



CHAPTER 4

LEARNER ADMISSIONS

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INTRODUCTION

Over the years a concerning trend has been observed, of thousands of children being unplaced in schools – in particular, those in grades 1 and 8. Every year a large number of learners do not secure suitable placement in the first term of the school year, and are placed much later or remain unplaced for the entire school year, losing out on the teaching of curriculum and on having access to education.

There are varying factors which adversely affect the admission of learners to ordinary public schools. These include:

- Exclusionary and/or inaccessible admission practices at school and district level (for example, schools requiring parents to sign 'admission contracts' binding themselves to pay the full amount of school fees and not exercise their right to apply for a fee exemption)
- Late applications by parents or caregivers
- Migration of learners between provinces
- Parents only applying for admission to one school of choice
- Overcrowding, particularly in rural and previously disadvantaged areas, and oversubscription to specific schools; and
- Lack of a clear and reasonable timeframe in which Heads of Department and Members of the Executive Council are required to attend to matters relating to learner placements that are brought to their attention, taking into account the best interests of the child, the right to education, and the urgency of the matter.

Everyone has the right to basic education, which is unequivocal and unqualified. Failure and/or refusal to admit learners to ordinary public schools is a direct violation of such learners' rights to basic education. In this chapter we look at the regulation of learner admission to public schools (both ordinary and special schools) in South Africa. We also look at the key role players for learner admissions, the admission process, and some of the challenges around exclusionary admissions practices.



LAW AND POLICY

ACCESS TO BASIC EDUCATION AND THE CONSTITUTION

The Constitution of the Republic of South Africa guarantees everyone the right to basic education. The right to basic education is interlinked with several other constitutional rights, such as the right to equality, the right to have one's dignity respected and protected, and the right of children to have their best interests considered in any matter concerning them.

In Section 7(2), the Constitution says that government must "respect, protect, promote, and fulfil" these constitutional rights. This means that the government must take positive steps to ensure that everyone has access to basic education, and must ensure that the right of each person is enjoyed freely without any interference and/or obstruction. The right to access

basic education must also be protected against unfair discrimination based on culture, language, social groups and/or individual differences.

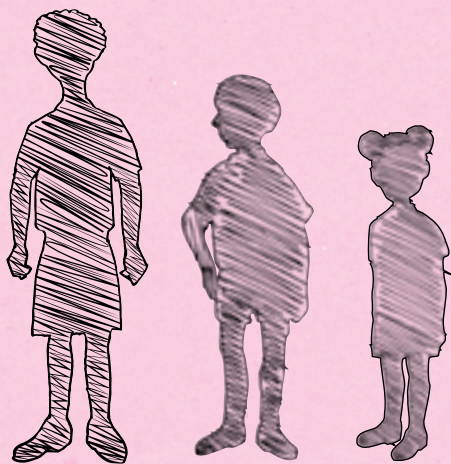
Basic education is an immediately realisable right, and is not dependent on the availability of government resources. The state organ responsible for the provision of basic education is the Department of Basic Education (DBE). The DBE must cater to all grades, from grade R to grade 12, including Adult Basic Education.

THE REGULATION OF LEARNER ADMISSION TO ORDINARY PUBLIC SCHOOLS

The National Education Policy Act (NEPA) authorises the government to make national policy for "the admission of students to education

institutions, which shall include the determination of age of admission to school". To give effect to this, the South African Schools Act ('the Schools Act') has been promulgated, together with other key policies such as the National Admission Policy for Ordinary Public Schools ('the Admission Policy').

The Schools Act was enacted to give effect to a transformed basic education system that would serve all learners, and in particular previously disadvantaged, marginalised and vulnerable groups. The preamble of the Schools Act addresses the need for a **new** national education system for schools which will redress the injustices of the past in education. It also repeats the fundamental constitutional values of equality and the combatting of unfair discrimination.



LEARNERS WHO ARE ABOVE THE AGE-GRADE NORM

The Schools Act defines a learner as “any person receiving education or obliged to receive education in terms of the Schools Act”.

Section 3(2) of the Schools Act says that the Minister of Basic Education must determine the ages of compulsory attendance at school for learners with special education needs. Despite this, the Minister has yet to determine the compulsory school going age for these learners.

Clause 26 of the Admissions Policy says that learners must be admitted to public schools and placed in different grades according to their age requirements.

Clause 27 deals with learners who have been admitted at an age above the age norm for the grade. The age-grade norm means the age that a learner must be in a grade – taken as the grade plus 6 years, for example 7 years in grade 1 and 15 years in grade 9. The maximum age for admission to a grade is two years above the age-grade norm, for example 17 years in grade 9.

Clause 27 presents two options for the admission of learners who are above the age-grade norm:

Option 1 – As far as possible, the learner must be placed in a fast-track facility, or with his or her peer group, or

Option 2 – If option 1 is found not to be in the educational interest of the learner, the learner must be placed in a suitable lower grade, and an accelerated programme must be worked out for the learner to enable him or her to catch up with the peer group as soon as possible.

Clause 28 states that the age-grade norm does not apply to a learner who is already enrolled at a public school on 1 January 2000. However, it may apply in instances where it is deemed to be in the best interests of the learner. While at the time this clause may have been necessary to safeguard the interests of learners, currently its practical effect is unclear.

Clause 29 relates to learners who are 16 years old or older:

If such a learner has never attended school and is seeking admission for the first time, or

If the learner is not making sufficient progress with his or her peer group,

Such a learner must be advised to enrol at an Adult Basic Education and Training (ABET) centre.

AGE OF ADMISSION TO SCHOOL

In terms of Section 3(1) of the Schools Act, all learners of compulsory schoolgoing age (between ages 7 and 15, or grade 9, whichever occurs first), must attend school. This section is often interpreted and implemented by provincial education departments (PEDs) to the exclusion of learners 16 years and older (referred to as ‘over-aged’ learners). There are more details on this below.

