



LRC

Legal Resources Centre

Access to
Education for
Undocumented
Learners in
South African
Public Schools



Introduction

Section 29(1) of the Constitution of South Africa (1996) states that “everyone has the right to education.” Children who are undocumented often struggle to access schooling as they are expected to present a birth certificate, passport, or permit before the school will admit them. Even if children can access schooling, they are sometimes excluded by the school if they cannot provide the documentation to the school within a specified period, leaving many learners without access to education.

Children are undocumented for many reasons. Parents, guardians, and caregivers often struggle to secure birth certificates when they themselves are undocumented, the children are born at home, or they lack certain documents to support the application for a birth certificate. Similarly, parents, caregivers, and guardians of children born to non-nationals face significant barriers in obtaining valid passports and permits to legalise the children’s stay in South Africa.

Education is critical to the development of children and the realisation of their full potential. It is important that all children, irrespective of their ability to produce documentation, be provided with an education in South Africa. The purpose of this publication is to provide learners, parents, guardians, caregivers, principals, school governing bodies, and teachers with an understanding of the legal position of undocumented learners and the steps to provide them with education. It also seeks to answer some of the most frequently asked questions about the education rights of undocumented learners.

1. What does the law say about the right to education for undocumented learners?

The Constitution

Section 29(1) of the Constitution grants everyone the right to education, and does not draw any distinction between learners with birth certificates, passports, or permits. This means that all children should be allowed to access education.

The South African Schools Act 84 of 1996

The South African Schools Act was enacted to give effect to the right to education in the Constitution and regulates school attendance. In terms of section 3(1) of the South African Schools Act, parents must cause every learner for whom he or she is responsible to attend a school from the year that the learner turns seven until the year that the learner turns 15 or reaches grade 9.

Section 3(6) criminalises the failure to ensure that learners attend school and imposes a fine or imprisonment for a period not exceeding six months. Section 5(1) states that a public school must admit learners and serve their educational requirements without unfair discrimination in any way. Denying learners access to school because they are undocumented is prohibited by the South African Schools Act as it unfairly discriminates against these learners.

Admissions Policy for Ordinary Public Schools

The Admissions Policy for Ordinary Public Schools provides a framework to provincial education departments and school governing bodies for the development of admission policies for schools.

Previously, clauses 15 and 21 of the Admissions Policy stated that a birth certificate or a permit had to be presented to the school when a learner applied for admission. The Admission Policy was routinely used to exclude learners from schools if they were unable to provide documentation after three months or deny them admission to the school.

Clauses 15 and 21 of the Admissions Policy have since been declared unconstitutional by the Grahamstown High Court in Makhanda in the Centre for Child Law and Others v Minister of Basic Education and Others (3) SA 141 (ECG) (12 December 2019) case.

2. What do the courts say?

In March 2016, the Eastern Cape Department of Education issued a circular in which it informed schools that it had taken a decision to stop funding any undocumented learners that were present in schools in the province.

The decision prompted a crisis in the education system as many schools were suddenly not receiving any funding on behalf of undocumented learners for teachers, textbooks, scholar transport, school nutrition, school furniture, or any other funding that is allocated in terms of the paper budget of the schools. This particularly affected no-fee schools in the province that provide education to predominantly black South African learners living in rural areas.

Some schools in the province had well over 100 learners that are undocumented. In practice, this meant that the funding resources they received for the documented learners had to be distributed amongst all the learners.

This impacted negatively on all the learners in the school as resources that were, for example, meant for 300 learners, were now being used to educate and feed 400 children. The result was that the rights of all the learners were being infringed. This decision saw many undocumented learners being denied admission into schools as the schools knew they would not receive funding for the learners.

