

Hurter Spies Incorporated
Reg. no. 2008/009761/21
Attorneys/Notaries/Conveyancers

Pretoria-offices:

Second Floor, Block A, Loftus Park
416 Kirkness street, Arcadia
Pretoria, 0007

Centurion-offices:

54 Union Avenue (c/o Union Avenue & Kort street)
Kloofsig, Centurion, 0158

P O Box 14505

0140 Lyttelton

Tel : 012 941 9239

Fax : 012 644 1997

e-mail : admin@hurterspies.co.za

Internet : www.hurterspies.co.za

Our ref. DJ Eloff / MAT3247

03 June 2020

Lindiwe Zulu

Minister of Social Development
HSRC Building, North wing
134 Pretorius Street, Pretoria

By email: VuyiswaM@dsd.gov.za
ThulisileN@dsd.gov.za
HlangananiM@dsd.gov.za
info@dsd.gov.za
SusanP@dsd.gov.za

Dear Ministers,

RE: PRIVATE PRE-SCHOOL INSTITUTIONS: REOPENING

1. We act on behalf of the following institutions:
 - 1.1 *Bronkieland Kleuterskool*, a private pre-school institution situated in Bronkhorstspuit, Gauteng;
 - 1.2 Solidarity Occupational Guild, a division of Solidarity Trade Union (“Solidarity”). The interest of Solidarity herein lies in the protection of the interests of its members which include Social Workers

involved in the field of early childhood development and care of children;

- 1.3 *Skole-ondersteuningsentrum* (“SOS”), an independent non-profit company that aims to promote quality education at all levels of education including pre-primary level education. Amongst the members of SOS are principals and educators of several private pre-school institutions in the country;
2. This letter concerns the following:
 - 2.1 The fundamental rights of minor children as contemplated in Section 28 of the Constitution;
 - 2.2 The right to basic education in terms of Section 29(1) of the Constitution;
 - 2.3 The social and economic consequences and economic effect on private pre-school institutions as a result of the declaration of the national state of disaster and the consequential lockdown regulations;
 - 2.4 The social and prejudicial impact upon pre-school children and parents of such children following sub-paragraph 2.3 above;
 - 2.5 The risks posed by the SARS-CoV-2 virus to children;
 - 2.6 The interpretation of the most recent alert level 3 lockdown Regulations gazetted on 28 May 2020 (“the Regulations”) by the Minister of COGTA;

- 2.7 The Directions issued by the Minister of Basic Education on 29 May 2020 and the amendment of the aforementioned Directions dated 1 June 2020 (collectively referred to as “the Directions”);
3. As you are no doubt aware, the re-opening of schools and private pre-school institutions during the national lockdown has been a source of great uncertainty amongst learners and parents alike.
 4. Since the publication of the Directions issued by the Minister of Basic Education in respect of schools as defined in the South African Schools Act on 29 May 2020 as amended on 1 June 2020 which, *inter alia* makes provision for the phasing in of early childhood development (“ECD”) and Grade R or lower in a school, the uncertainty in respect of private pre-school institutions, which do not fall within the auspices of the Minister of Basic Education, still prevails.
 5. With this uncertainty in mind, our clients sought legal advice. What follows herein below is a brief exposition of the interpretation of the Regulations and Directions and issues arising therefrom.
 6. This letter is addressed to you in order to remove any legal uncertainty in the spirit of co-operation with the state as regards the re-opening of private pre-school institutions.
 7. When consideration is given to the full context and purpose of Chapter 4 of the Regulations, including the wording and intention of Table 2 in respect of alert level 3, read with regulation 46, it appears that all

businesses and other institutions may operate, except those set out in Table 2.