It is mandatory for all learners of compulsory schoolgoing age (between ages 7 and 15, or grade 9, whichever occurs first) to attend school. Parents or caregivers must ensure that they apply to schools in order for these learners to be enrolled in a grade-appropriate school. This requirement is often interpreted and implemented in a way that excludes learners who are 16 years or older from the schooling system.

The MEC’s obligation to ensure that there are enough school places for all



A learner’s needs must be attended to through the efforts of the learner, and his or her teachers, with support from the learner’s family and peers.

the children in a province should not be interpreted restrictively to apply exclusively to learners of compulsory school-attendance age. The MEC’s obligation to ensure that there are enough school places includes (but is not limited to) learners of compulsory schoolgoing age. Provision should be made by the MEC for enough school spaces for the admission of all learners who seek to complete their basic education. A broad purposive interpretation of the MEC’s obligations under Section 3(3) of the Schools Act is consistent with Section 29(1)(a) of the Constitution. In the case of *Moko v Acting Principal of Malusi Secondary School & Others*, Justice Sisi Khampepe stated: “To limit basic education under section 29(1)(a) either to only primary school education or education up until grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the

term that would fail to give effect to the transformative purpose and historical context of the right.” As such, the Constitutional Court in this matter held that the matric examinations fell within the definition of basic education.

In certain circumstances, a learner may be exempt from the age-grade norm:

- If a learner repeated one or more years at school, he or she is exempt from the age-grade norm.
- If the learner is three years older than the norm age per grade, the Head of Department must determine whether the learner will be admitted to that grade. (Admission Policy, clause 30)
- The norm for repetition is one year per school phase, where necessary. Multiple repetition in one grade is not permissible. (Admissions Policy, clause 31)

UNFAIR REFUSAL OF ADMISSION

A concerned parent was looking for assistance for his 18-year-old son, who had been expelled from school before he could complete grade 10. He applied to three high schools in the area without any success. The schools refused to admit the learner, saying that the learner was ‘over-aged’ and had to go to an ABET Centre.

THE AGE-GRADE NORM

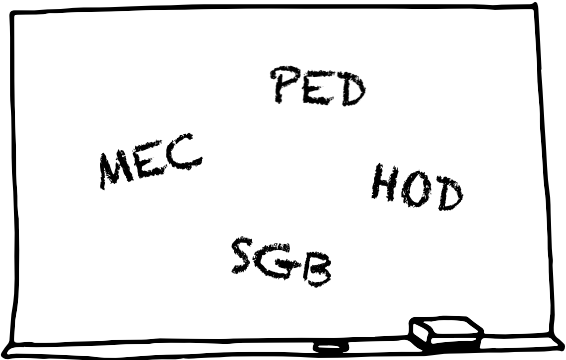
Clauses 31 and 32 of the Admissions Policy say that in principle, a learner should progress with their age cohort, as repetition of grades seldom results in significant increases in learning attainment and often has the opposite result. The age-grade norm is not to be construed as promoting the practice of automatic promotion. A learner’s needs must be attended to through the efforts of the learner, and his or her teachers, with support from the learner’s family and peers.

SECTION 5(4)(A)

Section 5(4)(a) of the Schools Act gives the admission ages for learners to grade R and grade 1 as follows:

- grade R is age four turning five by 30 June in the year of admission; and
- grade 1 is age five turning six by 30 June in the year of admission.

Section 5(4)(b) of the Act says that the Head of Department may admit a learner who is younger than the admissions age as stipulated above if good cause is shown, and if such a learner complies with the criteria set by the Minister of Basic Education.



KEY ROLE PLAYERS

The Schools Act regulates the admission of all learners to public schools, and places certain roles and responsibilities on key role players – such as the Member of the Executive Council (MEC), the Head of Department (HOD), the education districts, the school governing bodies (SGB), and parents – to ensure that all learners are enrolled in a suitable school.

PEDS

The provincial education department (PED) is crucial to admission of learners to school. Section 3(3) of the Schools Act says that the MEC for a province (who is the head of the PED) must ensure that there are enough school places so that every child who lives in that province may attend school. The PEDs have raised many reasons for failure to comply with

their obligation to build enough schools to accommodate all learners in the province. These include the growth of the provinces, immigration, and lack of funding for additional infrastructure and teachers. Section 3(4) says that if an MEC is unable to comply with this statutory obligation due to a lack of capacity, he or she must take steps to remedy such lack of capacity as soon as possible, and must

make an annual report to the Minister on the progress achieved in doing so.

Clause 5 of the Admission Policy stipulates that the HOD must determine a process of registration for admission to public schools, in order to enable the admission of learners to take place in a timely and an efficient manner. The HOD is responsible for the administration of the admission of learners to public schools.

The HOD must coordinate the provision of schools and the administration of admission of learners to ordinary public schools with SGBs to ensure that all eligible public schools are suitably accommodated in terms of the Schools Act. Importantly, the HOD has a responsibility to place a learner in a suitable grade-appropriate school, not necessarily in a school of the parent's choice.

UNPLACED LEARNERS IN THE WESTERN CAPE AND GAUTENG

Table 23.1: Approximate number of unplaced learners in the Western Cape and Gauteng for the years 2017 to 2021.

YEAR	GAUTENG	WESTERN CAPE
2021	917 (grade 1) & 1 484 (grade 8)	2 440 (grade 1) & 5 896 (grade 8)
2020	0	6 027
2019	7 000 (grade1 and grade 8)	3 900
2018	29 000	4 880
2017	124 454	29 330

As demonstrated by the statistics in the table above, year-on-year, the Western Cape and Gauteng have a large number of unplaced learners. This could be attributed to various factors, including in-migration and lack of school infrastructure. At the time of writing this chapter, there were still a number of learners who had not yet secured a place at a grade-appropriate school. For instance, in the Forest Village community of the Western Cape, a large number of learners were unplaced. As a result, a makeshift school was established that operated under the trees in Forest Village.

