



TEL: +27 (0)74 355 0775

FAX: +27 (0)86 725 0837

EMAIL: INFO@CAUSEFORJUSTICE.ORG

WEBSITE: WWW.CAUSEFORJUSTICE.ORG

POSTAL ADDRESS: P.O. BOX 12622, DIE BOORD, 7613, SOUTH AFRICA

Our reference: Admissions Policy for Ordinary Public Schools

Date: 12 March 2021

**The Director-General
Department of Basic Education
PRETORIA**

For attention: Adv C Ledwaba

By email: Ledwaba.C@dbe.gov.za
Gela.N@dbe.gov.za

Dear Advocate Ledwaba,

RE: SUBMISSIONS ON ADMISSIONS POLICY FOR ORDINARY PUBLIC SCHOOLS

- 1 We refer to the abovementioned matter, specifically to the notice published in the Government Gazette of 10 February 2021, calling for public comments in respect of the *Admissions Policy for Ordinary Public Schools* ("the Policy").
- 2 Cause for Justice ("CFJ") hereby thanks the Department of Basic Education ("DBE") for the opportunity to present these written submissions and to participate in the law-making process.
- 3 Our submissions focus on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting human dignity, the best interest of children and the public interest.

BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is an a-political, non-partisan human rights organisation that exists to act in the public interest and in the interest of justice by promoting and protecting constitutional rights, freedoms, and obligations in South Africa. The principal ways in which CFJ does this are through participating in the policy-making and legislative process (and other state decision-making structures); public education and awareness campaigns; and court proceedings.
- 5 All five of CFJ's core values gives it a keen interest in the draft Policy, namely protecting the inherent worth of all persons and promoting the value of human dignity in society, protecting family life (including parental rights and children's rights), advocating for the responsible exercise of freedom, social justice (protection of vulnerable individuals and groups, including children), and ensuring accountable government action.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: NC SNYDERS | JP DICKS

- 6 CFJ’s involvement in matters pertaining to basic education, specifically the interplay between stakeholders (partners) in the education environment, dates back to September 2014 when we joined the *Organisasie vir Godsdienste-onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ)* court case.¹
- 7 Other examples of our involvement in the basic education sector include our submissions to the DBE on the draft *Basic Education Laws Amendment Bill*² and the draft *National Policy on the Prevention and Management of Learner Pregnancy*,³ respectively, as well as our engagement with the DBE in respect of Comprehensive Sexuality Education (“CSE”).

STRUCTURE OF SUBMISSIONS

8 Our submissions are structured under the following headings:

| | | |
|----------|---|----------|
| A | Scope and Purpose of Admissions Policy | 2 |
| B | School Capacity and Zoning | 3 |
| C | Administration of Admissions | 5 |
| D | Conclusion | 7 |

A. SCOPE AND PURPOSE OF ADMISSIONS POLICY

- 9 Clauses 2 and 3 of the Policy respectively state that it applies “*uniformly to all Provincial Departments of Education and all ordinary public schools*” and that the “*admission policy of an ordinary public school must be consistent with*” it. In clause 4, the Policy states that its purpose “*is to provide all Provincial Departments of Education and the governing bodies of all ordinary public schools with a framework for developing admission policies for schools.*”
- 10 We recommend that those provinces who have already promulgated their own admission policies, regulations, and/or guidelines, should be motivated strongly to review these in order to ensure compliance with the national Policy. In light hereof, we request national DBE to inform Members of the Executive Council (“MECs”) and Heads of Department (“HODs”) of their responsibility in terms of section 2(2) of the South African Schools Act, 1996 (“Schools Act”), which reads as follows:

¹ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* (29847/2014) [2017] ZAGPJHC 160; [2017] 3 All SA 943 (GJ); 2017 (6) SA 129 (GJ) (27 June 2017). Available at: <http://www.saflii.org.za/za/cases/ZAGPJHC/2017/160.html>.

² CFJ written submissions *Draft Basic Education Laws Amendment Bill* (10 January 2018). Available at: https://causeforjustice.org/wp-content/uploads/2018/01/BELA-Bill_Cause-for-Justice-submission_10.01.2018.pdf.

³ CFJ written submissions *Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools* (3 June 2018). Available at: <https://causeforjustice.org/wp-content/uploads/2018/06/CFJ-Submissions-DBE-Draft-National-Learner-Pregnancy-Policy.pdf>.

“A Member of the Executive Council and a Head of Department must exercise any power conferred upon them by or under this Act, after taking full account of the applicable policy determined in terms of the National Education Policy Act, 1996 (Act 27 of 1996).”