8. The introductory portion of Table 2 provides as follows:

“All persons who are able to work from home must do so. However, persons will be permitted to perform any type of work outside the home, and to travel to and from work and for work purposes under Alert Level 3, subject to-

(a) Strict compliance with health protocols and social distancing measures;

(b) The return to work being phased-in in order to put in place measures to make the workplace COVID-19 ready;

(c) The return to work being done in a manner that avoids and reduces risks of infection; and

(d) The work not being listed under the specific economic exclusions in this Table”

9. When further consideration is given to the content of the specific economic exclusions listed under items 1 to 10 of Table 2, read with regulation 46(1) and regulation 33(1)(a), (b), (c) and (g), it appears that all institutions may operate and function except where specifically excluded under Table 2.

10. A proper reading and interpretation of the specific exclusions in Table 2, reveals that there are no specific exclusions pertaining to private pre-school learning institutions.

11. Item 9 of Table 2 foreshadowed exclusions relating to education services as set out in directions issued by the Cabinet members responsible for education. Those Cabinet members are the Minister for Basic Education and the Minister for Higher Education. No exclusions are envisaged or stipulated to be dealt with in directions to be issued by the Minister of Social Development.
12. We have referred to the Directions that have been issued by the Minister for Basic Education herein above, which makes provision for a phased-in return to schools i.e. public and independent schools under the South African Schools Act. These directions include the re-opening of early childhood development programmes as from 6 July 2020 for Grade R and lower, where these are presented by schools as defined in terms of the South African Schools Act.
13. **The private pre-school institutions, including nursery schools and early childhood development institutions which do not fall within the scope and function of the Minister for Basic Education appear not to fall under the specific economic exclusions in Table 2 and in our opinion, are allowed to re-open subject to the compliance with the implementation of COVID-19 health protocols as prescribed by the Regulations.**
14. There could be no rational and justifiable ground, when interpreting the Regulations, upon which it was envisaged that early childhood development programmes, including Grade R and lower, forming part of schools as defined in the Schools Act (which include both public and

- independent schools) are permitted to re-open as from 6 July 2020 in terms of the Directions, but that other private pre-schools offering early childhood development for children in Grade R or lower are not permitted to open or simply be left in a vacuum.
15. It appears in any event from Table 2 of the Regulations that a phased-in approach by any business or institution which is permitted to open as from 1 June 2020 should do it in a phased in manner so that measures are in place to render the workplace COVID-19 ready.
 16. Furthermore, Regulation 33(1)(a) provides that a person may leave his or her residence to perform any service as permitted under Alert Level 3. Regulation 33(1)(g) provides that a person may leave his or her residence to attend a school or learning institution once these are opened.
 17. In a letter dated 31 May 2020 by the Minister of Basic Education, addressed to the Chairperson of the National Alliance of Independent Schools Associations (“NAISA”), the Minister agreed in principle that independent schools should not be bound by the timetable for the phased-in re-opening of schools as set out in paragraph 4(1) of the Directions. The Minister further stated that independent schools may re-open for learners other than learners in Grade 7 and Grade 12 as long as there is compliance with health measures and social distancing requirements set out in the COVID-19 Compliance Monitoring Tool. A copy of this letter is attached hereto as **Annexure “A”**.
 18. It would be highly discriminatory and unconstitutional if a construction is given to the Regulations which would mean that private pre-schools are

not permitted to re-open and with no indication at this stage as to when this will be allowed whilst ECD's as contemplated in the Directions (which forms part of schools) will be allowed to re-open on 6 July 2020.

19. The problems with regard to private pre-schools have become even more acute since the further re-opening of large sectors of businesses in the economy where many parents of young children have had to return to work, leaving very few if any options as regards the daily care of children.
20. It must also be accepted that the lock-down period has been in operation for a period of 69 days from 27 March 2020 to 3 June 2020 and inevitably resulted in a serious detrimental effect on the emotional well-being of children, their worlds having changed drastically following the implementation of the nationwide lockdown. Many children from underprivileged communities have been dependent on school feeding schemes, which cannot operate as was the norm whilst schools were open. This impact upon the physical well-being of children on a very high level. Furthermore, as far as the emotional and psychological well-being of young children is concerned, it goes without saying that young children cannot be expected to understand the impact of the COVID-19 pandemic. Children that have been attending pre-schools prior to the lockdown have become used to daily social interaction and have had the benefit of various forms of educational stimulation on a daily basis. Young children long for their friends and the daily routine that they have become accustomed to within the context of schooling. Children also need social interaction, which is a crucial element of the development of children.

