



Teenage Pregnancy in South Africa: the role of Human Rights and the Law

By

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DECLARATION

I, THOLOANA MODISE declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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‘I can do all things through Christ who strengthens me’ - Phillipians 4:13

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*TEENAGE PREGNANCY IN SOUTH AFRICA:
THE ROLE OF HUMAN RIGHTS AND THE LAW*

ABSTRACT

This paper explores the pervasive issue of teenage pregnancy which disproportionately affects vulnerable girls who need protection. It highlights the legal, social and policy changes affecting pregnant teenagers and teenage mothers. This paper considers South Africa's international and domestic human rights obligations relating to teenage pregnancy and examines what the State has done to help pregnant teenagers and teenage mothers to realize their right to education. The paper finds that the policies which are in existence do not adequately address the gaps in the law and suggests that the solutions in place are not conducive to the full recognition of their rights. The result is that this demographic continues to be prejudiced by reason of their gender and age. Further, the stigma and lack of support they experience forces them to drop out of school. This paper avers that there is an urgent need for policy reform, particularly of the Integrated School Health Policy and the Screening, Identification, Assessment and Support Policy to ensure that there are adequate protections extended to pregnant teenagers and teenage mothers to enable them to enjoy their right to education.

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I INTRODUCTION

Teenage pregnancy is considered as pregnancy occurring in girls between the ages of 13 and 19 years of age.¹ It affects teenage girls who represent a particularly vulnerable demographic in society, mainly due to their age and gender.

South Africa has transitioned from a history of colonialism and apartheid, during which women—particularly African women and girls—experienced profound and systemic oppression. Due to a combination of ‘gender-based prejudice and racial oppression,’² African women and girls had limited access to resources and opportunities. To date, the pervasiveness of historical prejudice continues to constrain pregnant teenagers and teenage mothers. These young women are frequently marginalised and stigmatised. They face an education system that fails to adequately support them, often forcing them to leave school, which limits their future opportunities. Although inroads have been made by the South African government by enacting statutes and policy, there remain gaps in the current government policies which do not fully address the challenges faced by pregnant teenagers and teenage mothers.

This paper analyses teenage pregnancy and teenage motherhood from a feminist and intersectional standpoint. It focuses on the role of human rights and the law in safeguarding the ability of the pregnant teenage girl and the teenage mother to stay in school so that she preserves her ability to make choices later in life. The paper briefly considers the background and context of teenage pregnancy in South Africa which includes a short discussion of the possible contributors of teenage pregnancy. Next, the paper sets out the international and domestic rights frameworks that engage teenage pregnancy and education. Thereafter, it examines and critiques how the South African government has responded to this crisis, particularly in the public education sphere, and suggests that teenage pregnancy and teenage motherhood should be elevated to a separate category of vulnerable persons particularly within the provisions of the 2014 policy on Screening, Identification, Assessment and Support (‘SIAS policy’). This will allow teenage mothers to be granted the human rights protections afforded to them under the Constitution of the Republic of South Africa, 1996.

¹ Greta Hayward ‘Teenage Pregnancy and its health implications’ *International Journal of Public Health Research* 1(2) (2011) at 100 refers to the definition of the teenage pregnancy as set out by the World Health Organisation.

² Mlamli Diko ‘Intersectionality and the Oppressive Incidents of Women in the Old Testament and South African Context’ (2023) 36 (3) *Old Testament Essays* 614.

II THE BACKGROUND OF AND CONTEXT TO TEENAGE PREGNANCY IN SOUTH AFRICA

(a) Escalating teenage pregnancy rates in South Africa: implications for socioeconomic equity and education

The number of pregnant teenagers has fluctuated over the years. A 10-year overview demonstrates an increase in numbers. Statistics South Africa ('StatsSA') reported that 60 452 children between the ages of 12 and 17 were pregnant in 2014. Advancing to three years later and 66 443 children in the same age range were recorded as pregnant.³ In 2019, 129 223 teenagers between the ages of 10 and 19 gave birth in public health facilities in South Africa, with Kwa-Zulu Natal recording the highest number of live births followed by Limpopo, Eastern Cape.⁴ Between January 2021 and February 2022, the numbers decreased slightly with 109 462 births recorded for teenage mothers between the ages of 10 to 19.⁵

What is certain is that a substantial number of teenagers are falling pregnant each year. This undermines South Africa's efforts of breaking free from a painful history in which women and girls faced economic and social oppression,⁶ particularly because of their lack of education and limited access to resources.⁷ As pointed out by Willan,⁸ teenage pregnancy and adolescent motherhood have a negative impact on the teenager's ability to remain in school and to complete school. Of those teenagers who do manage to return to school after giving birth, many fail to balance the demands of school and motherhood unless they have adequate support. As a result of their inability to complete school, these teenagers are plunged further into cycles of poverty, socio-economic disadvantage⁹ and class prejudice.

Sadly, teenage pregnancy has the potential to affect South Africa's intended path toward freedom, dignity and the achievement of equality guided by the Constitution. As stated

³ Statistics South Africa 'Child Series Volume I: Children exposed to maltreatment, 2021' (Report 92-02-01) available at <https://www.statssa.gov.za/publications> accessed on 15 July 2024.

⁴ Statistics South Africa 'Profiling Health Challenges faced by adolescents (10-19 years) in South Africa' available at www.statssa.gov.za/publications/03-19-15 accessed on 15 July 2024.

⁵ Statistics South Africa Statistical Release P0305 'Recorded live births 2021' available at <https://www.statssa.gov.za/publications/P0305/P03052021.pdf> accessed on 15 July 2024.

⁶ Op cit note 2 at 614.

⁷ Op cit note 2 at 621- 622.

⁸ S Willan 'A review of teenage pregnancy in South Africa -Experiences of Schooling, and Knowledge Access to sexual reproductive health services' Partners in Sexual Health' 2013 available at <https://www.hst.org.za/publications> last accessed 24 October 2024.

⁹ Ibid at 7.

by law academics Sefoka and Odeku, the social factors contributing to teenage pregnancy all serve as an ‘impediment on the ability of the girls to realize their right to education.’¹⁰

(b) Factors contributing to teenage pregnancy

Many authors have written extensively on contributing factors of teenage pregnancy in South Africa.¹¹ They are not all repeated in this section. Covering all factors in detail is beyond the scope of this paper and may detract from a focused discussion on the most critical issues. Instead, selected factors are highlighted to illustrate the significant social, legal, and systemic challenges that contribute to teenage pregnancy.

(i) Gender-based violence and exploitation

Gender based violence is prevalent in South Africa¹² and a key contributor to teenage pregnancy. South Africa has been described as the ‘rape capital of the world,’¹³ with reports indicating that South Africa is one of the most violent countries in the world. ‘In the first quarter of 2022 alone, 10 818 rape cases were reported to SAPS.’¹⁴ Girls under the age of 16 are legally incapable of giving their consent to engage in sexual intercourse.¹⁵ Therefore, pregnancies in this age group result from acts of statutory rape and sexual assault. The Commission for Gender Equality has identified the exploitative sexual relationships between teachers and scholars as a further contributing factor to teenage pregnancy where power imbalances enable teachers to prey on young girls and force them into silence.¹⁶

¹⁰ Isiah M. Sefoka and Kola O Odeku ‘Critical Analysis of the right to education for pregnant school - going teenage girls in South Africa’ (2021) 10(3) *African Journal of Gender, Society and Development* 74-75.

