Children, classrooms and challenging behaviour: do the rights of the many outweigh the rights of the few?

Gillett-Swan, J. K., & Lundy, L. (2021). Children, classrooms and challenging behaviour: do the rights of the many outweigh the rights of the few? *Oxford Review of Education*. Advance online publication. https://doi.org/10.1080/03054985.2021.1924653

Published in:
Oxford Review of Education

Document Version:
Peer reviewed version

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Abstract:

Schools present a unique context for the generation and resolution of human rights conflicts. While the conflicts that arise are many and various, a common response appears to be the prioritisation of the rights of the majority, whereupon the rights of the many trump the rights of the few. However, the intersection of multiple stakeholders, and multiple interests and rights, requires decision-makers to identify the rights at stake for all and address conflicts in ways that are both principled and transparent. Drawing on an established body of human rights theory and using the example of children whose behaviour is causing disruption as a case, this paper offers a rights-informed approach and model to consider responses to some of the tensions and conflicts that can arise between students in schools. While acknowledging that (a) the resolution of these disputes will turn on individual facts and contexts and rarely be clear-cut and (b) that human rights theory and law on this issue is also complex and contested, we suggest that a rights-informed response should, and would usefully, be applied in situations when the interests of one child appear to conflict with the interests of others in the school context.

Introduction

Schools provide rich soil for the generation of conflicts between individual children and their peers and teachers. They also provide a unique domain for the consideration of implementing international human rights law generally but, more specifically, for resolving potential conflicts of rights between the diverse individual rights-holders who are required to attend them (Lundy 2005). Schools are usually the first place that the child ("the rights-holder") encounters the state ("the duty-bearer") on a regular basis. Moreover, children are an unusual group of rights-holders since not only do they have their own rights, but they are also the subject of the rights of others – their parents and guardians. This mix of diverse individual rights and interests provides a cocktail of potential rights claims and conflicts, involving a diverse array of actors. A current example is the return to the classroom during the COVID-19 pandemic, where the competing rights of education, health, and safe working environments are among those in play (Maguire & McNamara 2020).

There have been longstanding debates about responses to conflicts of rights in the school context. Most of these discussions have focused on minority rights such as the rights to freedom of expression and conscience, with the focus of the conflict in such cases on that between parents and their children (Harris 2007; Lundy 2005). There has been less discussion about how to respond to apparent rights conflicts when the conflict is peer to peer, and more particularly when the rights of the majority of children are in tension with the rights of a minority or an individual child (Perry-Hazan 2019). Similarly, a "teacher's right to teach" appears a common (albeit erroneous) response when a potential rights conflict involves

learning disruption. While there is no "human right to teach", teachers do have a right to a safe working environment. Moreover, as a duty bearer, a teacher has the obligation to fulfil the rights of *all* rights holders in the class – including the child/ren at the source of the disruption. However, in this instance, these rights belong to the children, not the teacher.

For the purpose of analysing conflicts of rights in the school context, we have simplified the description of actors to those whose rights are in the minority ("the few") and whose rights are in the majority ("the many"). The "few" may involve an individual, or a sub-group (e.g. children with disabilities) relative to the majority ("the many") whose rights are thought to be in opposition to each other. In some instances, there may be multiple actors who can be considered separately as "the few". For instance, using mandatory vaccination as an example, the right to education, right to health, and freedom of religion may be some of the rights in tension. The different "few" may involve an unvaccinated child/ren, an immuno-compromised child/ren in their class, and/ or a pregnant teacher or parent. There are also numerous other examples of contemporary rights tensions in education that may or may not lead to conflicts, including when there is opposition to comprehensive sexuality education (relationships and sex education) being taught (Gillett-Swan & van Leent 2019) or children taking part in climate change strikes (Mayes & Holdsworth 2020).

Responses to such "many/few" tensions in education have been handled in what seems at best to be a case-by-case basis but may in fact simply be *ad hoc*. The lack of a systematic process in resolving these tensions "on the ground" not only leads to greater potential for rights breaches to occur but denies children and their parents the type of accountability which is at the foundation of human rights law. This article begins by looking at the challenges faced by schools, principals and teachers to whom the task of resolving conflicts falls. It then describes how a human rights-informed approach (drawing on the UNCRC and UNCRPD in particular) could offer a process to address some of these tensions. Its application is demonstrated by drawing on a common but complex manifestation of this dilemma and one that is challenging many schools currently – instances where a child's behaviour is disrupting the class and/or posing a physical danger to other students or staff. In doing so, a principled, human rights-based framework for responding to educational tensions is proposed that could be used in instances where the rights of one child or a minority appears to conflict with the rights of others in the context of school.