21. In circumstances where parents or care-givers of children have rendered essential or permitted services at prior stages during the lockdown or under the current Alert Level 3, many young children may be left to fend for themselves, whilst their parents or care-givers are earning a living.
22. Furthermore, you are certainly mindful of the fact that private pre-schools perform a very essential service in terms of the Children's Act, 38 of 2005 which deals comprehensively with partial care of children and the need for early childhood development institutions and which are in the best interests of children and the society as a whole.
23. As a result of the lockdown, many of these institutions have been forced to close down, due to the economic impact of the lockdown. Many more of these institutions will be forced to close their doors, unless they re-open immediately. This directly impacts upon a multitude of children.
24. We refer you to Section 9 of the Children's Act which provides that in all matters concerning the care, protection and well-being of a child, the best interests of children, as contemplated in Section 7 of the Children's Act, are of paramount importance. This is emphasised by Section 28 of the Constitution.
25. Section 6(5)(b) of the Children's Act also begs mentioning in this regard. It provides that in any matter concerning a child, a delay in any action or decision to be taken must be avoided as far as possible.
26. Moreover, for as long as private pre-schools are not entitled to re-open, important objects of the Children's Act, as set out in Section 2 thereof, are

not being fulfilled, in particular Section 2(l), which provides that one of the objects of the Children's Act is to promote the protection, development and well-being of children, encapsulating the other objects of the Act as a whole.

27. We wish to draw your attention to a statement published by the South African Paediatric Association ("SAPA") in respect of the return of South African children to school within the context of the COVID-19 crisis. A copy of this statement, dated 30 May 2020 is annexed hereto, marked **Annexure "B"**.

28. We highlight crucial aspects dealt with in this document. The position of the SAPA is summarised as follows:

27.1 SAPA supports the immediate return of children to school;

27.2 SAPA deals at length with the risk that the SARS-CoV-2 (the virus causing the COVID-19 disease), may pose to children and highlights the following:

27.2.1 *"Children biologically contain SARS-CoV-2 better than adults, are less likely to get sick if infected, have milder disease, are unlikely to die from COVID-19 and are probably less infectious than adults.*

27.2.2 *It is emphasised that although children are at higher risk of being infected once at school, this additional risk to themselves and other is outweighed by the benefits of them returning to school."*

29. You will note from the document that the SAPA outlines evidence to support its recommendations and, *inter alia*, states the following:

28.1 Children are less likely to acquire SARS-CoV-2 than adults;

28.2 Children have less severe disease, accounting for less than 1% of severe cases and deaths;

28.3 Children are more likely to have an asymptomatic infection than adults;

28.4 At a population level, children may be less likely to transmit and have a minor role in transmission;

28.5 Teachers are not at high risk of being infected by children;

28.6 Measures obviously have to be taken in order to reduce the risk of transmission in school settings such as hand washing, sanitizing and social distancing as is the case with all other business and institutions in operation amid the pandemic and provided for in the health protocol as provided for in the Regulations.

30. In paragraph 7 of the statement, which deals with Risk-benefit analysis, the following is stated, *inter alia*:

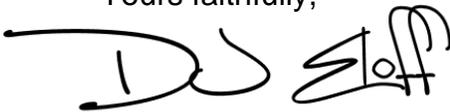
*“The **benefits of returning to school**, particularly for poorer children, include the positive impact on their learning, access to the School Nutrition Programme (one meal per day), and mental health and well-being gains.”*

31. The document contains important and useful recommendations to be implemented following the re-opening of schools which ought to be taken into consideration and which, in our view, equally apply to private pre-school institutions.
32. In the end, as long as private school institutions implement the necessary health protocols comprehensively dealt with in the Regulations, there cannot be any reason why it should be prohibited from re-opening.