¹¹ Jonas, K., Crutzen, R., van den Borne, B. *et al.* ‘Teenage pregnancy rates and associations with other health risk behaviours: a three-wave cross-sectional study among South African school-going adolescents.’ (2016) 13 *Reprod Health* 1, Commission for Gender Equality ‘Learner Pregnancy - Policy Interplay: School dropout of adolescent girls during pregnancy and in the postpartum period in selected South African provinces’ 2023 at 27-30; NR Maharaj ‘Adolescent pregnancy in sub-Saharan Africa – a cause for concern.’ (2022) *Front. Reprod. Health* 1 – 3.

¹² ‘National Strategic Plan on Gender Based Violence and Femicide’ <https://www.justice.gov.za/gbv/nsp-gbv-final> at 22 -26 accessed on 14 November 2024.

¹³ <https://ballardbrief.byu.edu/issue-briefs/gender-based-violence-against-women-in-south-africa> accessed on 9 October 2023.

¹⁴ I. Govender ‘Gender-based violence – An increasing epidemic in South Africa’ (2023) 65 *South African Family Practice* 1.

¹⁵ Section 15 of Sexual Offences and Related Matters Amendment Act No. 32 of 2007.

¹⁶ Commission for Gender Equality ‘Learner Pregnancy - Policy Interplay: School dropout of adolescent girls during pregnancy and in the postpartum period in selected South African provinces’ 2023 at 16.

(ii) Inadequate reproductive knowledge

Reproductive ignorance is a contributing factor to teenage pregnancy. Dr Nkala-Dlamini¹⁷ conducted research which found that teenagers have access to information about pregnancy prevention, however ‘studies suggest that this information might be inadequate, conflicting or overwhelming’.¹⁸ Limited access to contraceptives and inadequate knowledge of reproductive health and family planning, often exacerbated by fear of stigma from nurses at clinics,¹⁹ contribute to the prevalence of teenage pregnancy. Mcleod identifies risk-taking behaviour as a significant contributing factor, describing it as ‘behaviour that increases the chances of pregnancy.’²⁰ Such behaviours include girls partaking in sex at an early age, not using protection and neglecting contraceptive measures.

(iii) Harmful cultural practices

Harmful cultural practices also contribute to teenage pregnancy. In South Africa, cultural practices such as ukuthwala, in which young girls are married to older men, persist despite it being against the law. This ‘practice continues in some parts of the country like the rural Eastern Cape and Kwa-Zulu Natal.’²¹ Inevitably, the girls are compelled to assume traditional marital roles, including sex. As a result, the girls fall pregnant and leave school to raise their children. This cultural practice infringes on the girls’ right to bodily integrity, human dignity and freedom from harmful practices.²²

McCleod cites the breakdown of traditional cultural practices due to acculturation as a factor contributing to teenage pregnancy.²³ As a proponent of universal human rights, I argue that evolving cultural norms are essential to protecting vulnerable populations. For example, practices such as virginity testing have no place in our society as they violate the rights of

¹⁷ B. Nkala – Dlamini ‘It was a Mistake, but we knew that Something Might Happen’: Narratives of Teenage Girls’ Experiences with Unintended Teenage Pregnancy (2021) 3 *Front. Reprod. Health* at 1 – 7.

¹⁸ Ibid at 5.

¹⁹ M. Hlongwa, B. Tlou & K. Hlongwana. ‘Healthcare providers’ knowledge and perceptions regarding the use of modern contraceptives among adolescent girls in Umlazi Township, KwaZulu-Natal province, South Africa’ (2021) 38 *Pan African Medical Journal* at 1 – 6.

²⁰ C Mcleod ‘The causes of teenage pregnancy: review of South African research – Part 2 (1999) 29 ‘S. Afr.J Psychol at 10.

²¹ Moaba Phomolo *Understanding the Practice of Ukuthwala: An Analysis of the Experiences of Women from Mmapeng, Eastern Cape* (unpublished LLM thesis, University of Johannesburg, 2021) 11. See also L Mwambene ‘Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi’ (2018) 18 *African Human Rights Law Journal* at 532.

²² Ibid L Mwambene at 527 -550.

²³ Op cit note 20 at 12-13.

girls,²⁴ perpetuate gender discrimination²⁵ and fail to address the underlying issues of teenage pregnancy. My stance aligns with scientific views expressed by the World Health Organization that there is no conclusive way of determining one's virginity based on examining their hymen.²⁶

(iv) Poverty and transactional relationships

According to the World Bank, 'South Africa is the most unequal country in the world, ranking first among 164 countries in the World Bank's global poverty database.'²⁷ Due to reasons of poverty and inequality, young girls often enter relationships with older men. There is even a contextual nuance to these relationships: in rural areas, girls enter relationships with older men to provide for their families, often with parental knowledge; in urban areas, these dynamics are described as 'blesser – blessee' relationships, where transactional exchanges also occur. In exchange for sexual relations, young girls receive essentials such as food, clothes (including school uniforms), cellphones and other necessities.²⁸ Due to the inherent power imbalance, many girls are unable to negotiate condom use, further increasing their vulnerability to pregnancy and other risks.²⁹

What cannot be gainsaid is that the key contributory factors to teenage pregnancy discussed above reflect a complex social issue, manifesting in significant gender disparities in school retention among young girls. This paper supports the call for the law and human rights to be used as tools to redress the prejudicial consequences and to allow for transformation.³⁰

III SOUTH AFRICA'S INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS RELATING TO TEENAGE PREGNANCY

Since the start of democracy, South Africa has ratified several international and regional treaties³¹ which provide a strong rights framework for addressing teenage pregnancy and

²⁴ The rights to dignity, equality, right not to be unfairly discriminated against, the right to privacy.

²⁵ E. Durojaye 'The human rights implications of virginity testing in South Africa' (2016) 16 *International Journal of Discrimination and the Law* at 228–246.

²⁶ OCHR 'Eliminating Virginity Testing: An Interagency Statement' <https://www.ochr.org/issues/women/WRGS> accessed on 7 September 2024.

²⁷ <https://www.worldbank.org/press-release/2022/03/09> accessed on 9 October 2023.

²⁸ Brent Frieslaar *The Blesser-Blessee Relationship: A pastoral challenge* (unpublished LLM thesis, University of Pretoria, 2019) 18.

²⁹ G Mchunu, K Peltzer, B Tutshana and L Seutlwadi 'Adolescent pregnancy and associated factors in South African Youth' (2012) 12 *Afri Health Sci* at 246-434.

³⁰ Catherine Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 *Politikon: South African Journal of Political Studies* at 220.

³¹ Lilian Chenwi 'International human rights law in South Africa' in Erika de Wet, Holger Hestermeyer & Rudiger Wolfrum (eds) *The implementation of international law in Germany and South Africa* at 339- 373 (PULP 2015) 341.

enabling pregnant teenagers to claim their right to education. South Africa, therefore, has international law obligations to extend human rights protections to pregnant children.

