informed individually. Care should be taken to protect the names of the infected. Two members of an SGB felt that only those infected should be informed, but if the status of the infected proves hazardous to the school, disclosure would be encouraged. This is in line with paragraph 6.2 of the Department of Education (1999). This provision encourages voluntary disclosure, which according to paragraph 6.3 should be done for educational purposes.

All schools agreed that neither parents nor learners should be informed about the status of the HIV-infected educators. This line of reasoning resonates with the Department of Education, 1999 paragraph 6.4 which stipulates that:

Any person to whom any information about a medical condition of a learner, student or educator with HIV/AIDS has been divulged, must keep this information confidential.

Reasons for not disclosing to parents were that “it will damage the name of our school”, “the school will no longer be free”, “there is ignorance about the disease—parents will withdraw their children”, “HIV is frightening—the community must be educated first”. Schools felt that learners should not be informed because they may undermine the teachers and disrespect them, “they will want to know the names of the infected educators and they will spread rumours and lies about the teachers”.

The SGBs' understanding of the expectations of the Department of Education was that the HIV status of a person is confidential and that there should be no discrimination on the basis of HIV status. They also understand that it is expected from them to provide support and counselling and not to discriminate. None of the schools had any training from the Department of Education and two schools mentioned that they were not sure what is expected from them because they have no guidelines from the Department of Education.

5.3.2 Case study two

Questions in this case study were based on the principle of disclosure. SGBs were expected to reveal what they would expect from an educator with HIV-infected learners in his or her class and what they think the Department of Education would expect from both the SGB and the educator.

All the schools agreed that the school teacher has no responsibility to disclose the status of infected learners. A principal argues that she would keep the learners’ status confidential, because donating and testing of blood holds no danger to anybody. However, one school did not have total consensus on this question. A parent felt that the educator should inform the learners. An educator argued that the nurse should be informed about the infected blood to prevent any mistakes in the handling of the blood, which might result in infection.
Almost all SGB members agreed that they would expect from the Education Department to keep the infected learners’ status confidential. One member felt that the principal should be informed and another felt that the SGB had to be told without disclosing the learners’ names.

One school mentioned that it is expected from the educator to treat all learners equally and another said that the educator should not discriminate, but should make all learners comfortable and happy and ensure a safe environment for all learners. This is correct as shown in paragraph 6.4 of the Department of Education (1999).

The schools’ general understanding of the Department of Education’s expectations was that there should be no disclosure of the HIV status of learners. They also understood that it is expected from them to advise parents of counselling and to provide support and information to address the epidemic and to prevent further infection. Two schools mentioned that they have no guidelines from the Department of Education.

All the members of the SGBs had consensus that HIV-infected learners should not be expelled. Expulsion would be discriminatory. This resonates with Department of Education (1999) paragraph 5.1 which stipulates that:

> Learners and students with HIV have the right to attend any school or institution. The needs of learners and students with HIV/AIDS with regard to their right to basic education should as far as is reasonably practicable be accommodated in the school or institution.

There was general consensus that the infected learners should be allowed to participate in all sports under the supervision of a teacher. Excluding the HIV-infected learners from sports activities could be discriminatory. Views from two schools were that they would be denied to participate in contact sports such as boxing. In sports, where non-disclosure could pose a threat to other learners, the schools felt that precautionary measures should always be available and that learners should be educated in the prevention of HIV/AIDS. It was also agreed that emergency first-aid kits should always be available at sports activities. However, none of the respondents mentioned the need to implement universal precautions to eliminate the risk of transmission of HIV as provided in paragraph 7 of the Department of Education (1999).

The most important provision in this instance is paragraph 8 of the Department of Education (1999), which provides guidelines for the prevention of HIV transmission during play and sport.

6.3.3. Case study three

Questions in case study three were based on the principle of employer/employee’s rights. SGBs were expected to give their view on how they understood, responded to and managed issues of employer/employee’s rights regarding HIV/AIDS and Education.

SGBs responded differently on how they would deal with the fact that a teacher with AIDS was absent from school on a regular basis because of deteriorating health. Two schools revealed that they would address the matter according to normal sick leave policy and support the educator. One school felt that they would give support by providing a substitute educator. Another school argued that they would first want to assess whether the sick educator can cope by referring him/her to a medical practitioner for evidence. All these are procedural requirements in dealing with absence from work. The Employment of Educators Act of 1998, the Basic Conditions of Employment Act of 1997 and the Labour Relations Act of 1995, as well as the collective agreements all provide comprehensive guidelines on how to deal with this issue.