REQUEST

33. If you differ from the view in summary as expressed in paragraph 31 above and the balance of the content hereof, you are requested to revert to us in writing by no later than **16h00, Friday, 5 June 2020** and specifically indicate whether you are in agreement with the interpretation and exposition of the legal position or if you take issue with the interpretation.
34. In the absence of a response, our client will have no alternative but to approach the High Court for declaratory relief in respect of the issues raised herein and appropriate consequential relief.

Yours faithfully,



HURTER SPIES INC

AND TO: Nkosazana Clarice Dlamini-Zuma
Minister of Cooperative Governance and Traditional Affairs
87 Hamilton Street
Arcadia
Pretoria

RSA
0002

By email: info@cogta.gov.za
PamelaS@cogta.gov.za
MandisaMB@cogta.gov.za
MathoM@cogta.gov.za
CarolineM@cogta.gov.za
legadimal@cogta.gov.za

CC: **Angie Motshekga**
Minister of Basic Education
Sol Plaatjie House
222 Struben Street
Room TF1062
Pretoria

By email: mabua.s@dbe.gov.za
info@dbe.gov.za



**MINISTER
BASIC EDUCATION
REPUBLIC OF SOUTH AFRICA**

Private Bag X603, Pretoria, 0001 • Tel (012) 357 3000 • Fax (012) 323 5989
Private Bag X9034, Cape Town, 8000 • Tel (021) 465 7350 • Fax (021) 461 4788
Website: <http://www.education.gov.za>

31 May 2020

**Mr Mandla Mthembu
Chairperson
National Alliance of Independent Schools' Associations
32 West Riding Row
Sherwood
DURBAN
4091**

By e-mail: mandia.mthembu@aeegroup.co.za
secretary@naisa.co.za

Dear Mr Mthembu

COVID-19: RE-OPENING OF INDEPENDENT SCHOOLS

1. I refer to the discussion between representatives the National Independent Schools Alliance ("NAISA") with the Director-General, Mr Mathanzima Mveli accompanied by senior officials from the Department of Basic Education ("DBE") on 30 May 2020, regarding the re-opening of independent schools in the context of the Directions published under Government Notice No. 302 of 2020, in *Government Gazette* No. 43372 of 29 May 2020 ("the Directions").
2. I confirm that we agreed in principle that:
 - 2.1 Independent schools should not be bound by the timetable for the phased re-opening of schools set out in paragraph 4(1) of the Directions.
 - 2.2 Independent schools may re-open for learners in Grades 7 and 12 with effect from 01 June 2020, provided they are in compliance with the health, safety and social distancing requirements set out in the COVID-19 Compliance Monitoring Tool issued by the DBE ("the Compliance Tool").
 - 2.3 Further to the publication of the amended Directions for the reopening of schools, independent schools may, re-open for learners in Grades other than Grades 7 and 12, they are in compliance with the health, safety and social distancing requirements set out in the COVID-19 Compliance Monitoring Tool.

- 2.4 As stated in paragraph 4(3) of the Directions, no school may re-open unless and until it complies with the abovementioned requirements.
- 2.5 NAISA will, as soon as reasonably practicable, submit to the DBE a list of its member schools that have signed the requisite declarations that they meet the abovementioned requirements in respect of the Grades of learners for which they will be re-opening.
- 2.6 Duly authorised officials of the provincial education departments will be entitled to inspect independent schools from time to time, with a view to monitoring compliance with the criteria set out in the Compliance Tool.
3. I confirm, further, that it has been agreed that the Directions will be amended formally as soon as possible to give effect to the arrangements outlined above. Meanwhile, independent schools may re-open for learners in Grades 7 and 12 with effect from 01 June 2020, if they comply with the requirements set out in the Compliance Tool. I also confirm in terms of regulation 4(3) of the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 that independent schools may begin to re-open for learners in other Grades, provided they have signed the declarations of compliance referred to above, and provided NAISA has notified the DBE that the schools concerned have done so.