International law scholars, Alston and Goodman assert that states must protect human rights by either ‘observing the national law that is consistent with international norms or by making the international norms themselves part of the national legal and political order.’³² Notably, the Bill of Rights in the Constitution³³ draws considerably from international human rights norms.³⁴ Section 39 of the Constitution provides that international law must be considered when interpreting the law. South Africa has domesticated these various international instruments as seen in sections 231, 232 and 233 of the Constitution. These provisions set out South Africa’s constitutional approach to international human rights law and provide the way for international human rights treaties to become part of the domestic legal order.³⁵

(a) International human rights treaties and teenage pregnancy

(i) Convention on the Elimination of All Forms of Discrimination against Women

In 1995, South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³⁶ This treaty enjoins member States to take steps to eliminate discrimination against women, thus advancing equality of their rights. Article 10 in particular provides that ‘State parties must take appropriate measures to eliminate discrimination against women in the field of education’ to ensure that women have equal access to opportunities at school. Further, that States should take measures to ‘reduce the rates of female student drop-out’ and ‘organize programmes for girls who have left school prematurely.’³⁷ This treaty recognizes that women are more vulnerable as compared to their male counterparts particularly in the education sphere. Pregnant teenagers and teenage mothers are afforded the protection to enjoy their right to education by being retained in school.

³² Philip Alston & Ryan Goodman *International Human Rights- The Successor to international human rights in context* (Oxford 2013) 1048.

³³ Sections 9, 10, 11.

³⁴ Op cite note 32 at 1051. For example, see also sections 26, 27 and 28 which deal with civil and political rights.

³⁵ Op cite note 31 at 353.

³⁶ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981).

³⁷ CEDAW Article 10(f).

(ii) African Charter on Human and People's Rights

On 9 July 1996, South Africa acceded to the African Charter on Human and People's Rights (the Charter).³⁸ In terms of Article 1 of the Charter, South Africa must adopt 'legislative or other measures to give effect' to the 'rights, duties and freedoms' contained therein. Article 17 of the Charter provides that 'every individual shall have the right to education' and Article 18(3) requires of a member state to

ensure the elimination of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

From this provision, it is apparent that discrimination against women and the need for the protection of the rights of children, especially girl children, are in focus.

(iii) African Charter on the Rights and Welfare of the Child

In 2000, South Africa ratified³⁹ the African Charter on the Rights and Welfare of the Child (the Child Charter).⁴⁰ This Child Charter specifically extends several civil and political rights together with economic, social and cultural rights to children. The Child Charter's preamble notes that African children are particularly vulnerable due to 'socio-economic, cultural, traditional and developmental circumstances.' Further, Article 1 of the Child Charter, places an obligation on member states to 'recognise the rights, freedoms and duties contained therein and to adopt Constitutional and legislative measures to realize those rights.'

Teenage pregnancy has a clear impact on girls' economic and social rights, particularly their right to education. Article 11 of the Child Charter provides for the right to education, with Article 11(6) expressly requiring member states to

take appropriate measures to ensure that children who become pregnant before completing their education will have the opportunity to continue with their education on the basis of their individual ability.

Thus, at a regional human rights level, it is specifically recognised that teenage pregnancy poses a barrier to education for young girls. Consequently, South Africa has a duty to support pregnant teenagers to complete their schooling. Effective implementation of this provision is

³⁸ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

³⁹ On 7 January 2000.

⁴⁰ African Charter on the Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999).

important, as providing support to pregnant teenagers can fundamentally change their futures, creating upward mobility and enabling broader opportunities.

(iv) *The Maputo Protocol*

South Africa ratified⁴¹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). This protocol deals with women's and children's rights. Conscious that women and girl children are subjected to gender discrimination, it seeks to extend more human rights protections to these vulnerable groups in Africa. The Maputo Protocol mirrors much of what is contained in the African Charter on the Rights and Welfare of the Child. Particularly, it affords extensive rights protections to women and provides them with remedies where there are rights violations.⁴² Article 12(2)(c) of the Protocol protects the right to education and enjoins a member state to take positive steps to promote the girls' enrolment and retention in schools.

The obligations in the Treaties outlined above are intended to protect the right of the pregnant teenager and adolescent mother to education. The question to be answered is to what extent South Africa has domesticated the regional human rights obligations. Before I do so, I look at some of the regional jurisprudence.

(b) *Regional jurisprudence on teenage pregnancy and education*

(i) *Women Against Violence and Exploitation in Society (WAVES) v Sierra Leone*

In December 2019, the Community Court of Justice Economic Community of West African states (ECOWAS) heard a matter brought under the African Charter: *Women Against Violence and Exploitation in Society (WAVES) v Sierra Leone*.⁴³ The applicants in the case challenged a policy that had been communicated in the media by Sierra Leone's Minister of Education, Science and Technology. The policy precluded pregnant schoolgirls from attending school while visibly pregnant 'as they would be a negative influence on their peers.'⁴⁴ The applicants contended that this policy violated various provisions of the regional human rights

⁴¹ On 17 December 2004.

⁴² JD Mujuzi 'The Protocol to the African Charter on Human and People's Rights on the Rights of Women in South Africa: South Africa's reservations and interpretive declarations' (2008) *African Journals Online* 12 *Law Democracy and Development* at 45-46.

⁴³ *Women Against Violence and Exploitation in Society (WAVES) & Child Welfare Society, Sierra Leone (CWS SL) (On behalf of Pregnant Adolescent School Girls in Sierra Leone) v Sierra Leone* ECCJ Jud No. ECW/CCJ/JUD/37/19.

⁴⁴ *Ibid* at 4.

instruments,⁴⁵ including the African Charter on Human and People's Rights which guarantees the right to education, and constituted discrimination. The ECOWAS Community Court held that the policy was an unlawful ban on pregnant schoolgirls from attending school⁴⁶ and was discriminatory in that it allowed for differential treatment of the pregnant girls 'without reasonable justification'.⁴⁷ Significantly, the Court authoritatively stated that the right to education requires the State of Sierra Leone to 'ensure that both males and females are afforded equal opportunities to education without distinction'.⁴⁸ The Court's judgment made it clear that the provisions of the various charters should be upheld and that the rights of pregnant teenagers to education should be protected in the ECOWAS.

(ii) Legal and Human Rights Centre v Tanzania

In the seminal decision of *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania*,⁴⁹ the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) had the opportunity to express itself on the right to education for pregnant girls and adolescent mothers.

This case concerned a challenge to the Tanzanian government's policy, contained in Regulation No. 4 of the Education Regulations of 2002, which sanctioned forced pregnancy testing in public schools of primary and high school girls and their expulsion from school by reason of pregnancy.⁵⁰ It also authorised the exclusion of girls who were pregnant before their enrolment and from re-entry those who had given birth.⁵¹ To defend its position, the Tanzanian government contended, inter alia, that it:

retained the margin of appreciation to limit the right to education on the ground of morality. It had the responsibility to protect African values and morality that do not condone sexual relations between children. Further that it had the discretion to determine what was moral.⁵²

In a progressive step, the ACERWC rejected these arguments and decisively upheld the human rights of pregnant teenagers, finding that the State had violated multiple provisions of the Charter.⁵³ A central conclusion from its findings regarding the violation of Article 11 of

⁴⁵ Supra note 43 at 20.

⁴⁶ Supra note 43 at 20 para 2.

⁴⁷ Supra note 43 at 26 para 3.

⁴⁸ Supra note 43 at 27-30 para 3.