At the outset, it should be noted that the analysis presented focuses on the international legal obligations under the UNCRC and UNCRPD[1]. Not all countries have ratified these Conventions and their status in domestic law varies across contexts, with some countries incorporating on ratification, some incorporating fully via constitutional or domestic law and some incorporating on a sectoral basis within domestic legislation (Lundy, Kilkelly & Byrne 2014). However, in all instances, the States parties that ratify UN treaties have committed to implementing them fully. For example, Article 4 requires that states 'undertake all appropriate

[1] The UNCRPD includes for children a right to an inclusive education (United Nations 2016).

legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.'

The UN Committee on the Rights of the Child has stressed that 'Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental (United Nations 2003: para. 2). In practice, this means that even where the UN treaties are not incorporated directly into domestic law, law and policy at the national level should be compliant with the international legal commitments (Lundy 2012). In some instances, domestic law may go further than international legal comments. Moreover, in many contexts, the domestic court (and in Europe the European Court of Human Rights) will draw on UN treaties to interpret domestic law in a way that is consistent with international law (Kilkelly 2001; Kilkelly, Lundy & Byrne 2021). In summary, domestic laws, policies and practices do not always mirror international human rights law but they should, and if challenged in court, the international provisions will in some instances be directly enforceable and in others will be used to inform understanding of the domestic legal obligations (as illustrated in the examples discussed below). In this respect, what follows is a consideration of what a domestic approach could and should look like if it were to be consistent with international human rights legal standards.

"Many-few" tensions and school decision-making

When schools are faced with these dilemmas of potential conflicts of rights, they may turn to official guidance such as codes and standards. However, nuances in the day to day realities of resolving educational dilemmas on the ground may not be adequately reflected in these codes and standards. Ultimately, any decision that requires consideration of possible moral or ethical dilemmas in education contains varying levels of subjectivity in the determination and rationalisation of the decision. Therefore, it has been suggested that 'the problem lies not so much in the codes themselves, but in the fact that we sometimes expect too much from them with regard to moral decision making' (Shapiro & Stefkovich 2011:22), particularly in instances when immediate decisions must be made in an attempt to reduce the potential for harm to oneself or others.

A common, yet challenging, manifestation of the need for immediate decisions is in the management of disruptive behaviour. When a child's behaviour is considered to be too disruptive to remain in the classroom and/or school, a common response is removal of that child, either temporarily, for a fixed period, or permanently (Daniels et al 2019). While this may resolve the immediate disruption, it does little to consider and respond to the rights-based implications of such a decision for all actors. Exclusion may also be a breach of the right of access to education (United Nations 2016). Justifications for the removal of the child (if provided) may focus on a purported rationale of communal justice, with decisions based on a general perception of fairness, or justice, and ultimately, a claim that it is an appropriate balance between 'the rights of individuals versus the greater good of the community' (Shapiro & Stefkovich 2011:12). While policy may frame this practice as a procedure, it ultimately

presents a moral dilemma and a conflict of human rights, even if it is not always understood or positioned this way.

Building on the above example, while school exclusion may provide an immediate response to eliminating the perceived threat, it does little to ensure that the rights of the child/ren in question are at the centre of the decision and considered equally alongside the range of other individual rights holders. The justifications for school exclusion or restrictions appear to draw upon a many-few based argument; for example, the costs associated with adapting existing educational provision to provide reasonable accommodations for the education of one/few relative to undue burden on the school (Dickson 2018) or whether the child's behaviour would impact the learning or achievement of other children (Daniels et al 2019). School exclusion does not just relate to disruptive behaviour. Social, political, cultural, religious, geographical, medical and other barriers that may limit a child's access and rights to education may also influence a child's exclusion *from* school and/or access *to* school, placing the rights of the individual in possible tension with the rights of others. This can occur, for example, where the exclusion is based on grounds of health/medical reasons rather than behaviour (e.g. *Kunkel et al vs NKY Independent Health Department et al*) or cultural beliefs (e.g. Sudduth, 2009).