As a result, an application was instituted by five individuals seeking direct access to the Constitutional Court on behalf of the learners attending the makeshift school in Forest Village. The applicants have brought the application seeking to place their children (as well as others attending the makeshift school in Forest Village), who remain unplaced, as well as seeking the provisioning of psycho-social support. In addition to this, the application seeks a declaratory order, declaring the following:

- That the MEC of the WCED has failed to comply with her statutory and constitutional duties to ensure the availability of sufficient school places for every child in the Western Cape province.
- That the MEC failed to comply with her constitutional and statutory duties in terms of Section 3(3) of SASA.

The application furthermore seeks to compel the WCED to file bi-monthly reports with the SAHRC and the court, detailing:

- The steps taken by the WCED (MEC, Head of Department, and Deputy Director General) to ensure there are sufficient places available for learners at public schools at the start of the 2022 academic year, and
- The steps taken by the WCED to address the need for schools offering isiXhosa as a primary language of instruction in the Forest Village and Eerste River areas.

This application has been dismissed by the Constitutional Court.

CASE STUDY

A CASE OF MISPLACED PLACEMENT

A parent needed assistance with the placement of his grade 8 son for the 2020 academic year. He made an online application timeously in 2019; however, all three schools rejected his applications, informing him that they had no more space to accept new learners. The parent was advised to visit the relevant district office to register his son on the unplaced learners database, and did so. When he did not receive any feedback from the district office, he returned; and was instructed by an official to approach two local schools, as these schools still had capacity to admit his son. When the parent got to these two schools, they refused the learner admission, saying that the schools were full and that they could only admit more learners on the circuit manager's instruction and had received no communication to that effect. The parent went back to the district office, to get some direction. To his shock, he was informed that they could not recall the learner's case, and could not find any record of the learner or parent details on the system. When the parent enquired about the lack of coordination between the office and the schools, the district official revealed that the district office did not keep a database of unplaced learners, and that the schools were responsible for having such databases.

Table 23.2: Legislative Framework for each province.

PROVINCE	LEGISLATIVE FRAMEWORK
Eastern Cape	<ul style="list-style-type: none">• Eastern Cape Schools Education Act 1 of 1999 as amended by Act 5 of 2004• Circular 2 of 2021: 'The Administration of Learner Admissions in Public Ordinary Schools for 2022 Academic Year Section 5 of SASA (1996)'.
Western Cape	<ul style="list-style-type: none">• Western Cape Provincial School Education Act 12 of 1997 as amended by Act 4 of 2018• Western Cape Education Department Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools• Circular 38 of 2020, dated 02 November 2020: 'Dates and time frames for applications for admission to ordinary public schools and the management of school admission information for 2021/2022.'
Limpopo	<ul style="list-style-type: none">• Limpopo School Education Act 9 of 1995.
KwaZulu-Natal	<ul style="list-style-type: none">• KwaZulu-Natal School Education Act 3 of 1996• Regulations relating to the Admission of Learners to Public Schools PN 74 of 5 March 1998• Circular no 21 of 2021: 'Administration of Learner Admissions in Public Schools for 2022'.
Mpumalanga	<ul style="list-style-type: none">• Mpumalanga School Education Act no 8 of 1995 as amended by Act 7 of 1998.
Free State	<ul style="list-style-type: none">• Free State School Education Act 2 Of 2000.
Northern Cape	<ul style="list-style-type: none">• Northern Cape School Education Act no 6 of 1996• Circular 12 of 2021: 'Management of Learner Admissions to Public Schools in the Northern Cape Province'.
Gauteng	<ul style="list-style-type: none">• Gauteng School Education Act 6 of 1995• Gauteng Department of Education School Admission Policy exemplar for Admission of Learners to Public Ordinary Schools• Regulations relating to the admission of learners to public schools (GN 148 of July 2001 as amended by provincial notice 268 of 2019).
North West	<ul style="list-style-type: none">• North West Schools Education Act 3 of 1998• Regulations on admission of learners to public schools, 2013 (PN 1 of 14 March 2013).

EDUCATION DISTRICTS

Each province has education districts. The HOD of a PED may delegate the responsibility for the admission of learners to a school to officials of the department, which includes the district officials. Each district has a District Director, and a team working with the Director. The district office is allocated certain schools in its area. The officials in the district are responsible for assisting parents with placement of learners by assisting with and processing admission applications. If a parent cannot resolve an issue with a school, the district office is normally the first point of call on any education-related matter before approaching the PED. Proper data-capturing systems and management of learner and parent information at district level is of utmost importance to ensure the timeous placement of learners in grade-appropriate schools. Learner admissions require communication and cooperation between all the key role players, which includes the districts, SGBs and schools.

SCHOOL GOVERNING BODIES

The HOD must coordinate the provision of schools and the administration of learner admissions to public schools with the SGBs of the schools. The admission policy of a public school is determined by the SGB of the school; it must be in line with the Constitution and the Schools Act, and with all other relevant laws and policies. This position was confirmed by the Constitutional Court in the cases of MEC for

Education in Gauteng Province & Another v Governing Body of Rivonia Primary School and Others and Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng & Another. An admission policy cannot unfairly discriminate against anyone. For example, a school cannot refuse a learner admission because his or her parents cannot afford the school fees, or because the learner or parent does not subscribe to the mission statement or code of conduct of the school. Section 5(1) of the Schools Act says that a public school must admit all learners and serve their educational requirements without unfairly discriminating in any way; the admission policy must thus allow for this.

