

**ADMISSION TO SCHOOLS:
A GUIDE FOR SCHOOL GOVERNING BODIES
IN SOUTH AFRICA**



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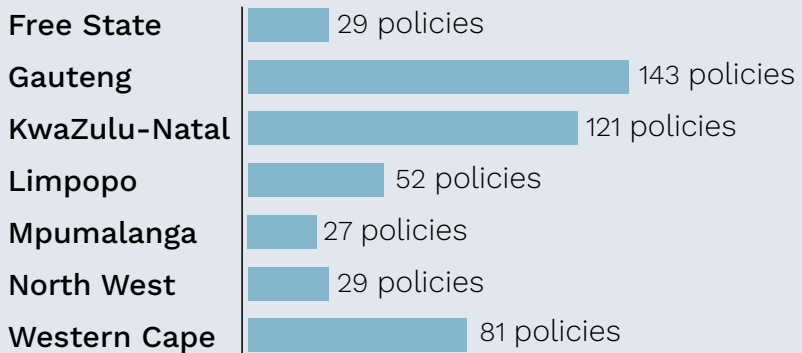
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Overview

Between 21 May 2021 and 12 April 2022, the Legal Resources Centre analysed a randomised selection of school admission policies which were obtained from the following provincial departments of education:



The laws

There are many laws which are important to the school admission process as they set out the rights of parents and learners. They also regulate the conduct of schools.

The two most important laws in the school admission process are the Constitution of the Republic of South Africa and the Schools Act 84 of 1996 (the Schools Act).

Constitution

Section 29(1) of the Constitution guarantees everyone an unqualified right to basic education.

Numerous other constitutional rights which are relevant to school admissions are: rights to equality and non-discrimination (Section 9); human dignity (Section 10); and the right of the child to have their “best interests [be] of paramount importance in every matter concerning [them]” (Section 28[2]).

Schools Act

The Schools Act is the primary legislation governing education in South Africa. According to its preamble, the Schools Act “set[s] uniform norms and standards for the education of learners at schools”.

Section 5 of the Schools Act sets out admission to public schools. The governing bodies of public schools are responsible for determining their admission policy in line with the Schools Act and applicable provincial laws.

Importantly, in Section 5(1), the Schools Act states that “[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way”. Non-discrimination, therefore, forms an important basis of all national and provincial school admission policies and underlies the Schools Act as a whole.

Rights which should be included in admission policies

In light of our analysis, we wish to draw SGBs attention to the following rights which are regrettably often excluded in admission policies.

The right to fee exemptions

In terms of section 39(2) of the Schools Act, every school that charges fees must provide an equitable procedure for parents to apply for a total, partial or conditional exemption of parents who are unable to pay school fees. In terms of section 40 of the Schools Act, a parent may appeal to the head of department against a decision of a governing body regarding the exemption of such a parent from payment of school fees.

The omission of notifying parents of this right constitutes a form of financial discrimination as it may discourage parents from applying to certain schools on the basis that they cannot afford the quoted school fees. In fact, the Schools Act seeks to deny such financial discrimination from occurring in section 5(3)(a) where it provides 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 school fees'.



The right to appeal refusal of admission

In terms of Section 5(8), where a school refuses to admit a learner, the parents of the learner must be informed, in writing, of the reasons for the refusal. If, following having read the reasons for refusal, the parent wishes to challenge the rejection, section 5(9) of the Schools Act empowers the parents to appeal against the decision to the member of the executive council.

Despite the right to apply for fee exemptions, many school policies do not include reference to this right. For example,

In Limpopo,



43% of school policies surveyed did not do so.

In KwaZulu-Natal,



33% of school policies surveyed did not notify parents of the procedure which they can follow should they be unhappy with the outcome of their admissions application.

Our analysis indicates that generally in South Africa, school admission policies are inadequate in notifying parents/legal guardians of the rights which they have in terms of the South African Schools Act. In order to remedy this, schools must ensure that they include such provisions within their admission policies.

Required documents

Almost every school surveyed required certain documents of learners and, sometimes, of their parents. It is sensible for schools to request documentation to verify certain details as information relating to a learner's age, the identity of their caregivers, and a learner's education are relevant.

South African learners

Many schools required copies of the learner's birth certificate to be submitted as part of the application process. Some admission policies added the requirement of the identity documents of the parents of the learner to be submitted as well.