Many learners were thus being excluded from formal education, while their attempts to obtain birth certificates through the Department of Home Affairs were unsuccessful. This also impacted on non-national children who were undocumented as they were struggling to gain access to education or were being excluded by schools as they were no longer being funded. The court found in favour of the learners and made several important findings:

2.1. First, the right to education in section 29(1) of the Constitution extends to everyone within the boundaries of South Africa, irrespective of whether they have a birth certificate, passport, or permit;

2.2. Second, South African children without birth certificates have the right to education and must be granted admission to schools in South Africa;

2.3. Third, undocumented non-national children have a right to education and must be granted admission to schools in South Africa;

2.4. Fourth, clauses 15 and 21 of the Admission Policy for Ordinary Public Schools (1998) is declared unconstitutional;

2.5. Fifth, the Department of Education must provide education funding to all learners in schools, including undocumented South African learners and non-national learners;

2.6. Sixth, no child may be removed or excluded from school on the basis that they are undocumented;

2.7. Seventh, where a learner does not have a birth certificate, passport, or permit, the principal of the school must accept alternative proof of identity, such as an affidavit or sworn statement by the parent, care-giver or guardian of the learner wherein the learner is fully identified.

3. What does the Department of Education say?

Following the judgment, the Department of Basic Education issued Circular 1 of 2020 on 10 February 2020 that clarified the position of undocumented learners in schools. The circular was sent to all the schools in South Africa and applies to all public schools in the country.

The Department endorsed the position as established in the judgment. The circular specifies that the right to education extends to everyone and that schools are directed to follow the judgment of the court.

Principals must accept alternative proof of identity such as an affidavit or a sworn statement deposed by the parent, caregiver or guardian of the learner wherein the learner is fully identified.

4. What are the duties of the school and the principal?

A school has a duty to provide education to all learners, including undocumented learners. Schools and principals are therefore not allowed to refuse admission to an undocumented learner or exclude a learner in the school who does not have a birth certificate, passport or permit. In cases where learners do not have birth certificates, passports, or permits, the principal must accept alternative proof of identity. This can take the form of an affidavit or a sworn statement in which the parent, guardian, or caregiver of the child fully identifies the child. It remains important for learners to be documented and schools must try to assist undocumented learners to obtain documentation from the Department of Home Affairs.

Schools and principals do not commit a criminal offense by providing education to undocumented learners. They cannot be fined or arrested for admitting and educating undocumented learners.

Know Your Rights

1. I don't have a birth certificate – can I still go to school?

Yes, Circular 1 of 2020 directs all schools to admit learners without birth certificates. If you cannot produce a birth certificate, the schools must accept alternative proof of identity such as an affidavit or a sworn statement by the parent, caregiver, or guardian of the learning in which the learner is fully identified.

2. I am a non-national, and I don't have the correct immigration documents – can I still go to school?

The judgment in *Centre for Child Law* determined that the right to education in section 29(1) of the Constitution extends to undocumented non-national children as well. This means that nobody can be excluded from education, even if you are an undocumented non-national.

3. I have been told by the school that I cannot be admitted as I don't have a birth certificate, passport, or permit – what can I do?

It is unlawful to be refused admission to school on the basis that you don't have a birth certificate, passport or permit. If you have been refused admission by the school, you need to approach the local district office of the department of education within which the school is located. If the district office is not able to assist, you can approach the provincial department of education, or the national department of education to assist with gaining admission. If the department does not assist you, you need to approach one of the civil society organisations below to assist.

4. What must I do once I am admitted to school without documentation?

It is important for all children to have birth certificates if they are South African citizens, or passports and permits if they are non-nationals. If a child is undocumented, parents, caregivers, or guardians must approach the Department of Home Affairs to try to obtain documentation for the child. This can be a lengthy process and must be started as soon as the parent, caregiver, or guardian realises that the child is undocumented.

5. Do you need support?

If you require support you can contact any of the following organisations:

Legal Resources Centre

- Cape Town – 021 879 2398
- Johannesburg – 011 836 9831
- Durban – 031 301 7572
- Makhanda – 046 622 9230

Scalabrini Centre – 021 465 6433

Lawyers for Human Rights

- Johannesburg – 011 339 1960
- Cape Town – 021 424 8561
- Durban – 031 301 0531
- Musina – 015 534 2203
- Uppington – 054 331 2200
- Pretoria – 012 320 2943

Centre for Child Law – 012 420 4502



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