⁴⁹ *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania* Communication No: 0012/Com/001/2019 (judgment on the merits).

⁵⁰ Ibid para 2.

⁵¹ Ibid para 4.

⁵² Ibid para 38.

⁵³ Ibid paras 37-42.

the Charter is that the right to education should not be interfered with on any basis that is inconsistent with the Charter's provisions and the other human rights treaties. Further, that member states are obliged to take steps to realise the right to education by adopting policies and allocating budgets to fulfil this right. The ACERWC endorsed the decision of ECOWAS in *WAVES v Republic of Sierra Leone*.⁵⁴ Similarly, the ACERWC found that the right to education is afforded to all children equally and that the impugned policy violated the provisions of the Charter and amounted to a violation of the right to education.⁵⁵

This paper now turns to the domestic rights' framework in section IV below.

IV SOUTH AFRICA'S CONSTITUTIONAL OBLIGATIONS RELATING TO TEENAGE PREGNANCY

(a) Relevant constitutional provisions

South Africa has domesticated its international law obligations. It has adopted a world-renowned Constitution which is the supreme law of the land⁵⁶ and which has a Bill of Rights that accords several substantive rights protections to pregnant teenagers and adolescent mothers. Section 7 of the Constitution imposes an obligation on the Government to 'respect, protect, promote and fulfil the rights in the Bill of Rights.'

For purposes of this paper, the discussion of rights is limited to the right to equality,⁵⁷ the right not to be discriminated against by reason of sex, pregnancy and gender,⁵⁸ the right to have access to healthcare services (including reproductive health),⁵⁹ the right to human dignity,⁶⁰ and the right to basic education.⁶¹

(i) The right to equality and not to be discriminated against by reason of sex, pregnancy and gender

The achievement of equality is one of the founding values in the Constitution.⁶² The Constitution clarifies that as a democracy, South Africa's Bill of Rights contain rights that are afforded to everyone.⁶³ The right to equality and the right to equal protection and benefit of the

⁵⁴ Ibid paras 40-42.

⁵⁵ Ibid para 42.

⁵⁶ The Preamble read with section 1 and 2 of the Constitution.

⁵⁷ Particularly gender equality.

⁵⁸ Section 9.

⁵⁹ Section 27 read with section 28(1)(c), (d).

⁶⁰ Section 10.

⁶¹ Section 29(1)(a).

⁶² Section 1(c).

⁶³ Section 7(1).

law are indeed guaranteed in the Constitution.⁶⁴ The Constitution imposes a duty on the State to promote equality by taking legislative and other measures to protect or advance categories of people disadvantaged by unfair discrimination. Section 9(3) of the Constitution relates to differentiation and discrimination by the State against private individuals.⁶⁵ It provides that ‘the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds,’ which grounds are listed. Gender, pregnancy and sex are specifically listed.

The Constitutional Court has given effect to these constitutional principles and has acknowledged that women face acute challenges which cause inequality in society.⁶⁶ The Constitutional Court further held that ‘the new constitutional and democratic order requires that all human beings are accorded dignity and respect regardless of their membership of particular groups.’⁶⁷ In essence, people should not be unfairly discriminated against in ways that cause stigma, prejudice, exclusion, disadvantage or impairment of dignity.⁶⁸ However, certain sections of society persist in chastising and stigmatising pregnant teenagers and teenage mothers. As such, they view them from a vantage point of blameworthiness and judgment to which their male counterparts are not subjected. In addition, this leads to their exclusion from education and attendant disadvantage in not completing schooling and limiting life choices.

(ii) The right to access to healthcare services (including reproductive health)

Section 27(1)(a) of the Constitution guarantees the right to have access to healthcare services, including reproductive healthcare, to everyone. Therefore, this right extends to pregnant teenagers and adolescent mothers. Section 27(2) places an obligation on the government to take ‘reasonable legislative and other measures, within its available resources, to ensure the progressive realization of the right.’ This provision must be read with section 28(1)(c) of the Constitution which places a duty on the government to provide basic healthcare services to children. As the South African Human Rights Commission explains, in light of section 7 of the Constitution the ‘State must respect the right and has the obligation to refrain from denying the access to healthcare to anyone. It must protect the right by adopting legislation and take

⁶⁴ Section 9(1).

⁶⁵ Vertical Discrimination.

⁶⁶ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 para 39.

⁶⁷ *Ibid* para 41.

⁶⁸ *Ibid* 41. See also *Harksen v Lane* 1998 (1) SA 300 (CC) and *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC).

measures to make healthcare services available within its available resources.’⁶⁹ For pregnant teenagers, this means full access to reproductive health-care services.

(iii) The right to dignity

The pregnant teenager and adolescent mother have the right to be treated with dignity by virtue of being human beings⁷⁰ and the state has the duty to respect and protect their dignity.⁷¹ This applies to all aspects of life, including in schools and healthcare facilities. Therefore, the state has a duty to ensure that these teenagers obtain the antenatal or postnatal medical care that they require, and that the healthcare workers treat them with dignity whilst ensuring the confidentiality of any treatment that they receive. In addition, the state has a duty to ensure that the educators treat the pregnant teenager and adolescent mother with dignity in the school without being shamed and stigmatised.

(iv) The right to basic education

Pregnant teenagers have the constitutional right to basic education which is not subject to limitations and which is immediately realisable.⁷² Mathenjwa asserts that the right to education ‘requires the state to refrain from impairing access to the right but to take positive steps to ensure that those who lack access do gain access to the right.’⁷³ Therefore, in relation to the pregnant teenager, the right to basic education concerns the extent to which that pregnant teenager is able to stay in school and the teenage mother’s ability to return to school after giving birth and continuing with her education.

As alluded to above, decisions of regional human rights bodies have consistently stated that teenagers should be given equal opportunity to attend school. They should not be discriminated against and excluded from school on the basis of their status (pregnancy).⁷⁴ Although there is a dearth of jurisprudence in South Africa in which the interplay between teenage pregnancy and the right to basic education was considered, the South African

⁶⁹ South African Human Rights ‘The right to health’ available at https://www.sahrc.org/home/21/files/Reports/4th_esr_chap_4.pdf accessed on 22 October 2024, at 95, See also *Soobramoney v Minister of Health Kwa-Zulu Natal* 1998 (1) SA 765 (CC) paras 10-11.

⁷⁰ The constitutional right to dignity has been discussed in Drucilla Cornell et al *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013) 175 states that the court in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) ‘embraces the idea that dignity is something that is inherent in, or intrinsic to, every human being. It is not earned. And it can never be lost.’

⁷¹ Section 10 of the Constitution.

⁷² *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 37.

⁷³ M Mathenjwa ‘The Realisation of the Right to a Basic Education in the Twenty Years of Constitutional Democracy.’ (2017) 3 *Speculum Juris* 4.

⁷⁴ *Supra* note 43 at 27.

Constitutional Court has generally followed these principles and added that adolescent mothers should not be prevented from re-entry into school after giving birth.