- The school must:
- Make the application forms, the school admission policy, and the school code of conduct available to parents who wish to apply
 - Assist parents who may require assistance in completing the application form
 - Ensure that admissions policies do not unlawfully discriminate against learners on the basis of (among other criteria) language, race or financial means
 - If the learner has special needs, the HOD and school principal must take into account the rights and wishes of the parents of such learners
 - The principal must keep a register of admission, recording all the admissions of learners to the school. The register must contain the name, date of birth, age, identity number if applicable, and address

of the learner; as well as the names of the learner's parents or caregivers and their addresses and telephone numbers, where applicable (Admission Policy, clause 36). This information must be verified against the birth certificate or identity document of the learner, and the officials of the provincial education department must have access to the register of admission. (Admission Policy, clauses 37 and 38).

PARENTS

Parents or caregivers have the responsibility to apply for their children to be admitted into school, especially if their children are of compulsory schoolgoing age, i.e. between the ages of 5 and 15 (grade R to grade 9). Parents are encouraged to ensure that children stay in school for as long as possible. Parents and caregivers should apply within the admission application period of the relevant PED, and to as many schools as possible. Parents should research the schools they wish to apply to, and find out when applications open and close. If a child has special educational needs or needs extra support, the parents or caregivers must find out from the relevant local district office which school has the resources and facilities to support their child. Parents can choose to have their child admitted into an ordinary public school or a special needs school. Section 3(6) of the Schools Act says that parents could be guilty of a criminal offence if they fail and/or refuse to apply for schools or keep their children away from school.

ADMISSION OF LEARNERS WITH SPECIAL EDUCATION NEEDS TO ORDINARY PUBLIC SCHOOLS

The MECs not only have to ensure that there are enough schools to accommodate all the learners in the province – including learners with special education needs, such as learners with disabilities – but must also ensure that all learners are admitted to these schools on an equitable basis.

INDIVIDUALISED SUPPORT PLAN

A parent of a grade 8 learner with special education needs applied for the learner to be admitted into a high school (an ordinary school). During the application process the parent disclosed to the school that the learner had special education needs, and that an Individualised Support Plan had been drawn up and implemented at the learner's previous school (a primary school), which helped the learner to make good academic progress. The parent provided the school with a copy of the plan. After considering the plan, the school informed the parent that the school had many learners and only a limited number of educators to see to them all, and that they did not have the time and resources to accommodate the learner. The school refused the learner's admission application.

As mentioned above, Section 5(1) of the Schools Act acknowledges the responsibility of public schools to assist **all** learners, as it states that “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way”.

Section 12(4) of the Schools Act makes provision for the admission and reasonable accommodation of learners with special education needs in ordinary public schools. It says that the MEC of a provincial education department “must, where reasonably practicable, provide education for learners with special education needs at ordinary public schools and provide relevant educational support services to such learners”.

This means that if a child has special education needs, such as a physical disability, and he or she is enrolled at an ordinary public school, the school has a legal duty to admit the learner, immediately assess their support needs, and make the appropriate **reasonable accommodations**.

The Screening, Identification, Assessment and Support Policy (SIAS) 2014 outlines the process of identifying and providing this support at a school.

South Africa signed the UN Convention on the Rights of Persons with Disability (UN CRPD) and ratified it in 2007, which means that South Africa is a party to the UN CRPD and must ensure an equitable and inclusive

education system where learners with special education needs can be accommodated in ordinary public schools. In particular, Article 24(2)(c) of the UN CRPD places a direct obligation on State parties to ensure that “[r]easonable accommodation of the individual's requirements is provided”. Despite this, the reality for most learners with special education needs is that they are often refused admission to ordinary public schools. The failure to provide reasonable accommodation amounts to unfair discrimination. There is a clear legal duty on PEDs to ensure that all ordinary public schools make reasonable accommodations for these learners.

A school must admit all learners and serve their educational needs without unfairly discriminating in any way. Schools must admit learners with special education needs, where this is reasonably practicable. Schools are encouraged to make the necessary arrangements, as far as practically possible, to make their facilities accessible to such learners.

WHAT IS 'REASONABLE ACCOMMODATION'?

Article 2 of the UN CRPD defines 'reasonable accommodation' as

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

This means that the specific support needs of learners with disabilities must be provided for, so that they are able to participate equitably in learning alongside their peers.

In its General Comment 4, the Committee for the UN CRPD states that “‘**Reasonableness**’ is understood as the result of an objective test that involves an analysis of the availability of resources, as well as the relevance of the accommodation, and the expected goal of countering discrimination”.

Reasonableness must be determined on a case-by-case basis, weighing up several considerations, including resources available to the school and the child's unique support needs. This is covered in greater detail in Chapter 6, 'The Right to Basic Education for Children with Disabilities'.

The Admission Policy, in clauses 22 to 25, further regulates the admission of learners with special education needs to ordinary school. The Admission Policy in clause 22 states that “the rights and wishes of learners with special education needs must be taken into account at the admission of the learner to an ordinary public school”. It reiterates the position held in Section 12(4) of the Schools Act that these learners must be admitted to ordinary school where this is “reasonably practical”. Schools are encouraged to make the necessary arrangements, as far as practically possible, to make their facilities accessible to such learners.

REASONABLE ACCOMMODATIONS

Examples of reasonable accommodations include changing the location of a class; adaptations to the curriculum; adjusting Learning and Teaching Support Materials (LTSM), for example enlarging print, and providing handouts in Braille; providing assistive devices; and accommodations for assessment.