Though such dilemmas for the decision-maker are determined on a case-by-case basis, in practice, there appears to be a tendency for the perceived 'best interests' of the majority to outweigh the rights and 'best interests' of the individual. The following witness statement in the *Report of the Select Committee on Access to the South Australian Education System for Students with Disability* (Parliament of South Australia 2017:128) stated: 'the consistent messages I got from schools were from people saying, "we're not equipped to manage this sort of behaviour," and "the needs and the safety of other children outweigh the needs of the one."' Graham et al.'s (2020:235 *emphasis in original*) research found similar with 'most principals, and many teachers, were of the view that there needed to be *other* schools for students with behaviours of concern to attend. These respondents called for more segregated special schools for children with disability, especially those on the autism spectrum, citing a belief that the rights of students without disability to trump the rights of children with disability to an inclusive education.' Principals also identify clear tensions between the rhetoric of putting the needs and interests of each individual child first and meeting the collective needs of the entire student body (Swayn 2018). In practice, '[e]ven though administrators would like to consider the best interests of each and every student, they viewed their thinking, decisions, and actions in accordance with the best interests of all students as taking centre stage in the daily operation of their schools' (Frick et al. 2012:228).

The interests of the majority are also evident when school-based tensions draw the attention of media and become the subject of wider public scrutiny and debate. In some cases, conflicts of rights may escalate to the point where they end up the subject of litigation and resolution by courts. Management of behaviour seen to be disrupting others and/or violent *(e.g. Connor v State of Queensland [Department of Education and Training] 2020)*, school access and provision for children with disability and/or additional support requirements *(e.g. C & C v The Governing Body of a School [2018] UKUT 61 (AAC)*, curricular content (*e.g. Parker v. Hurley, 514 F. 3d 87 [1st Cir. 2008])*, and health risks associated with communicable diseases (e.g.

Kunkel et al v NKY Independent Health Department et al. 2019) are a selection of examples that frequent public discussion around the world. As these conflicts continue to confront schools and their leaders, there is a pressing need for educational leaders to have access to a process and criteria that allow them to respond transparently and fairly to the tensions that may occur in schools. We suggest that a human rights-based framework, although rarely applied and/or understood (Power & Scott 2014), is one based on the existing body of legal, ethical and moral principles incorporated within human rights law.

Human rights, conflicts of interest and education.

Human rights law provides a set of standards for addressing disputes when competing interests are at stake. As Donnelly has observed, '[r]ights are actually put to use, and thus important enough to talk about, only when they are at issue, when their enjoyment is questioned, threatened, denied' (2003:8). An ongoing challenge can be that rights-holders often view their rights as not just individual but absolute so that when they appear to be breached, they fail to comprehend why their claims might be rejected. In reality, few rights are absolute: in schools and elsewhere the rights of one human often conflict with the rights of others and a resolution of that conflict is required. Human rights standards provide a legally endorsed framework to inform this process, but that requires understanding of which rights are, in fact, at stake.

Education rights are often summarised as a singular right 'to' education, a phrase that fails to capture the scope and remit of this multifaceted right (Lundy & Brown 2020). Instead the right is better classified as rights *to, in* and *through* education (a typology suggested by Verhellen 1993). Moreover, even the category of the right 'to' education cloaks a complex weave of rights since the right 'to' education encompasses both access to an educational environment and the goals of education – the learning. This can become muddied when conflicts arise, with emphasis placed on issues of access rather than the goals of the education itself. In particular, children's right to an education should meet the comprehensive and ambitious statement of the aims of education in Article 29(1) of the Convention on the Rights of the Child (United Nations, 1989) which includes each child's full and holistic development, preparation for 'responsible life in a free society', and 'development of respect for human rights and fundamental freedoms.' Children with disability also have the right to *inclusive*[2] education (United Nations 2016).

Understanding the ambit of the education rights involved is significant for discussions of conflicts of rights in schools as the debate is often presented as the right of one child 'to' education versus the rights of other children 'to' education. In the first case, the right to education is understood as a right of access to the school itself. In the latter, the right 'to' education is understood as the right to learning. All children should enjoy both. Moreover, what is also sometimes omitted from discussions of conflicts in schools are the child/children's rights 'in' education, such as the rights to be heard, to freedom of conscience or information. Children

[2] The right to inclusive (rather than segregated or integrated) education is a right afforded to the child, not the parent (United Nations 2016).

are also entitled to be protected from harm – including protection from harm that they might inflict on themselves.