Yours sincerely,



Mrs AM MOTSHEKGA, MP
MINISTER OF BASIC EDUCATION
Date: 31 MAY 2020

Position statement: Return of South African children to school

30 May 2020

Summary

The South African Paediatric Association (SAPA) supports the government's position that children should return to school on 1 June 2020. There is uncertainty about the future trajectory of COVID-19 in South Africa, with more infections and a long duration being predicted. Children biologically contain SARS-CoV-2 better than adults, are less likely to get sick if infected, have milder disease, are unlikely to die from COVID-19, and are probably less infectious than adults. Although children are at higher risk of being infected once at school, this additional risk to themselves and others is outweighed by the benefits of them returning to school.

Background

There is controversy regarding the imminent reopening of schools in South Africa with conflicting views expressed by government, teacher trade unions, political parties, civil society organisations, school governing bodies, and parents, amongst others. This has led to much parental, caregiver, and child anxiety about whether children should return to school.

The Department of Basic Education (DBE) has proposed a staggered reintroduction of public schooling, with learners in Grades 7 and 12 starting school on 1 June 2020. There are concerns about schools' levels of preparedness and the possibility of them becoming nodes of SARS-CoV-2 spread.

This position paper represents the view of the South African Paediatric Association, a professional society representing paediatricians in the public and private sector in South Africa. The position is supported by the Paediatric Management Group.

Evidence to support recommendations

There is a paucity of data on SARS-CoV-2 in children, particularly in low resourced countries. None of the following statements is definitive, but reflect current best evidence.

1. Acquiring SARS-CoV-2

- a. Children are less likely to acquire SARS-CoV-2 than adults. Children account for 1-3% of reported cases across countries. Children and young people have lower susceptibility to SARS-CoV-2, with a 56% lower odds of being an infected contact.¹
- b. Children have less severe disease, accounting for less than 1% of severe cases and deaths.
- c. Children are more likely to have an asymptomatic infection than adults.

2. Transmission in children:

- a. The ability of children to transmit SARS-CoV-2 is dependent on their susceptibility, symptoms, viral load, social contact patterns and behaviour.¹
- b. At a population level, children may be less likely to transmit and have a minor role in transmission. A systematic review of household cluster studies suggests that children

- were the index (transmitting) case in only 3 of 31 (10%) individual cluster studies.² A population-based contact-tracing study from Australia reported only two secondary cases in students and none in staff from 18 index cases (9 students, 9 staff).³
- c. **There are no published studies on the mechanisms of transmission of SARS-CoV-2 in children.** Data on viral load in children, a potential marker of higher transmission is limited. A German study indicated that viral load may be lower in children than adults.⁴
3. **Teachers are not at high risk of being infected by children. Teachers are at a higher risk of contracting the virus from other adults (e.g. colleagues), at home or in the community (outside school). Teachers with comorbidities are at increased risk for severe COVID-19.**
 4. **School opening**
 - a. **There are no data on the relative contribution of school closures to transmission control.** COVID-19 modelling studies predict that school closures alone would prevent only 2-4% of deaths, much less than other social distancing interventions.⁵
 - b. **COVID-19 incidence in South Africa will inevitably increase over the next three months and possibly for longer. Postponement of re-entry to school to reduce transmission risk to negligible would entail a delay of many months before schools could reopen.**
 - c. **School opening in many highly-resourced countries has not resulted in any major COVID-19 outbreaks.** There have been sporadic cases reported, e.g. 70 infected children in France in the first week of reopening among 1.4 million children who returned to school.
 5. **Reduction of Transmission**
 - a. **Measures taken to reduce transmission risk in school settings include attempts to reduce learner mixing (e.g., by increasing spacing between learners in classes, closing playgrounds, cancelling non-essential activities and meetings, keeping learners in fixed class groups or classrooms, staggering school start and break times across classes, shortening the school week or days), reduced class sizes, and extra handwashing or hand sanitiser use.**
 6. **Additional considerations**
 - a. **It is expected that there will an increased circulation of various pathogens and illnesses that ordinarily appear during the winter months in South Africa, including influenza, respiratory syncytial virus (RSV) and rotavirus.**
 - b. **Most South African schools will be unable to easily keep children 1.5 metres apart in classrooms, and winter conditions will prohibit outdoor learning or keeping classroom windows open. Similarly, ensuring that physical distancing is maintained during school transport may be problematic.**
 - c. **Recent South African surveys of parents have suggested that only one-quarter are supportive of sending their children back to school, while principals fear not having enough healthy staff.**
 7. **Risk-benefit analysis**
 - a. **The benefits of returning to school, particularly for poorer children, include the positive impact on their learning, access to the School Nutrition Programme (one meal per day), and mental health and well-being gains. Only about 20% of school children are currently benefiting from online schooling according to the DBE. School reopening will increase parents' and caregivers' ability to return to work.**