THE PROCESS FOR ADMISSION TO ORDINARY PUBLIC SCHOOLS

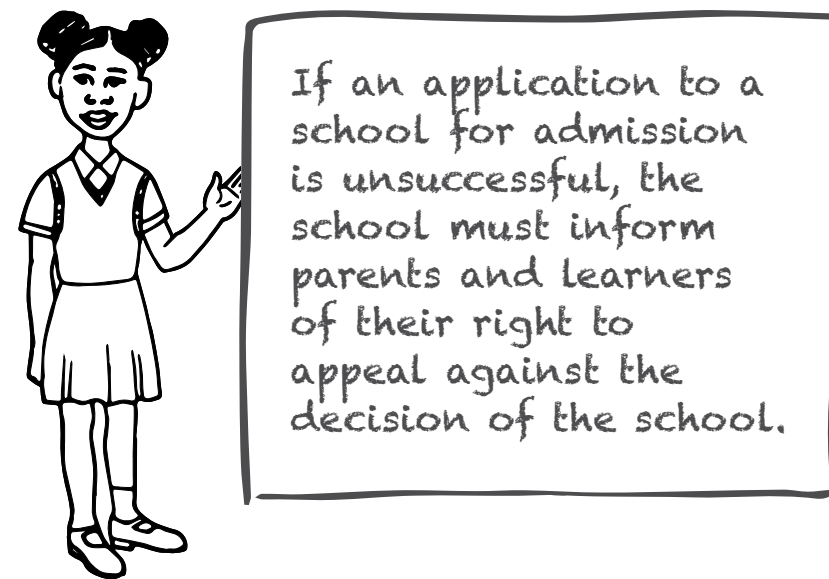
Together with the Admission Policy, the Schools Act guides the process of admissions in ordinary public schools in South Africa. Section 5(1) of the Schools Act states that “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way”.

In relation to the process of admissions, the Schools Act states that an application for admission must be made to the education department in a manner determined by the HOD. This therefore means that the HODs of each province have discretion in determining the admissions application process for their province. In other words, there is no uniform national process dictated by the Schools Act or the Admission Policy in relation to the administration of admissions.

Admission processes are tailored to the specific contexts and requirements of each province, including accessibility needs of parents or caregivers. For instance, Gauteng only makes use of an online platform for admission applications, and KwaZulu-Natal schools only accept hard copy application forms.

The parents or caregivers of the learner must complete and submit a school application form. In most instances the application form can be obtained from the school. However, some provinces (such as the Western Cape, Gauteng and the Northern Cape) make use of online application systems, where the parent is required to register on the provincial education department website to complete an online application form. Some provinces use a hybrid model, which allows parents to choose either to complete a hard copy application form and submit it to the school in person, or to complete the application form online. The Admission Policy places an obligation on principals to assist parents in completing admission application forms.

The Admission Policy provides a broad framework for the admission of learners to ordinary public schools, and echoes the provisions of the Schools Act insofar as the obligations of the HOD are detailed. It must be specifically noted that this policy is currently undergoing a process of review, and may change not only the processes but also the obligations of officials in the provincial education departments. The policy states that the HOD is required to determine the process of registration for admission to public schools, to ensure that the admission of learners takes place in a timely and efficient manner. Furthermore, the policy states that the HOD is responsible for the administration of the admission of learners to a public school, and that the



HOD may delegate this responsibility to officials of the Department. The policy is clear that the HOD is required to coordinate the provision of schools and the administration of admission of learners to ordinary public schools with SGBs, to ensure that all eligible learners are accommodated.

The Admission Policy sets out various documents that are required to be submitted together with a completed application form. These documents include an official birth certificate of the learner, proof that the learner has been immunised, and where applicable, a transfer card.

Should a parent or guardian not be able to submit an official birth certificate of the learner, the policy states that the

learner may be admitted conditionally until a copy of the birth certificate is obtained. For a detailed discussion on challenges in this regard, see the section below on undocumented learners.

During the admission application process, the parent must show that the child has been immunised against polio, measles, tuberculosis, diphtheria, tetanus and hepatitis B. This is done by producing a copy of the child's clinic card. If the parent cannot show proof, the principal must advise the parent to have the learner immunised as part of the free public primary healthcare programme.

In a situation where a child is transferring from one public school to another, they require a transfer card

from the school they are leaving, which must be given to the new school. Should a parent not have a transfer card, the policy states that a school may place a child using either a report card, other equivalent documentation from the previous school, or an affidavit from the parent detailing why they are not in possession of a transfer card and what grade the child should be entering. A school must therefore admit a child using any of this documentation.

If an application to a school for admission is unsuccessful, the school must inform parents and learners of their right to appeal against the decision of the school. Also, the school must provide full and proper reasons for the refusal of admission to parents and learners.

CHALLENGES WITH THE ADMISSION APPLICATION PROCESS

Year on year, the same types of complaints arise from parents who are trying to navigate admission processes to secure a place for their child in a school.

- **Accessibility of online application platforms.**

Three provinces currently use an online system for application processes. There are concerns around the accessibility of this online system, as many parents do not have access to the internet or the devices needed to complete and submit application forms. In addition to this, the online applications, together with instructional videos and information, are all in English and/or a combination of English and Afrikaans, which limits the ability of some parents to interact with (and properly understand) the online application process and requirements.

- **Inadequate data capturing system at district level**

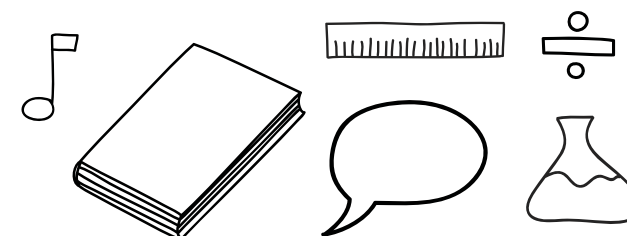
In a situation where a learner is not placed in a school, the parent is required to approach their local district for assistance with placing the learner in a school that has space. Some provinces (such as the Western Cape) do not prescribe a comprehensive data capturing system at district level to properly capture the details of a learner

who requires assistance with placement; nor do they capture the date on which an enquiry is lodged with them. Unfortunately, on occasion this leads to learners slipping through the cracks and not being assisted, or waiting an excessively long time for placement.