Moreover, an important cross-cutting right is the best interests principle which requires that in all actions concerning the child, the best interests of the child are 'a primary consideration' (Article 3 UNCRC). Educational leaders are required to make decisions on a daily basis to protect the 'best interests' of each member of the school community, though what constitutes one child's 'best interests' or indeed the best interests of a community of school-children is often contested. On this, the UN Committee on the Rights of the Child's General Comment 14 (2013) states that decision-makers:

> *shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations* (§6c).

Even so, determinations of best interests remain 'indeterminate and opaque, so that it tends to be invoked from different sides to justify sometimes opposing decisions' (Vandenhole 2017:26). More problematically, best interests are often equated to welfare or safety, which is a misreading (Eekelaar & Tobin 2019). The Committee has been clear that applying the best interests test involves a consideration of all of the child's rights and must include respect for the children's wishes as well as those of their families. So, for example, if a child poses a danger (physical or emotional) to others, that individual child's rights (not just their right to education) must be considered taking into account the child's own wishes and views. Likewise, the rights of the other children (not *just* their right to be protected from harm) must equally form part of the consideration for the decision.

In a similar vein, the child's right to be heard is a crucial, yet often overlooked, part of school practices and decision-making processes. This right becomes even more pertinent when decisions about possible rights tensions in the school context have the high-stakes outcome of possible exclusion. Ensuring children's input is considered equally alongside other stakeholder views, enables a greater understanding of how each child may be experiencing the potential rights conflict, and indeed, whether it is even an issue for them at all. For example, despite its prevalence as a rationale for exclusion, little is known about how other children think about or respond to children who are disruptive (Perry-Hazan & Lambrozo 2018). While much is said about the impact on the education of 'the many', it may be that other children are more tolerant of this than is expected. In fact, students may welcome some of that disruption, particularly when it is an indicator of boredom that may be felt by more children than the child who is being disruptive. What if, in fact, in some instances, this behaviour is a barometer for poor pedagogy? Or if the other children have simply managed to work around or through some disruption? For example, Szumski et al's (2017) meta-analysis of the impact of inclusion of students with disabilities found no evidence of negative impact on students without disability and that result held even when including students with severe emotional and/or behavioural disorders.

In summary, education rights are not just contested but complex. Responses that jump straight to prioritising the rights of many rights holders over the rights of one other human being are

simplistic and will often be wrong. Rights are afforded at the individual level: they do not in themselves become more persuasive or important based on the number of people claiming them (Jones 1999). If decision-makers such as principals are to effectively manage apparent rights tensions in a way that respects the rights of *all* actors, they could (and indeed should since it is a legal requirement) adopt a human rights-based process. In the following section, we propose a process for addressing these conflicts, informed by an existing body of international human rights law and theory.

The 3Cs model of resolving conflicts of rights at school

We suggest there are three stages in resolving conflicts of rights in the school context. These involve:

1. **Classifying:** Identify *all* of the rights at stake for *all* actors involved to be sure that there is in fact a conflict of rights.

   If there is a conflict:

2. **Compromising or Choosing:** Reconcile where possible but, if a compromise is not possible, balancing the rights at stake.

   If this is the decision:

3. **Continuing:** Persist to ensure that, *if* an individual's (or individuals') rights are denied, that continual effort and action is taken to realise the right in question as soon as is feasible.