(b) Jurisprudence, law and the protection of pregnant learners' rights

The only case to address teenage pregnancy was *Head of Department, Department of Education, Free State Province, Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another* ('Welkom case').⁷⁵ This case stems from a legality review in which the exercise of public power by the Head of Department (HOD) was challenged. Apart from this issue, which is not the focus of the paper, the court considered the constitutionality of the pregnancy policies which stated that 'learners who fall pregnant may not be readmitted to school in the year in which they give birth and must effectively repeat up to an entire year of school.'⁷⁶ These policies affected a learner in grade 11 at Harmony and the other learner in grade 9 at Welkom. In both instances, the learners were precluded from completing their grade, thus requiring them to repeat the grade the following year. In both cases, the families of the affected learners challenged their exclusion from school.⁷⁷ The HOD had instructed the principals of both schools to ignore the pregnancy policies on the basis that, on his version, they were unconstitutional and thus they should allow the learners to return to school.⁷⁸

The court held that the Schools Act does not authorise school governing bodies to adopt policies that are unconstitutional in that they 'undermine the rights of pregnant learners.'⁷⁹ Indeed, the court was persuaded that the policies *prima facie* violated the learners' constitutional rights such as the 'rights to equality, basic education, human dignity, privacy and bodily and psychological integrity.'⁸⁰ First, 'the pregnancy policies were discriminatory and presumptively unfair as they differentiated between the learners on the basis of pregnancy. They also differentiated between male and female learners and were more onerous against the girls.'⁸¹ Secondly, they affected the learners' right to education as they required the learners to stay out of school and repeat up to a year whilst some learners cannot afford to repeat a year of

⁷⁵ *Head of Department, Department of Education, Free State Province, Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC).

⁷⁶ *Ibid* para 15.

⁷⁷ *Ibid* paras 15 to 18.

⁷⁸ *Ibid* para 19.

⁷⁹ *Ibid* para 71.

⁸⁰ *Ibid* paras 111 to 112.

⁸¹ *Ibid* para 113.

school. This also had a great impact as some learners never returned to school after that break.⁸² Third, the policies *prima facie* ‘violate the learner’s right to human dignity, privacy and bodily and psychological integrity by obliging them to report the school authorities when they believe they are pregnant. Other learners were also required to report to the school when they suspect that another learner was pregnant which had the effect of stigmatizing the pregnant learner.’⁸³ Fourth, the court found that by ‘operating inflexibly’ the policy also violated section 28(2) of the Constitution as it did not take into account the best interests of the child.⁸⁴

Unfortunately, even though the court found that the ‘pregnancy policies seemed to have violated the various fundamental rights of learners’, the court declined to make a declaration of constitutional invalidity as the schools did not have the opportunity to make submissions on the constitutionality of the policies. Instead, the court ordered the school governing bodies to revisit the pregnancy policies to bring them in line with the views expressed by the court. The court reflected on what it said in the case of *Hoerskool Ermelo*⁸⁵ about the disparities created by apartheid in the education sphere and added that the state has the obligation to remedy this by ensuring that the right to education is realised.⁸⁶ Furthermore, the capacity for reproduction and the potential for pregnancy are natural biological and physiological processes specific to females beginning at puberty. By contrast, males are not impacted by pregnancy in the same way, reflecting a gendered aspect of this issue that highlights the need for supportive educational policies tailored to the unique experiences of pregnant learners.

In my view, the question that remains unanswered in this case is whether the South African government ought to do more to ensure that its obligations relating to teenage pregnancy are met in so far as the protection of the right to education is concerned. Notably, the court did not consider the state’s international human rights law obligations on this issue. To my mind, the practical implication of this is that, save for noting the human rights violations that the policies perpetuate, the case does not meaningfully address the challenges on the ground.

Although this is only one case, it is submitted that it does demonstrate the direction of our Constitutional Court and how it applies the rights contained in the Constitution to protect pregnant girls so that they are supported to stay in school. In light of this case, the policies

⁸² Ibid para 114.

⁸³ Ibid para 115.

⁸⁴ Ibid para 116.

⁸⁵ *Head of Department Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC) para 45.

⁸⁶ Supra note 75 para 36.

discussed in this paper must be reviewed and amended to align with the decision of the Constitutional Court in *Welkom* so as to give effect to the constitutionally enshrined rights as well as International Law and the Children's Act.

Inspiring as the Constitution might be with all the rights it accords, it is not a panacea. As Woolman⁸⁷ argues, the Constitution should be viewed as form of scaffolding⁸⁸ which gives us a structure to build upon to get us to the society we envisage. A society wherein the freedoms as guaranteed can be enjoyed. As prescribed by the Constitution,⁸⁹ the South African lawmakers have taken steps and codified legislation in order to realise and give effect to the aforementioned rights. To this end, legislation such as the Choice on Termination of Pregnancy Act⁹⁰ legalises abortion for pregnant teenagers. It gives teenagers who make a choice not to continue with the pregnancy the autonomy to make decisions about their own bodies, despite the ongoing stigma associated with this choice.⁹¹ I submit that this Act protects the rights of pregnant teenagers to their bodily and psychological integrity as contained in section 12(2)(a) and (b) of the Constitution. Another important piece of legislation is the Children's Act 38 of 2005 which has expanded on the rights contained in section 28 of the Constitution and reinforces the fact that the best interests of the child should be paramount in any issue that concerns children.⁹² Therefore, the State has a duty to act in the best interests of the pregnant teenager by ensuring that they are retained in school and return to school after delivery to continue their education. It is further in the best interests of the pregnant teenager and adolescent mother that they obtain the necessary medical attention that they require during this period in the form of prenatal, antenatal and psychological interventions which the state has a duty to provide without them having to take too much time out of school.

⁸⁷ Stu Woolman 'Understanding South Africa's Aspirational Constitution as Scaffolding' (2016) 60 *New York Law School Law Review* 283.

⁸⁸ *Ibid* p294.

⁸⁹ Section 8(1)(a).

⁹⁰ Choice on Termination of Pregnancy Act 92 of 1996.

⁹¹ J.M.J Mavuso & Macleod C.I 'Resisting abortion stigma in situ: South African womxn's and healthcare providers' accounts of the pre-abortion counselling healthcare encounter.' (2019) 22 *Culture, Health & Sexuality* at 1299-1313.

⁹² Section 9.

V WHAT HAS THE GOVERNMENT DONE TO HELP PREGNANT TEENAGERS AND TEENAGE MOTHERS REALISE THEIR RIGHT TO EDUCATION

(a) Legislative framework: South African Schools Act 84 of 1996

Having set out the broad substantive rights framework for pregnant teenagers and teenage mothers, this section of the paper focuses on the ability of the pregnant teenager and adolescent mother to stay in school. Therefore, attention will be turned to the existing legislation and policies for public schools which are intended to protect and realize this right to education.

The South African Government has enacted the South African Schools Act⁹³ which is the primary legislative instrument giving effect to the right to education ('School's Act'). Its preamble records that the Schools Act sets out 'uniform norms and standards for the education of learners at schools' and 'upholds the rights of all learners.' It makes attendance at school compulsory for children aged 7 years until 15 years of age.⁹⁴ It also makes it incumbent upon the MEC to ensure that there are enough schools for learners to attend in each province for which they are responsible.⁹⁵ Significantly, it also provides for the admission of learners without unfair discrimination.⁹⁶ It criminalises the act of preventing a learner, who is subject to compulsory attendance, from attending school without just cause.⁹⁷ It is reassuring that at this national level, pregnant learners or teenage mothers are legally entitled to be enrolled into schools and protected from being prevented from attending school. However, it is in the policy framework that the real extent of protection can be found.