- **Unlegislated feeder zones result in irregular practices and policies by schools**

Many parents believe that an obligation exists to place a learner in the school closest to where the learner resides. While this would be ideal, the obligation of the provincial education department is to place a learner in a school that has space. Not all provinces have feeder-zone policies or clauses in their provincial admission policies. For example, in the Western Cape there is no feeder-zone policy, which means that schools may regulate their own feeder zones within their school admission policies. This lack of oversight and guidance from the Western Cape Education Department often leads to schools adopting discriminatory practices when admitting learners,

by not accepting learners who reside in areas that the school deems undesirable. This is in contrast to Gauteng which has a comprehensive policy relating to feeder zones. An unlegislated feeder zone often results in discriminatory practices by schools, as it effectively allows schools to pick and choose the areas from which their learners come, thus giving the schools the power to avoid accepting learners from what they consider to be 'poorer' or underperforming areas. As a result of the Federation of Associations of Governing Bodies of South African Schools (FEDSAS) case (see case summary below), the MEC for education in Gauteng declared an increase in size of feeder zones in Gauteng, from 5km to 30km. This broad feeder zone will ensure that learners are able to access schools in an equitable and fair manner. The National Admissions Policy for Ordinary Public Schools does address the use of school feeder zones, and provides some guidance as to how these should be applied.



ADMISSION APPEAL

TO APPEAL TO THE MEC

In the appeal, you must address the following:

- The current admission application to the school(s), when the application was made and whether or not the application was made timeously.
- The outcome of the application and the engagement the parent or caregiver has had with the principal.
- Any subsequent steps taken by the parent or caregiver (especially whether or not the parent has approached other schools and if such schools' admission application dates have lapsed).
- Grounds for the appeal (reasons why the school's decision is unreasonable and without basis)
- Request that the MEC overturn the decision of the principal or the SGB, or alternatively that the MEC find alternative placement for the learner at the nearest school possible. The

PED's obligation is to place the learner in a suitable school, not necessarily in a school of the parent's choice.

- The appeal should include all relevant documentation. It may also make reference to the school's admission policy, and where the parent feels the school has breached its own policy or acted unfairly towards the learner.
- It is important to note that the fact that the parent may only have applied to one school – as is often the case – could prove to be a hindrance to the appeal, as parents are encouraged to apply to a number of schools and no learner is guaranteed acceptance into a specific school.

A learner who has been refused admission to a public school – or their parent or caregiver – can appeal to the MEC against the decision, in terms of Section 43 of the National Education Policy Act (NEPA) and Section 5(9) of the Schools Act.

The Schools Act and the Admission Policy are silent on the timeline within which a parent must lodge an admission appeal. However, some provinces (for example, Gauteng) have detailed appeal timelines in their provincial admission policies. However, parents are encouraged to lodge an appeal as soon as possible after being notified of the school's refusal and having received the written reasons for such a refusal. Further, the MEC is also not given a specific timeframe within which to consider the appeal, which in practice often results in parents waiting unreasonably long periods of time to receive the outcome of an appeal. Gauteng has developed timelines in relation to appeal considerations, which assist in ensuring accountability and certainty in the admissions process. Parents are therefore encouraged to follow up regularly with the MEC's office on the status of their appeal.

REGULATION OF ADMISSION OF LEARNERS WITH SPECIAL EDUCATION NEEDS TO SPECIAL SCHOOLS

The Policy on Screening, Identification, Assessment and Support, 2014 (SIAS) defines special schools as “schools equipped to deliver a specialised education programme to learners requiring access to high-intensive educational and other support either on a full-time or a part-time basis”.

Clause 23 of the Admission Policy says that where a learner with special education needs cannot be offered the necessary support in an ordinary school, the principal of the school must refer the learner’s admission application to the HOD to have the learner admitted to a suitable school in that province or another province.

The HOD must arrange for a consultation process with the parents of the learner and the educators and support personnel concerned. The consultation process must form part of the assessment of the learner before the learner is referred to another school. The Admission Policy does not prescribe timelines for the conclusion of the consultation and assessment process, but states that it must be done “as a matter of urgency to facilitate the placement of the learner as soon as possible to

ensure that the learner is not prejudiced in receiving appropriate education”.

Clause 25 of the Admission Policy says that the assessment and consultation process must be carried out by a team based at the ordinary school, in consultation with parents, educators and other relevant support personnel, and that once the process concludes, the HOD must approve the placement of the learner.

The Special School Guidelines say that special schools are there to provide education support to learners who require high levels of support – special schools should therefore only admit learners with high levels of support needs. A special school may only admit learners who require support in the area of specialisation offered at the school. Only learners whose support needs have been identified using the SIAS process should be admitted to special schools.

- No learner with very high needs may be refused admission based on the severity of the learner’s support needs.
- Priority of admission to a special school should be given to learners who need high levels of support, are out of school and have not been able to gain access to any form of schooling.
- Admission to a special school should be considered a last option for a learner, and should only be done in cases where reasonable accommodation cannot be made available in the local ordinary school. Learners and parents who meet the requirements for additional support must still have the opportunity to exercise their choice as to whether they are educated in a special school or an ordinary or full-service school.

OTHER EXCLUSIONARY ADMISSION PRACTICES

ADMINISTRATION OF TESTS

The SGB of a public school may not administer any test relating to the admission of a learner to the school, or direct or authorise the principal of the school or any person to administer such a test. However, there is an exception: where placement in a specific course or programme is required, e.g. a technical field of study, and where it would be in the educational interest of a learner, the learner may be requested by the HOD to undertake a suitable test to assist a placement decision. (See example in the sidebar)

EXCLUSION DUE TO NON-PAYMENT OF FEES

The Schools Act says that no learner may be refused admission

to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the parent body of the school.

Another issue that comes up often is the issue of payment of upfront registration fees or deposits. Learners are often denied admission because their parents cannot afford to pay the upfront registration fees required by some public schools. Section 390 of the Schools Act says that no public school may charge any registration, administration or other fee, except school fees. Therefore, the school cannot request a registration fee from parents. (See example in the sidebar)

CASE STUDIES

TESTS

A parent applied to a former Model-C school for his son to be enrolled in grade 8. He was contacted by the school administrator, who said that while his son complied with the admissions criteria of the school, he was required to write an admission test before he could be admitted to the school. A week after the admission test, the parent was contacted by the school administrator to say that his son’s application had been unsuccessful because he had failed the test.