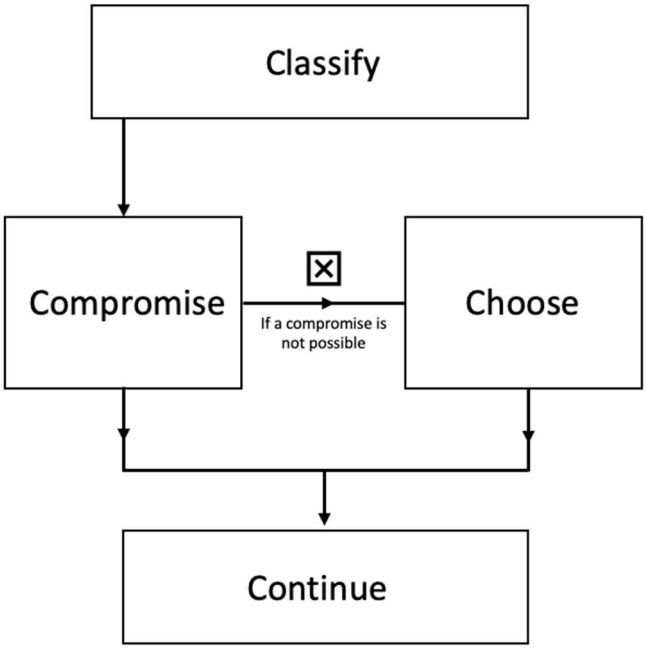

Figure 1. The 3Cs model of resolving conflicts of rights at school

The following sections unpack the proposed model and elaborate on what we mean by an appropriate rights-based response to handling situations when the rights of one child appear to

conflict with the rights of others in the school context. Drawing on an existing framework of human rights theory and principles, the following discussion is based on an analysis of case law and relevant academic literature to extract core principles required to enact a rights-based approach to addressing conflicts in educational decision-making. The examples provided relate mainly to the issue of addressing challenging behaviour at school - selected as this issue is the ongoing focus of public debate and scrutiny

Analysis Process: Classify, compromise or choose, continue

The first step in the resolution of any conflict of rights is to identify (**Classify**) which rights are at stake. Freeman has observed that 'apparent conflicts of rights may sometimes be resolved by carefully specifying the scope of rights' (2011:83). This necessitates answering two questions: *whose rights* are at stake and *which rights* are at stake. The first of these is interesting in the classroom context. In many instances, the rights of an individual adult will be in conflict with the rights of another individual or group of adults. Schools, on the other hand, are a venue for a complex weave of relationships. Within the mix of rights-holders can be the individual child, his or her peers, his or her parents and teachers and other staff. While not all rights-holders may be involved in the potential clash of rights at all times, their individual rights need to be reviewed individually to ensure that everything that is at play is identified and considered. Given the complexity of this endeavour, it may be a 'missed step' in existing considerations.

In the case of disruption/disruptive behaviour, the conflict of rights is generally seen to be between the individual child and the other individual children in the classroom (Article 28 UNCRC), unless the child's behaviour poses a physical danger not only to his or her peers (Article 19 UNCRC) but also to the staff (Article 7 ICESCR). It may also be based on the potential impacts on the teacher (e.g. burnout, stress) or the child impeding the teacher's 'right to a safe working environment.' In this way, the actual or perceived disruption that may be caused by one ('the few') is also considered to impact on the learning of the rest of the class ('the many'). This does not mean that the individual child posing the potential physical danger to others automatically loses their rights. Instead, it highlights the importance and complexity associated with the identification of *all* the rights at stake for *all* stakeholders.

Responses to student disruptions are often considered sufficient grounds for behavioural intervention – sometimes to the point of student exclusion, suspension, or removal from the class (temporary or enduring) (Cole et al. 2019; Dickson 2008; Valdebenito et al. 2018). Risks of exclusion may also be increased if children experience 'intersecting vulnerabilities' where 'inter-related factors can be at play, which can overlap and possibly have a multiplier effect' (Graham et al. 2019:16). Children and young people at greater risk of exclusion are 'more likely to have additional or special needs, to live in families affected by poverty, ill health and/or trauma, and are more likely to be male than female' (McCluskey, Riddell & Weedon 2015:596). It is therefore possible that there are more rights in play than what may appear on the surface: it is rarely as 'simple' as considering the right of access to education for one individual alongside many individuals' *individual* right to education.

Stage 1: Classify and collate? - Identification of the rights at stake [C1]

Human rights are indivisible, inter-related and inter-dependent (Vienna Declaration 1993). While not all rights are at play in every instance, it is rarely the case that only one right is at issue in any given matter of contention. Identifying the rights Identifying the rights requires consultation with the rights holders - including children themselves. However, the child's perspective is often missing/absent from discussions about their education (Lundy 2007). And it is not just the child at the centre of the tension ("the few") whose views are important. In identifying the rights at stake, all stakeholders need to be heard, not least to help determine which rights are impacted and how a decision might be taken that is in the best interests of the children affected (Art.3(1) UNCRC).