These documentary requirements are in conflict with the high court's decision in *Centre for Child Law v Minister of Basic Education* which considered the right to education for learners without birth certificates, passports, or permits and found that undocumented children cannot be refused admission to schools. Following the high court decision, the DBE has since published a circular, - binding on all provinces - which instructs schools to accept sworn written statement about the age of a learner if the learner does not have a birth certificate.

In order to be compliant with the high court decision, school admission policies should make provision for sworn statements when official government documents are not available.



Non-South African learners

Many schools required copies of the learner's study permit and permanent/temporary resident permit to be submitted as part of the application process.

Here it is important to note that asylum seeker permits and refugee status permits allow their holder to reside, work and study in South Africa. To avoid confusion, school admission policies should make it explicit that the presentation of these permits would be sufficient.

However, non-South African learners may be undocumented due to the challenges that people seeking asylum face. These undocumented learners should be admitted for the same reason that undocumented South African learners should be admitted.

In 2019, the high court found that undocumented children cannot be refused admission to schools. Following the high court decision, the DBE has since published circular which instructs schools to accept sworn written statement about the age of a learner if the learner does not have a birth certificate. This circular, which applies to all provinces, applies to both South African and non-South African learners.

Our analysis indicates that numerous South African school admission policies exclude documented South African and non-South Africans. In order to remedy this problem and be compliant with the high court decision, school admission policies should make provision for sworn statements when official documents are not available.

Lastly, with respect to undocumented non-South African learners, many policies referred to the Aliens Control Act 96 of 1991 which has since been repealed by the Immigration Act 13 of 2002. School Governing Bodies should ensure that their policies refer to existing, and not repealed statutes.

Feeder zones

A feeder zone is a rule found in many admission policies in which schools give preference to admission to learners who live in a certain geographical area, or if their parents work within a certain geographical area.

The admission policy for ordinary public schools sets the requirements with which the “admission policy of an ordinary public school must be consistent with”. Its purpose is to “provide a framework to all provincial departments of education and governing bodies of public schools for developing the school’s admission policy”.

The admission policy states that no admission policy may unfairly discriminate based on “any other arbitrary ground.” Therefore implicitly, it can be argued that not admitting a student to a school based on his/her geographical location would amount to unfair discrimination.

In light of the legal framework, the Western Cape Education Department (WCED) should be commended for issuing Clause 2 of Circular 0140/2003 which states that ‘WCED has not determined school feeder zones for public ordinary schools. Therefore, no child is precluded from seeking admission to whichever school he or she chooses to attend.’ However, it appears that this circular has not had its desired effect as 77% of the school policies surveyed in the Western Cape included feeder zones clauses within their admission policies.

In the other provinces surveyed, feeder zone provisions were found in 68% of the policies obtained from the North West, 85% of the policies obtained from the Free State and 92% of the policies obtained from Mpumalanga.

Tests and interviews

Very few schools provided for the possibility of interviews in the admission process. However, of those schools that did, an overwhelming majority of them were located in KwaZulu-Natal with approximately 10% of the policies surveyed possessing such provisions. Typically, these policies emphasised that an interview is not a precondition for admission to the school and is intended only to assess the school readiness of the learner and whether she would benefit from the program of the school given her proficiency in English, being the language of learning and teaching at the school.

Although there is no policy or law nationally and across the provinces which explicitly prohibits the use of interviews, one could argue that if an interview is held and specific questions are posed, these could be construed as a test to which the applicant learner is being subjected to prior to his/her admission. If so, this would constitute a contravention of section 5(2) of the Schools Act and section 2C of the Regulations to the Schools Act.



Administration/registration fees

Very few schools provided for the payment of admission or registration fees in the admission process. However, of the schools that did, an overwhelming majority of them were located in Mpumalanga. Indeed, 11% of schools surveyed in Mpumalanga contained such provisions.

School governing bodies should note that the imposition of admission and/or registration fees is a violation of the Schools Act which states that 'schools may not charge fees such as a registration fee, a deposit, re-admission or pre-admission testing fees, or any other fees at the time of application.'