NON-PAYMENT

A mother of two applied for the learners to be admitted to a primary school in the area where they resided. The school requested that the mother provide the school with various admissions documents, including her most recent bank statements and salary slips. After submitting these documents, the school bursar contacted her to say that unfortunately her children would not be admitted; because based on her financial records, she would not be able to pay the school fees for both learners.



CASE STUDY

UNDOCUMENTED LEARNERS OR FOREIGN NATIONALS

A single father of a young child attempted to enrol his child in grade 1 in a local school. The mother of the child died shortly after the child was born, and before a birth certificate had been applied for. The father made numerous attempts to apply to the Department of Home Affairs to be issued the child's birth certificate, but had not been successful. The school refused to accept the application for admission from the father due to the lack of a birth certificate.

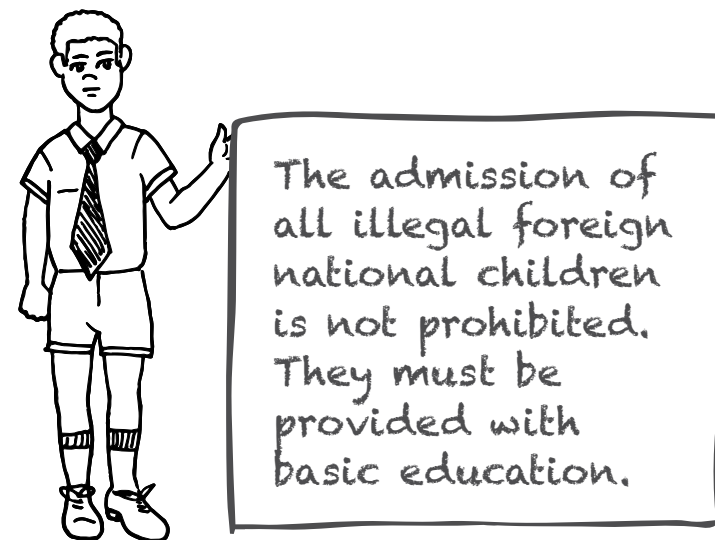
ADMISSION OF UNDOCUMENTED LEARNERS OR FOREIGN NATIONALS

POSITION PRIOR TO 2019

The United Nations Committee on Economic, Social and Cultural Rights, in their concluding observations on their initial report on South Africa in November 2018, noted with concern that about 30 per cent of undocumented migrant, refugee, and asylum-seeking children were not enrolled in formal education. The national Admission Policy requires parents to present an official birth certificate for the learner to the principal of a public school when applying for

admission. If the parent is unable to submit the birth certificate, the learner may be admitted conditionally until a copy of the birth certificate is obtained from the Department of Home Affairs. The parent must ensure that the admission of the learner is finalised within three months of conditional admission. This led to learners being excluded from public schools after the three months' conditional admission period if their parents were unable to obtain the birth certificate within that time.

Regarding the admission of non-citizens, Clause 21 of the Admission Policy requires persons classified as illegal aliens to show evidence that they have applied to the Department



of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991, when they apply for admission for their children. Similarly, many children of non-citizens unable to provide the required documentation could not get access to education.

In 2017, the Centre for Child Law (first applicant) and the School Governing Body of Phakamisa High School (second applicant) launched an application against the Eastern Cape Provincial department of education and others, seeking an order declaring Circular 06 of 2016 unconstitutional. The Circular had in effect stopped funding to undocumented learners enrolled in public schools in the Eastern Cape, and this resulted in

schools refusing to admit learners or excluding learners already enrolled in public schools in the Eastern Cape.

Central to the Phakamisa case was the issue of the constitutionality of clauses 15 and 21 of the Admission Policy.

The Court declared Circular 06 of 2016 and clauses 15 and 21 of the Admission Policy to be inconsistent with the Constitution, and invalid. The Court's reasoning was that in terms of Section 29(1)(a) of the Constitution, "[e]veryone has the right to basic education, including adult basic education". This right is unqualified, unconditional, and applies to everyone. It is not subject to the fulfilment of certain conditions or limited to a certain class or group of people.

THE CURRENT POSITION

As a result of the court case, DBE issued a Circular in 2020, directing schools to admit all children not in possession of an official birth certificate into public schools. Where a learner cannot provide an official birth certificate, schools are directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, caregiver, or guardian. The learner must be clearly identified – name, surname, age, grade and so on must all be included. The admission of all illegal foreign national children is not prohibited. They must be provided with basic education.



RELEVANT CASE LAW

MEC FOR EDUCATION IN GAUTENG PROVINCE AND OTHER V GOVERNING BODY OF RIVONIA PRIMARY SCHOOL AND OTHERS

In 2010, a grade 1 learner was refused a place at the school for the 2011 academic year and was placed on the school's waiting list. The mother of the learner lodged a complaint with the Gauteng Department of Education in an appeal to the MEC.

The HOD took the view that the school could admit the learner into one of its grade 1 classes, overturned the school's refusal of the application, and issued an instruction to the principal to admit the learner. The principal refused to admit the learner and the HOD intervened by physically placing the learner in one of the grade 1 classes, seating her at an empty desk.

The school lodged a High Court application, seeking a declaration that it had the power to make the admission policy and admit learners in accordance with that policy. The High Court dismissed the application. On appeal to the Supreme Court of Appeal, the Court held that the Department did not have the power to override the school's admission policy; and thus the HOD's instruction to the principal to admit the learner, and the HOD's placing the learner in the school, was unlawful.

On appeal to the Constitutional Court, the majority of the Court concluded that the HOD had the power to admit the learner, subject to certain procedural constraints. It held that the power of the school governing body to determine capacity as part of its admissions policy is subject to the Constitution and

other provisions of the Schools Act, which indicates a structure in which the Department retains ultimate authority regarding admissions.