B. SCHOOL CAPACITY AND ZONING

CAPACITY

- 11 We are strongly convinced that many so-called “admissions issues” are actually “capacity issues” – and should be addressed and resolved accordingly.
- 12 We draw the DBE’s attention to the fact that it is both the duty and right of the school governing body (“SGB”) to determine the capacity of a school. In doing so, the SGB must take into account important considerations, such as keeping classes to an educationally justifiable size to ensure the provision of quality education to learners. Failing to do so will be detrimental to the best interest of learners. Furthermore, both the HOD and SGB are obliged to consult each in order to prevent and/or resolve any conflict in this regard.
- 13 In the case of *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* (“the Rivonia case”),⁴ the Constitutional Court held that:
- “It is immediately clear from section 5(5) that the governing body of a school determines the admission policy. That this may include a determination as to the capacity of the school is no longer a contentious point between the parties. Indeed, as the Supreme Court of Appeal pointed out, having regard to section 5A(3) of the Schools Act,28 a governing body’s admission policy may include a determination as to capacity. And it is significant that school governing bodies are afforded this role.”⁵*
- 14 When the Rivonia case was before the Supreme Court of Appeal (“SCA”),⁶ the SCA noted that the SGB of the school in question “*determined its capacity by taking into account a number of factors, including its statutory obligation to promote the best interests of the school, and to ensure its development through the provision of quality education*”⁷ and concluded that there was “*no suggestion that it set its capacity unreasonably or irrationally.*”⁸ Clearly, where a SGB determined school capacity in a reasonable manner, capacity limits justify limiting the admission of learners.

⁴ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013). Available at: saflii.org/za/cases/ZACC/2013/34.html.

⁵ *Ibid* at [40].

⁶ *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* (161/12) [2012] ZASCA 194; 2013 (1) SA 632 (SCA); [2013] 1 All SA 633 (SCA) (30 November 2012). Available at: <http://www.saflii.org/za/cases/ZASCA/2012/194.html>.

⁷ *Ibid* at [7]. Other factors the SCA listed are: Number of educators, space requirement, number of designated classrooms, and optimum desk working space.

⁸ *Ibid*.

15 In order to prevent capacity disputes, we strongly recommend prescribing a guideline for determining school capacity. In this regard, an SGB should be guided by principles drawn from minimum uniform norms and standards for public school infrastructure⁹ and other factors relevant to the planning and governance of a school as a whole.¹⁰ Certain facilities are not appropriate as classrooms and cannot be included when calculating capacity.¹¹

16 **Formulas:**

16.1 When determining capacity, we recommend the following formulas:

16.1.1 Classroom with single tables:

[class size (m²) minus teacher's furniture (m²) (furniture/equipment such as cabinets/desks) minus 7 m² (space for educator)] ÷ [space per learner (m²) + size of learner-table (m²)] = learner capacity per class

16.1.2 Classroom with double tables:

[class size (m²) minus teacher's furniture (m²) (furniture/equipment such as cabinets/desks) minus 7 m² (space for educator)] ÷ [space per learner (m²) + size of learner-table (m²)] times 2 = learner capacity per class

16.2 We recommend that SGBs must be guided by the SANS 10400:2010 National Building Regulations¹² in determining the capacity of sanitary fixtures.

⁹ Such as those included in the *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* ("Regulations"). Available at:

https://www.gov.za/sites/default/files/gcis_document/201409/37081rg10067gon920.pdf.

We note that the Regulations prescribes the following minimum space allocated for learner and educator:

Grade R: Learner - 1.6m² / Educator - 7m²

Grade 1 - Grade 12: Learner - 1m² / Educator - 7m²

Students with disabilities: Learner - 2m²

¹⁰ Factors to be considered, include: That learners' best interests have preference; the number of educators available; the space available for administrative needs; the number of appropriate classrooms available; space needs for sports, cultural and recreational activities; the available space in the current media and computer centres, science and technology laboratories and the school hall; the sanitary facilities available; parking facilities; safety measures; the maximum number of learners permitted per class; and internationally recognised best practice with regard to class size in order to deliver effective and efficient quality education.

¹¹ Such facilities include: Laboratories; computer centres; media centres; school halls; offices; staff rooms; meeting rooms; storerooms; and cafeterias.

¹² Available at: <https://www.sabs.co.za/>.

17 **ZONING**

18 **At Clause 38(a):**

18.1 We propose the insertion of the following sentence: *“provided that the learner meets all other requirements of the admission policy of the school.”*

19 **At Clause 38(c):**

19.1 As noted above, in the *Rivonia* case, the judge found that *“the governing body determined its capacity by taking into account a number of factors, including its statutory obligation to promote the best interests of the school, and to ensure its development through the provision of quality education. If a governing body has thus determined the school’s capacity in a reasonable manner, it would justify the limitation of admission of learners.”*¹³

19.2 The learner’s right to basic education is a right established against the state. The learner has the right to basic education and may apply at the next school as is the suggestion, but if he/she is unable to find any space, the state, and not the school, must be held accountable. The state has a duty to ensure there is enough space in schools for all learners to receive a basic education.¹⁴

20 **At Clause 38(d)(iii):**

20.1 We propose replacing the wording of Clause 38(d)(iii) with the following: *“other learners who are eligible in terms of the school’s admission policy on the basis of first come, first served.”*

21 **At Clause 44(b):**

21.1 We propose the inclusion of an obligation to encourage their children to adhere to the school's code of conduct.

C. ADMINISTRATION OF ADMISSIONS

22 **At Clause 7:**

22.1 We have serious reservations about requiring an SGB of an ordinary public school to make a copy of its school admission policy available to the HOD. We have been made aware of the high number of

¹³ *Ibid* at [7].