Taking the example of a child with a disability whose behaviour is disrupting the class, the following rights could be said to be at stake:

The individual	*His/her peers*	*The teacher*
• **Inclusive** education (e.g. Art.24 CRPD; Art.28 and Art.29 CRC) • Protected from harm (e.g. Art.19 CRC; Art.16 CRPD) • **Not to be subjected to inhuman or degrading treatment (**e.g. Art.37 CRC; Art.15 CRPD) • Best interests (Art.3 CRC) • **Non-discrimination** (Art.2 CRC; Art.5 CRPD) • Views given due weight **(**e.g. Art.12 CRC; Art.7 CRPD)	• Education (Art.28 and Art.29 CRC) • Protected from harm (Art.19 CRC) • Best interests (Art.3 CRC) • Views given due weight (Art.12 CRC)	• Safe and healthy work conditions (Art.7b ICESCR) • Material conditions of teaching staff continuously improved (Art.13.2e ICESCR) *ICESCR (1976)* *CRC (1989)* *CRPD (2007)*

In the example of a child with disability whose behaviour is disrupting the class, a key question is whether it is the *enjoyment* of the right (to inclusive education) that is at issue here, or, is it the *violation* of the right that is causing the interference with the rights of others? If it is a violation, then the state must do all that is reasonable to address the violation, as '[p]lacing students with disabilities within mainstream classes without accompanying structural changes to, for example, organisation, curriculum and teaching and learning strategies, does not constitute inclusion' (United Nations 2016:§11). If no violation, can the competing rights be reconciled? That is, can the conflict between the right and a competing right can be resolved in a less restrictive way? This is explained further below.

Stage 2: Compromise or choose? Reconcile or balance the rights in tension [C2]

When a conflict of rights arises, such as where a child's behaviour is disrupting the education of other children, a decision must be made about whether and how the rights in question can be realised and whether, if at all, a right might need to be restricted. What appears to happen in practice is that the individual child's right to an (inclusive) education is denied and justified on the basis that interferes with the right to education of the other children. The evidence indicates that this often ends with a simple maths equation: the rights of the many outweigh the rights of the few and the child is excluded, often permanently (Daniels & Cole 2010; Daniels et al 2019; Graham et al. 2020). However, this approach (although not always the outcome) is fundamentally wrong from a human rights perspective - the rights of the many do not and cannot automatically outweigh the rights of the few.

A rights-based approach can be distinguished from utilitarianism: human rights are founded in dignity, equality and respect for the individual human person and that cannot be set aside for the 'greater good' (Waldron 1993:211). The test that is applied is one of 'proportionality', a concept that is the focus of extensive academic debate and legal discussion (Klatt & Meister 2012; Möller 2012). The complexity of the issue is of little solace to schools and teachers faced with these decisions on a daily basis and may explain why they resort to a many/few balance. However, Xu and Wilson, having addressed the tensions and debates around handing conflicts of human rights, suggest that:, 'No matter what methods we use to resolve CHRs [conflict of human rights], there are usually two types of results: either one of the conflicting rights overrides the other, or a compromise is reached between the conflicting rights' (Xu & Wilson 2006:40). Applying this to schools, this means doing one of two things: having identified the rights at stake, either compromising (i.e. deciding if there is another way in which a child's rights might be realised even if that is to a lesser extent for the individual or other children involved) or, if that is not possible, balancing the rights to choose which and whose rights will prevail. These steps are discussed below.

Compromise – all involved make some sacrifice

When one child's rights in a school context are perceived to be in conflict with those of another child or their parents, there can be a rush to 'balance' these rights to effect a resolution which determines whose rights are to be denied and whose are to be respected. However, this approach omits an important next stage in handling a conflict of rights – that of an attempted reconciliation of the rights at stake. This stage also recognises that rights are not 'absolute' and, importantly, that not being able to fulfil a right completely does not mean that there should not be an attempt to fulfil it all (Lundy 2018). In this respect, Freeman has suggested that 'a better approach may be to respect all rights, but, when some sacrifice is unavoidable, to distribute the sacrifice fairly' (2011:83). This raises the question as to how rights that are conflicting might in a given instance be reconciled in ways that one or other of the parties experiences a reduction or limitation on what otherwise might be considered to be full enjoyment of the rights.