(b) An evolving policy framework

(i) Early policies: measures and gaps

There was initially 'no national policy specifically relating to learner pregnancy'⁹⁸ in South Africa. However, in 2007 the Department of Basic Education (DoBE) developed guidelines called 'Measures for the Prevention and Management of Learner Pregnancy' (MPMLP) which sought to deal with pregnancy. Willan suggests that this was to address the 'implementation gap' left by the School's Act.⁹⁹ Mashisi and Makoane note that these guidelines were more

⁹³ South African Schools Act 84 of 1996.

⁹⁴ Ibid section 3(1).

⁹⁵ Ibid section 3(3).

⁹⁶ Ibid section 5(1).

⁹⁷ Ibid section 6(b).

⁹⁸ Lisa Drager, Chandre Stuurman & Dermichelle Petherbridge 'Basic education rights handbook-education rights in South Africa' at 166 available at <https://section27.org.za/Resources/Publications>, accessed on 23 October 2024.

⁹⁹ Op cit note 8 at 11.

focused on the prevention and reduction of pregnancy. It suggested a two-year waiting period before a girl could return to school after giving birth. They correctly note that this undermined the girls' right to education.¹⁰⁰ There was clearly a need to develop a comprehensive policy addressing teenage pregnancy.

On 9 February 2010, the Policy on Learner Attendance¹⁰¹ was published. It noted the importance of regular school attendance in order to break the cycle of teenage pregnancy.¹⁰² It regarded 'giving birth' as a valid reason for absence from school¹⁰³ and it provided that a 'female learner's record may not be cancelled on the grounds that she is pregnant or has given birth.'¹⁰⁴ This was a positive step in the right direction. However, a gap still existed for a national policy on teenage pregnancy.

(ii) Integrated School Health Policy (ISHP)

In 2012, the Integrated School Health Policy¹⁰⁵ ('the ISHP') was introduced. It is not a policy directly pertaining to teenage pregnancy, but it was intended to address 'the barriers to learning so as to improve the attendance and retention of learners at school.'¹⁰⁶ Unfortunately, this policy failed to recognise teenage pregnancy as a specific barrier to learning.¹⁰⁷ Consequently, it did not address the support that would be required by pregnant learners to ensure that they are retained at school and do not lose school time when obtaining antenatal care. For example, the policy refers to 'follow-up and referral.' It is contemplated that there are some health services that cannot be provided at school and 'mechanisms must be put in place to ensure that the learners access the type of healthcare they need. Further it is contemplated that special arrangements can be made with healthcare facilities to ensure that the identified learners are accommodated at times which do not affect their attendance at school.'¹⁰⁸ Pregnant learners ought to have been identified but they are not. This paper contends that this is a missed opportunity on the part of the State to ensure that pregnant learners benefit from the additional measures set out in this Policy.

¹⁰⁰ N. Mashishi & T. Makoelle 'Inclusion or exclusion ramifications of teenage pregnancy: a comparative analysis of Namibia and South African schools pregnancy policies' (2014) 5 *Mediterranean Journal of Social Sciences* 14, at 375-376.

¹⁰¹ Department of Education Policy on Learner Attendance (2010) GG No.33150

¹⁰² Ibid clause 9(d).

¹⁰³ Ibid Clause 13(c).

¹⁰⁴ Ibid Clause 56.

¹⁰⁵ Integrated School Health Policy (2012)

¹⁰⁶ Ibid para 2.2.

¹⁰⁷ Ibid 24-25.

¹⁰⁸ Ibid 15 -16.

In 2013, the DoBE indicated that it would be developing regulations on learner pregnancy. However, this did not immediately materialize.¹⁰⁹ In reality, apart from the guidelines (MPMLP), there was still no national policy on learner pregnancy. Certain Provincial Departments of Education started implementing their own learner pregnancy policies to assist them with managing the issue. This was an untenable situation as there was no uniformity on the issue¹¹⁰ which opened up the possibility of rights violations.

(iii) Screening, Identification, Assessment, and Support (SIAS)

The DoBE introduced the Policy on Screening, Identification, Assessment and Support¹¹¹ ('SIAS') in December of 2014. This policy does not specifically deal with pregnant teenagers and adolescent mothers, but it is aimed at all 'vulnerable learners' who experience barriers to learning. It sets out the 'procedures to identify, assess and provide programmes for all learners who require additional support to enhance their participation and inclusion in school.'¹¹² The definition section of this policy includes a definition of 'additional support needs'¹¹³ and, loosely put, it is any further support that may be needed by a learner who is affected by a factor that is considered as a barrier to learning. Therein some factors are listed, but pregnancy and early maternal age are not included as factors which are barriers to learning.

Furthermore, the policy is replete with references to the phrase 'barriers to learning' and its contributory factors yet, regrettably, it does not specifically identify 'pregnancy' or 'early maternal age' as a barrier to learning.¹¹⁴ Interestingly, factors such as poverty and sexual abuse, which are contributors to teenage pregnancy, are listed.¹¹⁵ At least indirectly, this policy can be read to acknowledge that additional support must be provided to those learners who are pregnant as a result of poverty or sexual abuse. However, this is insufficient. Positive protection for pregnant teenagers needs to be provided in order for their right to education to be protected. This cannot be dependent on an indirect interpretation of the policy.

(iv) Policy on learner attendance and admission policies

There was no national policy which addressed the admission of pregnant learners to school until 29 January 2021, when the Department of Basic Education published the Admission

¹⁰⁹ Op cit note 96.

¹¹⁰ Ibid.

¹¹¹ Department of Education Policy on Screening, Identification, Assessment and Support (2014) GG No. 38356.

¹¹² Ibid at 11 clause 1-2.

¹¹³ Op cite note 111 at 8.

¹¹⁴ Op cit note 111 at 11, clauses 1(1)-(3); at 13, clause 5.

¹¹⁵ Op cit note 111 at 13, clauses 2(a) & (b).

Policy for Ordinary Public Schools¹¹⁶ ('School Admission Policy'). Provinces were at liberty to develop their own policies provided they complied with the decision of *Welkom*. However, the School Admission Policy begins to fill this gap. It 'provides the framework' nationally of what should be contained in the admission policies of the various schools across South Africa. It regulates the admission of school-going children in public schools.¹¹⁷ The policy provides that all admission policies must be consistent with the Constitution and the law.¹¹⁸ It states further that the admission policies of schools must not unfairly discriminate against applicants for admission.¹¹⁹ This policy is progressive. It is clear that pregnant learners must be admitted for new enrolment and adolescent mothers must be re-admitted to public schools after delivery. In this way, the right to education of pregnant learners is preserved. However, there was still a lacuna in that there was no confirmed national policy on teenage pregnancy in schools until January 2022 when a National Policy on the Prevention and Management of Learner Pregnancy came into effect.¹²⁰

(c) Current policy: Prevention and Management of Learner Pregnancy (2021)

(i) Core goals and intent of the policy

On 8 November 2021, the then Minister of Basic Education, Angelina Motshekga, gazetted a national Policy on the Prevention and Management of Learner Pregnancy.¹²¹ The intended goal of the policy is to protect the constitutional rights of pregnant teenagers and teenage mothers and to comply with international instruments adopted by the government.¹²² The preamble states that the policy:

'provides guidance on the reduction of unintended pregnancies, management of their pre and post - natal consequences, limitation of associated stigma and discrimination against affected learners and, importantly the retention and re- enrollment of affected learners in school.'¹²³

Crucially, the policy also outlines the steps that schools should take to give effect to the right to reproductive health and assist with information and tools to prevent teenage

¹¹⁶ Department of Education Admission Policy for Ordinary Public Schools (2021) GG No. 44139.