School admission policies cannot be inflexibly applied; and, the Court said, it would be open to the principal or HOD to depart from that policy if there were good reason to do so.

The majority held that the HOD had not exercised his power in a procedurally fair manner. The Court held that cooperation is the compulsory norm in disputes between school governing bodies, provincial governments and/or national government. This cooperation is rooted in the shared constitutional goal of ensuring that the best interests of learners are furthered, and that the right to basic education is realised.

FEDERATION OF GOVERNING BODIES FOR SOUTH AFRICAN SCHOOLS V MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG AND ANOTHER

The matter concerned the validity of certain amendments to the Regulations Relating to the Admission of Learners to Public Schools published in 2012 ('the Regulations'). The central issue was whether the Regulations were inconsistent with the Schools Act or with the applicable provincial law; or were invalid, because they are irrational or not reasonable or justifiable.

Writing for a unanimous Court, Deputy Chief Justice Dikgang Moseneke found that there was no conflict between the Schools Act, the Regulations and applicable provincial law. Rather, the Regulations were held to be legislation authorised by

provincial legislation, and may be read in harmony with the Schools Act and other national legislation.

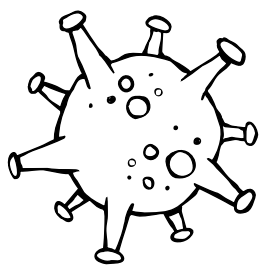
Turning to specific regulations, the Court considered regulation 3(7), which disallows a learner's prospective school from requesting confidential information from her current school. The Court held that the regulation properly combats unfair discrimination.

Proceeding to the issue of feeder zones, the Court held that the default position created by regulation 4(1), which determines feeder zones on a geographical basis, is indeed an interim, transitional arrangement. The Court found traction in the amicus' submission that since apartheid residential and workplace lines remain firm, the impact of the default feeder zone position is to prolong and legalise racial exclusion. The Court compelled the MEC to formulate fresh rules for feeder zones as required by

regulation 4(1) within a reasonable time, and not later than twelve months from the date of judgment.

Finally, the Court found that the duty to place unplaced learners and determine enrolment capacity and declare a school full falls on the MEC and HOD respectively. However, the Court noted that the admission policy of a school must conform to all applicable law, including provincial law. This means that the requirements of the Norms and Standards for School Infrastructure, insofar as they make mention of teacher/learner ratios and class sizes, must apply until the Norms and Standards for School Capacity are promulgated.

Accordingly, the Court found all the impugned regulations rational, reasonable and justifiable; except for the regulations relating to feeder zones, to which it attached a finite time period for determination.



RECENT DEVELOPMENTS

COVID-19 CRISIS

The Covid-19 crisis resulted in a number of learners either being withdrawn from school by their parents or dropping out of school. The parents of some of the learners who were withdrawn from school elected to enrol them for home schooling, in terms of Section 51 of the Schools Act. As fears around the Covid pandemic begin to ease, learners being home schooled and learners who had dropped out will probably begin returning to public schools, necessitating them reapplying for school.

A further consequence of the Covid-19 pandemic was the economic effect it had on many families in South Africa. Due to the economic hardship faced by many families, many parents are now unable to afford the cost of private schools, resulting in these learners being removed from their private schools and requiring space in public schools.

This influx of learners from the private education sector, together with

learners returning to public schools after dropping out or no longer being home schooled, places a burden on an already space-constrained public education system. This will undoubtedly have a negative effect on learner placements in the following academic year.

IMPLICATIONS OF THE ECD MIGRATION

During his State of the Nation address in 2019, President Ramaphosa announced the government's intention to introduce two years of compulsory schooling prior to grade 1. This marked the start of the migration of early childhood development (ECD) programmes from the Department of Social Development to the DBE. In June 2021 this decision was formalised, with the President signing a proclamation transferring all administration, powers, and function in terms of chapter 5 and 6 of the Children's Act (insofar as they

relate to the delivery of early childhood development programmes) to the DBE, with effect from April 2022.

The migration of ECD programmes to the DBE means that the DBE will have oversight over these centres and programmes, but does not mean that all ECD centres will now be considered public schools. Additionally, the DBE will be responsible for coordinating the roles of other departments (e.g. the Department of Health) and their obligations in relation to ECD services and programmes.

It is currently still unclear what the implications will be of the decision to introduce two additional compulsory years of school prior to grade 1, together with the migration, and what effects it will have on learners. However, the DBE will be responsible for ensuring that all learners included in these two additional compulsory years are appropriately catered for, not only in terms of sufficient spaces for learners, but in terms of funding.

Chandre Stuurman and **Tarryn Cooper-Bell** are senior attorneys at the Equal Education Law Centre.

CASES

Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC).

MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others 2013 (6) SA 582 (CC).

Moko v Acting Principal of Malusi Secondary School and Others 2021 (4) BCLR 420 (CC).

LEGISLATION, POLICY AND GUIDELINES

Constitution of the Republic of South Africa 1996.

Department of Basic Education 'Circular No. 1 of 2020: Admission of Learners to Public Schools', 2020.

Department of Basic Education 'Guidelines for Responding to Learner Diversity in the Classroom Through Curriculum Assessment Policy Statement', 2011.

Department of Basic Education 'Policy on Screening, Identification, Assessment and Support', 2014.

Department of Education 'Admission Policy for Ordinary Public Schools', 1998.

Department of Education 'Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System', 2001.

National Education Policy Act 27 of 1996.

South African Schools Act 84 of 1996.

INTERNATIONAL AND REGIONAL INSTRUMENTS

UN Committee on Economic, Social and Cultural Rights 'Concluding observations on the initial report of South Africa', 2018.

UN Convention on the Rights of Persons with Disabilities (UNCPRD), 2006.