schools, including sports, should be curtailed until the pandemic is under better control to reduce transmission risk.

10. No nutritional supplements, medication, or other agents prevent COVID-19 disease acquisition or recovery in children.
11. Children who are well but who have an infected household contact should remain at home for 14 days from the onset of the contact's symptoms. There should be no requirement for children to have a negative SARS-CoV-2 test before being allowed to return to school.
12. Children who have a SARS-CoV-2 infected classroom contact, defined as close contact (less than 1.5 m) with an infected learner or teacher for 15 or more minutes while not wearing a mask should be advised to stay at home for 14 days.
13. If a child develops symptoms of COVID-19 disease, he/she should be tested. If negative, he/she can return to school immediately. If positive, or if no testing is done, the child will have to remain at home for 14 days from the onset of his/her symptoms (see National Institute of Communicable Diseases guidelines).⁶
14. Children with high-risk individuals at home (such as the elderly) should be advised to reduce contact time with them and do this more safely (e.g. wearing a mask during contact time), with more vigilant attention to home cleansing, and developing a home routine that minimises risk such as limiting the sharing of towels and kitchen utensils.
15. There is no consensus on what constitutes a school outbreak and when a school should be considered for full or partial closure because of an excessive number of COVID-19 cases. This situation can be managed by educational authorities in conjunction with public health experts on a case-by-case basis once schools reopen. Entire school closures should be avoided unless necessary. Individual class closure(s) is/are a more practical and sustainable solution.
16. Regular reassessment and evaluation of the situation will be crucial over the forthcoming months. A routine school monitoring system for COVID-19 infections in learners and staff should be instituted by the DBE.
17. We acknowledge that parental anxiety is not unfounded, with some children at higher risk for severe disease. Parental and caregiver autonomy must be respected. High-risk children and those children whose caregivers elect not to send them to school are as entitled to education and efforts should continue to facilitate this.

These recommendations may, and will, be amended based on emerging and accumulating evidence.

References

1. Viner RM, Mytton OT, Bonell C, et al. Susceptibility to and transmission of COVID-19 amongst children and adolescents compared with adults: a systematic review and meta-analysis. medRxiv 2020.05.20.20108126; doi: <https://doi.org/10.1101/2020.05.20.20108126>.
2. Zhu Y, Bloxham CJ, Hulme KD, et al. Children are unlikely to have been the primary source of household SARS-CoV-2 infections. medRxiv preprint server 2020 doi: <https://doi.org/10.1101/2020.03.26.20044826>
3. (NCIRS) NCFIRaS. COVID-19 in schools - the experience in NSW. Sydney: NSW Government, 2020.
4. Held L. A discussion and reanalysis of the results reported in Jones et al. 2020. OSFPREPRINTS 2020
5. Viner RM, Russell S, Croker H. School closure and management practices during coronavirus outbreaks including COVID-19: a rapid systematic review Lancet Child Adolesc Health 2020; 4: 397–404.
6. National Institute of Communicable diseases. Clinical management of suspected or confirmed COVID-19 disease. Version 4 (18th May 2020). <https://www.nicd.ac.za/diseases-a-z-index/covid-19/covid-19-guidelines/>