Three of the four schools felt that the educator living with AIDS has full rights as a teacher. They have the right to confidentiality, sick leave, privacy and representation by a legal representative. They agreed that the educator could claim that he or she has been discriminated against because he or she experienced pressure at school due to the fact that the principal had spread rumours that he or she had AIDS. His or her right to confidentiality had been infringed. Only one school felt that the teacher has no right because he or she did not disclose his or her HIV status.

All the SGBs agreed that they would provide special support to cater for the needs of the educator living with AIDS. Members mentioned that
they would arrange special sick leave, reduce the teachers' workload and support them emotionally by advising them to see social workers and counsellors. The current laws on special sick leave do not treat HIV/AIDS differently from other diseases; for instance, a teacher with tuberculosis or cancer will be treated in the same way as a teacher with AIDS.

Members of all the SGBs had consensus that the educator living with AIDS should be allowed to teach as long as he or she is able to cope and is physically fit. One school felt that the educator should be allowed to work until he or she resigns.

All the SGBs revealed that the Department of Education expects from them to treat educators living with AIDS equally, to support them and not to discriminate against them. The latter is in line with provisions of labour laws that govern education labour relations.

5.4. Progressive, open-minded schools

This category refers to schools that are socially supportive, and have a strong culture of collectivism. The SGB is advanced thinking and audacious, e.g. they are prepared to inform parents about the teacher's HIV status and to manage disclosure at school level. SGB members harness the policies of the government to help those in need of support. Black South Africans have an experience of a culture of social support and collectivism. This culture was developed during the years of struggle against apartheid. What mobilised people was the common desire to uproot apartheid. With the advent of democracy the common enemy has become HIV/AIDS (Whiteside and Sutner, 2000). This spirit of support and collectivism is visible in the HIV/AIDS awareness campaigns held in South Africa (Mehumo, 2002). In the next paragraphs, we will discuss these characteristics through three case studies.

5.4.1. Case study one

SGB members were asked to identify school policies and the actions they would take in the case of a disclosure of the HIV status of tested educators. Of the six schools visited only one school appeared to be open-minded and progressive in its approach to HIV/AIDS issues of disclosure. Although this school had no school-based policy on HIV/AIDS, the SGB was aware of legal provisions. Hence, when we asked the SGB what the policy of their school would be in respect of disclosure, they stated that their policy would include amongst others, non-discrimination and voluntary testing. These are the principles provided in legislation and policy regarding disclosure of HIV status. This SGB was supportive towards educators who disclose their status on a voluntary basis, and agreed that an individual must be protected when disclosing his or her HIV status. At the same time, the SGB acknowledged the right of the parents to know about the education of their children. While the SGB strongly believed that an individual should be protected when disclosing his or her status, they also agreed that parents should know what was happening in the school. However, the SGB was prepared to inform parents on a general basis. They cited the following reason for disclosing: "to educate them".

The SGB was also aware of its limitations on disclosure. For instance, they argued that although they were prepared to manage disclosure at school level, they were not trained. The SGB further argued that "there are no guidelines for the management of HIV/AIDS for the SGB". Another question dealt with the support the SGB would give to educators whose HIV status was known. The SGB consistently maintained their stance on adhering to non-discrimination, and giving equal treatment. They mentioned that they would 'organise professional help'. Professional help could be wide-ranging. It could include organising counselors, giving support in terms of coping measures and education.

It appears that the SGBs are correct in the way they would handle disclosures (for more information refer to the relevant policy and legislative provisions referred to above in legal aspects of managing disclosures). This conclusion is supported by paragraph 10 of the Department of Education (1999), which outlines duties and responsibilities of learners, students, educators and parents on HIV/AIDS. Among others, paragraph 10.1 stipulates that:
All learners, students and educators should respect the rights of other learners, students and educators. In addition, paragraph 11.1 provides that:

Refusal to study with a learner or student, or to work with or be taught by an educator or staff member with, or perceived to have HIV/AIDS, should be pre-empted by providing accurate and understandable information on HIV/AIDS to all educators, staff members, learners, students and their parents.

6.4.2. Case study two
This case study dealt with disclosure of HIV status of learners by educators. The SGB had to explain what they would expect educators, who hold information on learner’s HIV status, to do. This SGB agreed that when an educator knows the HIV status of a learner, he or she is bound to follow procedures. He or she “must be given permission”. The SGB expected the educator to inform a member of the SGB or the principal. They emphasised procedures in disclosing the learner’s status. The procedures are spelled out in paragraph 6 of the Department of Education (1999).