Taking the instance of a child with a disability whose behaviour is disrupting the education of other children, an acceptable compromise might be to give the child opportunities to leave the class to settle down. It might even justify a reduced timetable if that is what is needed for a

time to enable the child to stay in school. Likewise, the other children may need to accept a level of disruption or distraction that comes from accommodating a child with a disability in the class. Reconciliation might also take other forms depending on the rights in question. For example, schools may ask children whose behaviour is noisy to work in a different space during certain activities (such as exams). That said, there remains the potential that reconciliation is either not possible or not tolerable in which case the next option – balancing the rights at stake – is required.

Choose – determining which rights will prevail

Freeman (2011:6) observes that 'human rights may not be "compossible", that is the implementation of one human right may require the violation of another, or the protection of a human right of one person may require the violation of the *same* human right of another'. Compossibility of children's rights in a classroom context is a likely outcome in some cases and requires a process designed to balance the rights in question. This involves a decision around proportionality, a common (albeit contentious) term in legal cases (Legg 2012). Möller (2012:715) defines the proportionality test as follows: '[t]he question is whether the interference with the right is justified in light of the gain in the protection for the competing right or interest. To this end, the two values have to be "balanced" against each other'. This requires us to ask if the rights are 'commensurable' and in Möller's view, '[b]alancing is about the sacrifice that can legitimately be demanded from one person for the benefit of another person or the public' (2012:716).

An example of balancing in relation to a child with a disability whose behaviour is disruptive can be demonstrated through the UK case of *C&C v The Governing Body of a School, The Secretary of State for Education, and The National Autistic Society 2018,* - a legal challenge to regulations that allowed schools to exclude children for violent behaviour on the basis that the regulations discriminated against children with disabilities. The judge describes the key issue as follows: 'bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has fair balance been struck between the rights of the individual and the interests of the community?' (§56). It is striking that the court highlights the additional weight to be given to education by drawing on a decision by Lady Hale where she says that education is different because it 'a right constitutive of a democratic society' (§43). In looking at the consequences, the court concluded that 'excluding such children often has a massive impact on them' and listed examples to include the fact that the child would struggle to get another placement; be out of school for a long time; and may end up in pupil referral unit with 'inappropriate peer groups, exposed to significant misbehaviour' (§80). He concluded that 'it would be hard to overstate the impact of [the regulation] on this particularly vulnerable cohort of children.'

In this case, limited argument or evidence was presented on the other side of the balance to suggest what harm, if at all, having a child with disruptive or physically challenging behaviour might have on the other children or staff. The government argued that other pupils and staff should not be required to tolerate a certain level of school violence, even from those who have an underlying disability (§19). However, counsel for the child at the centre of the case ('L') argued that excluding children would not make their aggressive behaviour go away:

'it simply moves the problem to another part of the education system' (§19). The court concluded:

> *I am firmly of the view that regulation 4(1)(c) comes nowhere near striking a fair balance between the rights of children such as 'L' on one side and the interests of the community on the other. The profound severity of the consequences of the measure on the status quo weigh extremely heavily and the arguments put in favour of the countervailing interest by no means counterbalance them. Indeed, in my judgment, this is not a case in which the issues are finely poised,* (§89)

Nuances of the complexity of the rights and considerations in play are emphasised and acknowledged through this decision. While in 'L's case, the regulations were considered unlawful, this is not always the outcome. In which case, the final stage of the model (**Continue)** comes into play.

Stage 3: Continue - Persistence in the pursuit of rights [C3]

If an individual has been denied the right to education in some form (e.g. excluded from school) as an outcome of a balancing exercise, that should not be the end of the story from a human rights perspective. Waldron (1993:215) emphasises that:

> Since rights generate not single duties but what I have referred to as successive waves of duty, the trading off of one right against another, in a situation of conflict, is never the end of the story.