¹¹⁷ Ibid at paras 2-3.

¹¹⁸ Ibid para 8.

¹¹⁹ Ibid para 9.

¹²⁰ Op cit note 98 at 166.

¹²¹ Department of Education Policy on the Prevention and Management of Learner Pregnancy in schools (2021) GG No. 45580.

¹²² Ibid Preamble at 9.

¹²³ Ibid para 1, at 9.

pregnancy.¹²⁴ Positively, the Government intends to ‘review its progress against its stated goals every five years,’¹²⁵ in this way it will be able to assess how effectively it is implementing the policy and make changes if necessary.

(ii) Reasonable accommodation for pregnant learners

Paragraph 5.9 of the policy is headed ‘reasonable accommodation.’ It provides that ‘learners will be retained at school for the duration of their pregnancy and ‘provision will be made for their absence during the term.’¹²⁶ Further, the adolescent mothers may return to school after delivery to continue with their schooling. It also provides that the educators will take reasonable steps to accommodate the learner’s basic education, health and maternal needs.’¹²⁷

At paragraph 6.3.4 of the policy, the procedure for the ‘handling the incidence of learner pregnancy’ is set out. The first paragraph provides that:

central to the success of this Policy are the guidelines to address procedures for handling the incidence of learner pregnancy and the responsibilities of the key role players. The school will accommodate the pregnant learner by upholding the right of the learner to education and provide access to care, counselling and support through ISHP.¹²⁸

(d) Shortfalls of the current policy

(i) Uncertainty of reasonable accommodation

The key question remaining is what is meant by the word ‘accommodate’ in these clauses as it is silent on the modality to be followed. The Commission for Gender Equality suggests that ‘the policy prevents unfair discrimination against pregnant learners by ensuring that their rights to education are protected and that support will be given through the implementation of the ISHP.’¹²⁹ Thus they will remain at school and still be able to access healthcare services. On all those issues on which the policy is silent, guidance can be found in the Implementation Guidelines on Learner Pregnancy (‘the Implementation Guide’).¹³⁰ The Implementation Guide, published in December 2021,¹³¹ details the support that is be given to a pregnant learner to stay

¹²⁴Ibid para 6.2.3, clause 1.1.1.1, at 21.

¹²⁵ Ibid para 6.1.3.

¹²⁶ Ibid para 5.9 at 17.

¹²⁷ Ibid.

¹²⁸ Ibid at 23.

¹²⁹ Ibid at 25.

¹³⁰ Ibid at 11.

¹³¹ Implemented in January 2022.

in school¹³² and a teenage mother to re-integrate back into the school environment post pregnancy.¹³³

Clause 4 of the implementation guide is headed ‘responding to teenage pregnancy’ and states that a written agreement must be entered into between the school, the learner and her parents which indemnifies the school.¹³⁴ Further it states that this agreement must record that ‘no alternative or additional logistical arrangements can be demanded from the school.’¹³⁵ The schools retain the sole discretion to determine what an ‘alternative’ or ‘additional logistical arrangement’ is. There are no criteria against which the exercise of the discretion may be judged. The implementation guide seems to be internally contradictory in that, a few clauses later,¹³⁶ it provides that there must be some flexibility that is considered as the pregnancy progresses, such as providing work for the learner to complete at home and the school should consider various teaching methods to enable access to education. Does it mean that a learner should drop out of school if they have pregnancy-related complications early in the pregnancy? Undoubtedly, there are circumstances in which a pregnant learner should be accommodated by means of additional arrangements over and above what the policy provides even if pregnancy has not progressed as contemplated in clause 5.1(viii). For example, the pregnant teenager could be placed on bed rest.

Further, the Guide provides that ‘there are no exceptions that can be made regarding adherence to the school’s code of conduct. However, reasonable accommodation to be considered where necessary.’¹³⁷ Yet again, the Implementation Guide starts off by placing a blanket restriction on concessions that can be made by the school relating to the code of conduct. This is disappointing. The whole purpose of the Guide is to ‘ensure that learners are not excluded from school because of pregnancy and childbirth.’ Further, it aims to ensure that ‘a supportive environment is created’ for those learners who find themselves in that position.¹³⁸ Following the blanket restriction, however, the Guide suggests the opposite, namely that ‘reasonable accommodation can be considered where necessary.’ I contend that reasonable accommodations for pregnant teenagers and adolescent mothers should include flexible learning schedules, access to childcare, access to healthcare services, in other words

¹³² Department of Basic Education Policy on the prevention and management of learner pregnancy in schools Implementation Guide at 11 -16 paras (i) - (viii).

¹³³ Ibid at 17-18 para 6.1(i) -(iv).

¹³⁴ Ibid at 10 - 18, para 4.2(i)(g) to p.18, para (iv).

¹³⁵ Ibid para (iii).

¹³⁶ Ibid at 12 para 5.1(viii).

¹³⁷ Ibid at 10 para (iv).

¹³⁸ Ibid at 4 para 1.

inclusionary policies - away from punitive practices. However, none of this is expressly provided for in the policies.

(ii) The identity of the biological father

The second half of paragraph 6.3.4 of the National Policy on teenage pregnancy provides that ‘attention will be paid to the identity and rights of the biological father involved, whether he is a learner, educator or a person outside the basic education system.’¹³⁹ Arguably, the purpose of seeking to obtain the identity of the biological father is to intervene and protect pregnant teenagers primarily in instances where they became pregnant as a result of sexual violence, sexual assault or statutory rape. An obligation of mandatory reporting to the police is placed on teachers in cases such as this.¹⁴⁰ This is commendable. However, the other side of the argument, which this paper advances, is that this intention to intervene has the potential to lead to unintended consequences, at least in so far as pregnant teenagers who are 16 years and above are concerned. It could lead to their secondary victimisation and their rights to privacy would obviously be violated as the Policy suggests that they would be probed as to the identity of the biological father.

The Implementation Guide states that a ‘learner must not be forced to reveal the identity of the father, however, if the learner is under the age of 16’ it is mandatory for the principal to report the pregnancy as guided by the Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools.¹⁴¹ Notably, the text of the Policy does not set out the details as to how a school would establish the identity of the biological father. However, it provides clarity that the step of revealing the identity of the biological father is voluntary for teenagers aged 16 years and older. This addresses the concern that learners may drop out of school for fear of being forcefully interrogated by third parties or be subjected to secondary victimisation and stigma. Furthermore, there is a balance between the rights of the pregnant teenager over 16 years of age to privacy, whilst also ensuring that there is support made available should they choose to divulge.

Overall, by 2022, the policies read together start giving meaning to the rights of pregnant teachers and adolescent mothers, however there are still gaps in the policy framework.

¹³⁹ Op cit note 121 at 23.

¹⁴⁰ Ibid at 24 para 6.3.5.

¹⁴¹ Op cit note 132 at 3 para (iv).