¹⁴ In its *7th Report on Economic and Social Rights*, the Human Rights Commission (available at: <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/100-7th-economic-and-social-rights-report>) noted that even though South Africa boasts high primary school enrolment statistics, increased access to education has come at the expense of quality. This insight applies to, and explains the detrimental impact of, ‘over-enrolment’ at a specific school: Overcrowded classrooms will infringe upon the learners in the overcrowded classroom’s right to quality basic quality education.

continuous complaints bemoaning the complete lack of response from HODs to correspondence, requests, applications, and submissions.

22.2 There is also no provision made for a timeframe within which the HOD must reply and for a default position if the HOD fails to reply. We recommend that, at a minimum, provision must be made for a default position where officials fail to respond to submissions within a prescribed period.

22.3 We have serious reservations about whether the DBE will be able to respond to all the submitted policies in a timeous fashion – leaving it exposed to flood of litigation for declaratory orders compelling a response to submissions.

23 **At Clause 8:**

23.1 The meaning of the following provision is unclear:

“The Head of Department must co-ordinate the provision of ordinary public schools and the administration of learners to public schools with governing bodies to ensure that all eligible learners are suitably accommodated....”

23.2 According to section 3(3) of the Schools Act, every MEC must ensure that in his/her province there are enough school places available to enable each child to attend school. We do not understand what co-ordination must be done with SGBs in respect of the provision of public schools. Clearly, it is the task of the MEC to ensure that there are enough schools (i.e. physical facilities) in each province – and not the duty of SGBs. This is not an “admissions issue” – but rather a problem that needs to be addressed and resolved in collaboration with national, provincial and local governments and departments, business, social partners and school communities.

24 **At Clause 9:**

24.1 In the context of refusing admission solely based on language policy, we fully support the rationale that language may not be used as an obscure mechanism to discriminate based on race. However, we also point out matters relating to issues like the language policy should not be considered purely legal grounds either – practical considerations must be taken onto account as well.

24.2 For example, it would not be fair to exclude a large group of learners based on their preference for a particular language simply because their language of choice does not correspond with the language of instruction at a particular school *and that school has room for additional learners*. At the same time, it would not be practicable to adjust the language policy of a particular school simply because a few learners request instruction in a language other than the language of instruction at the school.

24.3 According to section 29 of the *Constitution of the Republic of South Africa, 1996*:¹⁵

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the State must consider all reasonable educational alternatives, including single medium institutions, taking into account –
(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.”

24.4 Learners (and their parents) have the right to exercise a choice about the official language or languages in which they will receive instruction. Learners (and their parents) should be informed by public schools that they have this right and that the right is a fundamental right they are entitled to.

24.5 It is important to consider the meaning of “*where that education is reasonably practicable*”. It would be reasonably practicable for learners to receive instruction in the official language or languages of their choice if the school already instructs in the language of the learners’ choice. It would be reasonably impracticable for a learner to enroll at a school that does not already instruct in the language of the his/her choice and where there is another school offering the preferred language in the feeder zone.

24.6 The Policy – and specifically provisions regarding language policy – must also be in line with the *Language in Education Policy, 1997*¹⁶ as well as the *Norms and Standards Regarding Language Policy, 1997*.¹⁷ The Norms and Standards provide that it is reasonably practicable to provide education in a particular language if at least 40 learners in Grades 1 to 6, or 35 learners in Grades 7 to 12, require education in that particular language at that particular school. The language needs will most likely be ascertained when learners apply for admission with a view to the following academic year.

D. CONCLUSION

25 We trust that the above submissions are of assistance to the DBE and look forward to your response thereto (if any) in due course. CFJ remains at the DBE’s disposal to assist in the further development and/or amendment of the Policy to effectively achieve its intended purposes.

¹⁵ *Constitution of the Republic of South Africa, 1996*. Available at: <https://www.gov.za/documents/constitution-republic-south-africa-1996>.

¹⁶ *DBE Language in Education Policy, 1997*. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/languageeducationpolicy19971.pdf.

¹⁷ *DBE Norms and Standards for Language Policy in Public Schools, 1997*. Available at: <http://www.up2speed.co.za/Legislation/NORMS%20AND%20STANDARDS%20FOR%20LANGUAGE%20POLICY%20IN%20PUBLIC%20SCHOOLS.pdf>.

26 We also hereby respectfully request the DBE to give us an opportunity to make oral submissions (representations) to the DBE at an opportune time to augment these brief written submissions.

Yours faithfully,

Liesl Stander

Legal Advisor: Law and Policy