Discrimination

As stated earlier, both the Constitution and the Schools Act prohibit unfair discrimination on a number of grounds. None of the schools surveyed possessed policies which were racially or ethnically discriminatory. We are also happy to report that none of the surveyed policies discriminatory against learners on the basis of pregnancy. However, we would like to flag the issues concerning discrimination on the basis of gender, language and nationality.

Gender

Single-sex schools surveyed, across the seven provinces, typically state explicitly that only 'girl children' or 'boy children' can be admitted. None of these policies defined their understanding of the terms 'boy' or 'girl'. In the absence of defining the terms to include learners who are male but identify as girls or learners who are female but identify as boys, i.e. transgender learners, there is a risk that transgirls will be excluded from girls-only schools and transboys will be excluded from boys-only schools. This approach will constitute unfair discrimination on the grounds of both gender and sex.

In 2020, the Western Cape Education Department released 'Draft Guidelines on Gender Identity and Sexual Orientation in Public Schools of the Western Cape Education Department'. These guidelines define the terms 'gender identity' and 'gender expression' progressively so as to allow for the enrolment of transboys in boys-only schools and transgirls in girls-only schools.

Language

Although discrimination on the basis of language was found to be rare, some concerning provisions were found in our analysis in the Mpumalanga, North West and Free State provinces. These discriminatory provisions give preference to admission to learners whose mother tongue is either English or Afrikaans.

The effect of these policies may be to exclude learner's whose mother tongue is one of the countries other nine official languages and/or learners from a foreign background who are part one of the most vulnerable groups of learners in the country.

School governing boards are legally obligated to remove discriminatory language provisions from their admission policies. Whilst it is permissible for schools governing bodies to select the school's language(s) of instruction, it does not follow that learner's must be excluded on the basis that the language of instruction is not their mother tongue. The appropriate approach would be to provide additional support for students who are not sufficiently proficient in the school's language of instruction.

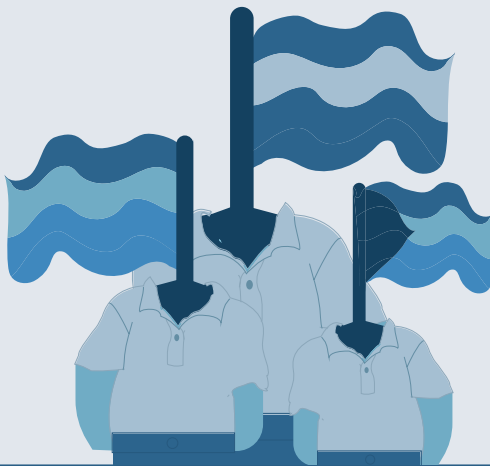
Nationality

Apart from listing documents which are required of non-national learners, there are two other instances of discriminatory clauses that exist.

Two schools in Mpumalanga were found to have policies which have the effect of subjecting non-national learners to higher school fees than their South African peers.

Two schools in Limpopo were found to have policies which give preference to admission to South African learners over non-national learners.

These types of policies are in conflict with Section 9(3) of the Constitution which has been interpreted to prohibit unfair discrimination on the ground of nationality. School governing bodies must ensure that whatever distinctions they have in treatment between citizens and non-citizens in their admission policy are rational, necessary and not discriminatory.



Repeating grades

Across the provinces many policies had clauses relating to repeating grades. Typically, policies stated that learners cannot repeat a grade more than once. This rule needs to be considered in light of the age norm for each grade, which states that a learner cannot exceed by two years.

These rules may give parents the impression that their child cannot be admitted to a particular grade at a particular school as they exceed the age norm. Indeed, it is likely that parents will adopt this view as only a fraction of the school policies surveyed explained how such situations are managed.

In terms of clause 27 of the Admission Policy for Ordinary Public Schools states that admitted learners who are above the age norm for a grade must, as far as possible, be placed in a fast-track facility or with their peers, unless it is not in the educational interests of the child to do so. In cases where a learner is more than three years above the norm age of the grade, the head of department must determine whether the learner will be admitted to that grade.

The effect of these two rules is that a learner cannot be refused admission for exceeding the age norm of a grade by less than three years. In cases where a learner who exceeds the age norm by three years or more applies to the school, the school must contact the head of department to determine whether the learner should be admitted or not.

Regrettably, these additional details are largely absent from school admission policies. The effect of this omission may be that those parents may be discouraged from applying for their children to be admitted to schools on the basis that their children exceed the age norm for the grade.

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