VI HOW DO WE ENSURE PREGNANT TEENAGERS AND TEENAGE MOTHERS REMAIN IN SCHOOL

As already stated above, the substance of the rights contained in the Constitution requires of the Government to ensure that pregnant teenagers and adolescent mothers remain in school, and they must return to school postpartum. Further, that these teenagers are not stigmatised in the healthcare facilities while obtaining prenatal and postnatal medical care. This paper argues that South Africa has conformed to these standards however, as stated, there are still gaps. The policies do not comprehensively set out the modalities of the intended support to be offered to pregnant teenagers. As a result, several questions are left unanswered about the practicalities of the implementation of the policies. This, in turn, risks violating the very rights that the policies seek to protect. The following policy amendments to the ISHP and the SIAS can contribute to closing these gaps.

(a) Suggested policy amendments

The first proposed amendment is for the ISHP to specifically identify pregnant learners as part of the ‘target group’, in the same manner as has been done about learners with special needs.¹⁴² In this way, the rights to health and education of the pregnant teenagers and adolescent mothers are preserved. The ISHP is the main policy which deals with school health and to merely defer the health protections of pregnant learners to other policies and programmes that are in place, without a basis to do so, leaves much to be desired.¹⁴³ In fact, none of the other policies grant adequate health protections to pregnant learners.

The second proposed policy amendment is to the pregnancy policy, which should clarify the scope of the concept ‘accommodate’. This is to avoid the schools’ non-compliance for lack of understanding the extent of its obligations.

The third proposed amendment relate to the SIAS. The SIAS is intended to provide comprehensive interventions for children with disability, as they are considered to be vulnerable learners, by offering them particular and additional support to enable them to stay in school.¹⁴⁴ In the SIAS, disability is specifically identified as a barrier to learning.

This paper proposes that teenage pregnancy and early maternal age also be included as a barrier to learning. Pregnancy and early motherhood render teenage girls particularly vulnerable, impacting on both their physical and mental health. The SIAS policy is explicit in

¹⁴² Op cit note 105 at 11 para 2.5.

¹⁴³ Op cit note 105 at 12 para 2.5.

¹⁴⁴ Op cit note 108 clause 1.

defining the types and levels of support necessary for children with disabilities, addressing both educational and health needs. However, this level of clarity does not extend to pregnant learners or teenage mothers, who are not sufficiently recognised as vulnerable in the policy, despite their compromised ability to function comparably to peers not in similar circumstances.

The argument is not that pregnancy is a disability because it is not. Nor does it make a pregnant teenager an invalid. However, it is suggested that pregnant teenagers and adolescent mothers should be designated as a distinct vulnerable group, similar to the recognition granted to individuals with disabilities. This designation is warranted as existing policies largely overlook the specific needs of these young mothers. Pregnancy significantly alters the trajectory of these teenagers' lives, often with long-term adverse effects.¹⁴⁵ Additionally, not only is the issue of teenage pregnancy a problem for the vulnerable parties but for society more broadly because the knock-on effect is felt for many generations. It impedes their right to education, perpetuates the cycle of poverty and allows for a blatant disregard of human rights, particularly based on gender and age in this group.

Including pregnancy and early motherhood within the SIAS policy would provide an essential framework for intervention, equipping teachers with the training and guidance necessary to support pregnant learners.¹⁴⁶

To address this policy gap, this paper proposes that policymakers revise the policy's purpose statement to explicitly include teenage pregnancy and early maternal age as areas of focus. Furthermore, this paper suggests amending clause 6 of the SIAS to add sub-clauses specifically for teenage pregnant girls and adolescent mothers. Such provisions would ensure that these learners receive the targeted support needed to exercise their right to education fully.

(b) Ongoing work to realise the right of pregnant learners

As a counterpoint, the State has not sat idly. It continues to grapple with the issue of teenage pregnancy. Recently, the Department of Social Development has commissioned a 'diagnostic evaluation' as part of its 'effort to understand the government's response to the issue of teenage pregnancy.'¹⁴⁷ It is reported that the 'Diagnostic Evaluation Report' was presented at the Department's stakeholder validation workshop held on 14 May 2024. Further, that the report

¹⁴⁵ Op cit note 100 at 375.

¹⁴⁶ Op cit note 105 at 29, clause 1(a).

¹⁴⁷ C. Pantshwa & P. Mupenzi 'Tackling teenage pregnancy: insights from South Africa's stakeholder workshop' available at <https://dsdnews.org/tackling-teenage-pregnancy-insights> accessed on 22 October 2024.

has added to the discourse in that it has identified certain shortcomings in the existing teenage pregnancy interventions.¹⁴⁸

Perhaps teenage pregnancy is already regarded as a human rights issue. However, this paper suggests that more needs to be done. The policies need to be amended in order to ensure that there are adequate protections for pregnant teenagers and adolescent mothers to enable their full and equal enjoyment of their right to education.

VII CONCLUSION

This paper aligns with Macleod and Felham-King¹⁴⁹ that ‘single focus strategies in efforts to reduce unwanted and unsupportable pregnancies and to support young women’s pregnancies will never be sufficient.’¹⁵⁰ A number of stakeholders, such as children, non-governmental organisations, various government departments, traditional and religious leaders, academics and to a certain extent law enforcement agencies, have to be engaged in dialogue to find solutions to the problem of teenage pregnancy and adolescent mothers.

In adding to the discourse, this paper has argued that there is more to be done about teenage pregnancy and teenage motherhood as a human rights issue. Various policies in the education sphere have been considered and it is clear that there are still inadequacies in the policy framework. I have provided insight and suggested amendments to the policies, particularly the SIAS, to create a more supportive environment for pregnant teenagers and adolescent mothers who still wish to attend school, in spite of their circumstances, so that their right to education is realised and they can make choices about their futures.

Albertyn and Goldblatt note that ‘equality for the disabled involves removing barriers to opportunities, eradicating discrimination and providing measures to accommodate and include them.’¹⁵¹ The same can be said for pregnant learners and teenage mothers. I aver that this additional support will more readily follow if teenage pregnancy and adolescent motherhood is elevated to the status of an independent and separate category of vulnerability in South Africa, in the same way as it has been done for people with disability. I argue that if

¹⁴⁸ At the time when this paper was finalized the diagnostic evaluation report had not been published on the Department’s website, therefore it was not publicly available. It is hoped that the findings contained in the report will assist the government with its future interventions aimed at ensuring that pregnant teenagers and adolescent mothers continue to attend school.

¹⁴⁹ Catriona Ida Macleod and Tracey Feltham-King ‘Young pregnant women and public health: introducing a critical reparative justice/care approach using South African case studies’ (2020) *Critical Public Health* Vol 30 at 319 -329.

¹⁵⁰ Ibid at 325.

¹⁵¹ Catherine Albertyn & Beth Goldblatt ‘Equality’ in Stuart Woolman, Theunis Roux & Michael Bishop (ed) *Constitutional Law of South Africa* 2 ed (2007) 35-70.

this is done, it could change the course of the future of an entire nation where young girls, who would ordinarily have fallen by the wayside but for the additional support, are retained in the school system. By protecting the right to education, these young people will consequently be able to enjoy the other freedoms and protections promised in the South African Constitution, have equality and be able participate economically in the future.

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