The issue of lack of training and guidelines for the SGB emerged again. When the SGB were asked what the Department of Education expected of them with regard to disclosure, they maintained that the Department of Education expected them to have knowledge about HIV. However, the SGB must be trained so that they may be able to give proper and adequate support.

In the same vein, when we asked them whether they would expel a learner because of his or her status, the SGB agreed that learners “leave the right to education”. However, the learner could be retained at school provided he or she received education about HIV. This was not given as a precondition for the retention of the learner. The SGB merely wanted to ensure that all learners were safe at school. They wanted to take precautions to prevent further infections. Hence, when they were asked whether they would give HIV-positive learners the permission to participate in sport, they agreed that they would, but with certain reservations. While they agreed in principle that they would allow the learner to participate in certain sports codes, they also mentioned the need to protect other learners. Hence, they stated that HIV-positive learners may not be allowed to participate in sports that have physical contact like rugby and boxing. They emphasised supervision. They argued that even in other sports there is a need for supervision. This is in line with the National Policy for Learners and Educators by the Department of Education (1999).

6.4.3. Case study three
This case study dealt with labour rights of an HIV-positive educator. The SGB had to give their views on how they understood and implemented employment legislation and policy regarding HIV/AIDS. This SGB was very supportive. When asked how they would deal with absenteeism arising from HIV-related illness they stated that they would inform the educator of different types of leave. It has to be mentioned that this school wanted to stay within the parameters of the law and policy regarding management of employment relations. The SGB believed that an educator should not forfeit his or her employment rights by being infected with HIV. To them educators should have the right to leave provided by the Department of Education. They stated that his or her other rights were the right to human dignity, the right not to be discriminated against, and the right not to be teased against his or her will. The Employment of Educators Act of 1998, the Basic Conditions of Employment Act of 1997 and the Labour Relations Act of 1995, as well as the collective agreements, provide the comprehensive guidelines on how to deal with this issue.

However, they argued that if an educator withholds information about his or her status they would not know how to help him or her even if they saw the symptoms that he or she was suffering from HIV/AIDS. The SGB wanted to create a supportive environment where HIV-positive educators would feel free to disclose their health status. They were against internal pressure created by lack of acceptance and support.

In the same vein, the SGB was prepared to treat each educator equally. They argued that special
treatment would amount to discrimination. Nevertheless, they were prepared to accommodate an HIV-positive educator. Reasonable accommodation in this regard would include “allowing them time for consultation”. They agreed that they would allow the HIV-positive educator to continue with his or her duties “if he or she can cope”. They were even prepared to look for a temporary replacement in the case of a protracted leave.

6.5. Unaware and unsupportive

One school, a primary school in the Witbank area is categorised as unaware and unsupportive. This school is categorised as unaware and unsupportive because its SGB, compromising educators, the principal and parents of middle-age range are not au fait with legislative and policy provisions regarding HIV/AIDS. Because of little or lack of knowledge about legislative and policy provisions regarding HIV/AIDS the SGB is unsupportive. Furthermore, this SGB clearly lacks information and experience in dealing with complex policy and legal issues. This is revealed in the following case studies.

6.5.1. Case study one

This case study was based on principles of policy action and disclosure. The SGB had to explain what their school policy would be with regard to disclosure, and what action they would take in implementing HIV/AIDS policy.

Initially, the SGB responded in a manner that was promising and satisfactory on the question of school policy. They responded that their school policy would be confidentiality and disclosure with the consent of the teacher. Confidentiality is premised on the right to privacy entrenched in the Constitution Act No. 108 of 1996. This right is protected in the National Policy on HIV/AIDS for Learners and Educators in Public Schools (Department of Education, 1990). It is emphasised in paragraph 6 of the National Policy on HIV/AIDS that disclosure will be based on consent. For this question the SGB’s response was totally appropriate. At this stage, we were tempted to categorise them as a progressive, open-minded school.