This aspect of the resolution of a conflict of rights is not widely understood or applied. In fact, there appears to be an assumption that, when rights are balanced, the winner not only takes all but that is the end of the matter. However, the human right does not cease to exist and nor does the obligation to respect, protect and fulfil it. So not only must education be provided while the child is outside school, but the state should also be doing all that is reasonable to secure their re-entry to inclusive education. Evidence suggests, however, that once a child is excluded, they often find it difficult to re-join their school or indeed any mainstream education (Daniels & Cole 2010; Graham, van Bergen & Sweller 2016), or even end up in juvenile detention (Graham, Sweller & Van Bergen 2010). A rights-based response would be to continue to all that is possible to secure the child's re-entry in ways that do not reopen a conflict of rights with the rights of other children. In some instances, the facts will change and that in itself will change the balance of rights or dissipate the conflict. Yet a challenge in such cases can be the damage done to relationships when a child is singled out for a loss because of the interests of other children. Ensuring a fair and transparent process could, however, be a step towards maintaining relationships during such conflicts and thus increasing the possibility of a successful re-entry. Embedding the continued persistence in pursuit of rights within education policy is one way to support school base implementation and *prevention* of rights breaches when seeking resolution of rights conflicts in education. If school staff, teachers, parents, and children know that the child/children whose rights may have ended up being restricted for a period, must 'come back in', there may be more attention/effort paid to resolving these tensions through mutual compromise earlier in the process. While the model introduced above outlines a rights-based response for when rights conflicts are occurring (or have occurred) in the school

context, it also offers a way forward for the prevention of rights breaches and pre-emptive processes for when rights tensions may begin to emerge to avoid their escalation.

Conclusion

Conflicts of wishes, interests and demands in classrooms are inevitable. Some of these will be resolved amicably through negotiation and compromise, some will be anticipated and provided for in advance by educators and/ or state regulation, and some will end up a matter of dispute and/ or in court. In every case, there will be a need to identify what is at stake for the individuals concerned and to provide a reasoned approach to addressing this in a way that is both fair and transparent. When it comes to educational decision-making relating to determinations about educational rights, it is clear these are socially complex and "wicked problems" given the need to reconcile multiple views held by multiple stakeholders, with the dilemma of providing a solution where no clear right or wrong solutions exist (Bon 2018; Swayn 2018). However, human rights law offers a principled framework to better understand and unpick what is actually at stake. The human rights-based framework, while undoubtedly complex and often contested, is, we suggest, the best available vehicle for addressing potential conflicts of rights in education given its widespread endorsement and, most importantly, its legal status. It provides those tasked with implementing an acceptable solution, at a time when interests clash and feelings may be running high, a logical process for doing so. The process of applying a rights-based framework such as the '3C's' to the example in question (challenging behaviour) illustrates the complexity that principals and school leaders face on a daily basis when needing to resolve rights-based educational conflicts.

We suggest that the tendency for decisions to err on the side of the interests of the majority automatically outweighing the interests of the individual/few is a default position that has been insufficiently problematised. These decisions need to be supported by a defensible rights-based response to resolution and recognise that responses that jump straight to prioritising the rights of many over the rights of one are simplistic, will often be wrong and may be illegal. While most stakeholders, not just courts but policymakers, schools and indeed rights-holders, use the language of rights and 'balancing' to describe and justify their responses when resolving rights tensions, the discussion is often partial and to some degree ad hoc. It is often a small set of rights or rights holders that are identified or there is no attempt to consider or effect a reconciliation. Moreover, when the rights are 'balanced', the scales in the balance have the habit of tipping away from the individual child towards the wider interests of other children or adults concerned. What needs to be recognised is that not being able to fulfil a right completely does not mean that there should not be ongoing attempts to comply as fully as possible (Lundy 2018). Moving forward in a way that will enable schools and others to address potential conflicts of rights in the school context, we suggest that there would need to be a revised focus on a systematic process and adequate evidence underpinned by an understanding of national and international human rights obligations, such as through the 3C's model outlined above.

We acknowledge that there are ongoing criticisms of human rights frameworks with some questioning whether rights can truly come into conflict with one another at all. However, the

reality is that human rights (and children's rights) exist, and are legally binding, and are directly relevant to the experiences and decision-making practices faced by schools on a daily basis. A framework alone will not solve these issues, but it may help in providing a transparent, principled response to resolution. There also remains a need for more transparency and accountability in educational decision-making when rights appear to be in tension, and a clear process for educators and school leaders to follow when making these decisions. For that process to be children's rights compliant, it must, above all, involve children themselves.

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