In the next question, namely whether they would inform the educators of the HIV test results, the SGB maintained that they would “keep confidentiality”. They were prepared to inform only those who were HIV-positive. They would not make the status of HIV-positive educators publicly known. On whether they would inform learners the SGB also stated that they would not inform the learners because “they will take the message home, and that will endanger our school”. This response resonates with other schools in the categories above. It seems that the SGB is afraid of stigma and prejudice prevailing in the community. By saying that disclosing the educators’ status would endanger their school, it seems they imply that because of the prevailing stigma and prejudice against people living with HIV/AIDS, their school would be projected in a bad light. Perhaps “endangering” may also mean that parents may take their children away. This may be an extreme reaction from the community. The SGB was aware of its limited knowledge about HIV/AIDS policy. Hence, they responded to the question on what would be the expectations of the Department of Education on the SGB, with “we are waiting for guidelines and policy” for the SGB. The current policy guidelines are meant for learners and educators. There is a gap in the policy. There is no policy on HIV/AIDS addressed to the SGB. In this case, the SGB will probably not have concrete measures to support the HIV-positive educators. Hence, when we asked them what they would do to support the HIV-positive educators, they responded “nothing, we don’t know what to do”. They said this despite the presence of educators among them. The assumption was that educators would invoke guidelines provided for them and learners. However, they said they did not know what to do. This creates the impression in us that they are an unaware, and unsupportive SGB.

6.5.2. Case study two

The SGB maintained that educators’ responsibility with regard to disclosure included keeping confidentiality, and that they expected educators to do so. They were unanimous that disclosure could be made to the principal. The reason for that was that the principal is available at school on a daily
basis and he or she is the liaison officer between the school and the parents.

Earlier we indicated that this SGB did not have any concrete measure to support HIV-positive educators. When we asked them what their expectations would be of educators who manage HIV-positive learners, the SGB stated that educators should tell learners “to stay at home and not to come to school”. This is a direct violation of the learner’s right to education, equality and non-discrimination. These principles are emphasised in the Constitution Act No. 108 of 1996 and the Department of Education’s (1999) national policy on HIV/AIDS in paragraph 5.

The SGB also revealed that they were unaware about what the Department of Education expected from them when asked. They responded that they “don’t know” and suspected that “there must be laws of the land” informing schools what to do. However, they unanimously agreed that learners must not be expelled from school because of their HIV-positive status, and that the HIV-positive learners should be allowed to participate in sports.

6.5.3. Case study three
In this case study, the SGB were asked how they would respond to the continued absence of an educator. They stated that if an educator continues to absent himself or herself they would ask the educator to “write a letter to the school informing us of reasons for her or his absence”. This is a “standard” procedure. It is another way of following protocol.

However, it appears that the SGB has a limited knowledge of education’s labour rights. When we asked them about the rights of the educator in this case, the SGB only indicated that the educator has “the right not to be discriminated against”. This response is consistent with the first response in case study one. The right to confidentiality is linked to the right to non-discrimination. However, if an educator withholds information about his or her status, it becomes difficult for the SGB to help him or her. The SGB bluntly stated that such educators “deserve no support at all”. Even if they can sympathise “there is nothing they can do”. This SGB was not supportive and seems to reflect and project the stigma and prejudice that is prevailing in the wider community. Hence, they pointed out that HIV-positive educators “can’t continue working... their career must come to an end”. The SGB is thus unsupportive towards HIV-positive educators, and would dismiss them due to its lack of knowledge and information about the rights of HIV-positive educators.

7. Conclusion
In this article, we discussed the responses of SGBs to legislation and policy on HIV/AIDS. We drew data through the use of focus group interviews from six SGBs of public schools in Mpumalanga. The findings appear to illustrate what is actually taking place in public schools regarding the management of HIV/AIDS. The findings reveal that there is a distance between policy and practice and that schools need to develop vigilance with respect to the legal challenges they might face without adequate knowledge and information on the pandemic. The following were major findings of the study:

- Schools visited did not have guidelines on HIV/AIDS for learners and educators. In addition, the SGBs were not trained and did not have policy documents specifically defining the role of the SGB in the management of HIV/AIDS in public schools.
- These schools do not have their own school-based policy on HIV/AIDS.
- Department policy on HIV/AIDS is not clearly communicated to schools.
- Although most SGBs are supportive of HIV-positive persons their intentions are stifled by the lack of training and policy guidelines.

We have presented the findings in three categories. Firstly, the cautious, image-conscious schools that are protective, supportive, very confidential and yet non-discriminatory. Secondly, the progressive, open-minded schools that are supportive and have a strong collectivist culture. Thirdly, the unaware unsupportive school, that is unsupportive because of little or lack of knowledge about legislative and policy provisions regarding HIV/AIDS.
These categories were arrived at through a comparative analysis of the results.

References
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