SOUTH AFRICAN HUMAN RIGHTS COMMISSION

COMMENT: ADMISSION POLICY FOR ORDINARY PUBLIC SCHOOLS

The South African Human Rights Commission (Commission) welcomes the opportunity to provide comments on the Admission Policy for Ordinary Public Schools (Policy) as contemplated in section 12(2)(a)(i) of the South African Schools Act 84 of 1996 (Schools Act) and section 3(4)(i) of the National Education Policy Act 27 of 1996. The Commission appreciates that the draft policy is aimed at providing all Provincial Departments of Education and the governing bodies of all ordinary schools with a framework for developing admission policies for schools.

The Commission is encouraged by **Paragraph 9** of the Policy, to the extent that it does not limit the prohibited grounds upon which an admission policy can unfairly discriminate. Equally, the Commission strongly advises that the Policy expressly provide the following as additional grounds which an admission policy should not unfairly discriminate upon:

1. 'Gender identity';
2. 'Gender expression'; and
3. 'Pregnancy'.

The Commission supports the idea behind **Paragraph 9(a) and (b)** to the extent that language can be used as a proxy for race to unfairly discriminate in the implementation of admissions policies. The Commission takes cognisance that due to the gross inequalities that persist in the education system following racially discriminatory apartheid-era laws and policies, many learners compromise (to their disadvantage) on their right to receive education in their mother tongues, in order to benefit from the better-resourced and historically "white" schools. The Constitutional Court has recognised this irony:

> Learners whose mother tongue is not English but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother tongue instruction is the foremost and the most effective medium of imparting education.[1]

Despite acknowledging the laudable intentions of **Paragraph 9** of the Policy, the Commission is concerned that the wording in **Paragraph 9(b)** does not sufficiently address the practical effects of not predicating the admissions policy of a school on its language policy. The Commission is of the view that this **Paragraph** does not provide sufficient; systemic; sustainable and/or clear guidelines to give practical effect to the intentions of the policy and section 29(2) of the Constitution. Given the ambiguity inherent in section 29(2) of the Constitution and related jurisprudence, it is in particular unclear whether it will be "reasonably practicable" to accommodate learners who do not speak the language of the medium of instruction, especially at single medium schools. If it is "reasonably practicable" to accommodate such learners, viewed in the light of the factors set out in section 29(2) of the Constitution, then schools would benefit from detailed guidance as to how such learners can be appropriately and reasonably accommodated. The Constitutional Court has noted that the enquiry as to "reasonable practicability" is a context-sensitive one:

> When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be

[1] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) para 50.

> whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.[2]

There is thus a need for practical guidance as to how schools, including single medium schools, should go about accommodating learners who are not necessarily fluent in the school's medium of instruction. Jurisprudential guidance offered in judgments such as *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*[3] or, in the context of further education, *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others*,[4] is broad in nature and may not offer practical solutions to schools faced with the challenge of accommodating learners who are not fluent in a school's medium of instruction. To this end, the Commission strongly proposes a colloquium, convening all relevant stakeholders, including the Department of Basic Education, to deal with challenges posed by language policies and the implementation thereof by schools.

The Commission is also of the view that the Department should do much more (specifically in terms of providing financial and human resources) to provide home language based education to learners, which is clearly in their best interest, and to enable schools to offer more than one language of teaching and learning. The Commission understands that the current post provisioning model does not provide sufficient support to schools with more than one, or multiple, languages of teaching and learning.

The Commission has reservations about **Paragraph 10(b)**. The Commission is of the view that this paragraph may detract from constitutional and legitimate grounds to suspend a learner. The Commission further holds that **Paragraph 7** guards against mission statements and codes of conduct that are prejudicial and that go against the spirit of the Constitution and applicable law. To this effect, the Commission believes

[2] Ibid. para 52.
[3] 2010 (2) SA 415 (CC).
[4] 2019 (12) BCLR 1479 (CC).

this paragraph can be done away with. Similarly, the Commission is concerned about the cumbersome nature and implications of **Paragraph 10(c)** on the teaching profession. The Commission understands that schools cannot legally waive 'gross negligence' or claim for damages arising from 'gross negligence'. To this extent, the Commission is of the view that this paragraph can be done away with.

The Commission is concerned about the language in **Paragraph 25**. The Commission is concerned that **Paragraph 25** does not stress 'universal design' enough, and does not emphasis 'reasonable accommodation' for learners with special needs. Further, the Commission holds that **Paragraph 25** should read as follows:

- **'**Schools *must* make the necessary arrangements …'.
- 'Public ordinary schools *should* admit learners with special education needs, where this is reasonably practical'.
- It is also suggested that in terms of use of language that the policy should refer to learners with disabilities or learners with impairments, rather than learners "with special educational needs'. Some learners have impairments that require accommodations that are not of an educational nature but rather relate to structural adaptations to the school or learning environment. These children are however denied admission because they are treated as children with "special educational needs' that schools might wrongly perceive as impractical or unreasonable, or belonging to a special school instead of looking for methods to include. Persons with disabilities is also the globally recognised term to refer to the impairments that persons may experience. This would therefore bring the phrasing in line with the convention on the rights of persons with disabilities that places emphasis on the environment more so than on the impairment.

In respect of **Paragraph 35(a)**, the Commission is concerned that no guidance is offered as to when a school can be considered to have reached capacity. The Commission therefore recommends that criteria be added with which to establish the capacity of schools. Such criteria should include, but not be limited to, infrastructure norms and standards, applicable building regulations, the total number of learners per

class (which the Commission understands has been determined by the Minister to be 40), etc.

The Commission is concerned about the wording in **Paragraph 34** of the Policy to the extent that the Head of Department can exercise his/her discretion to determine feeder zones. The Commission, with a view that feeder zones are important, advises that the language ought to read: 'A Head of Department *must*, after consultation with the governing bodies, determine feeder zones for ordinary public schools, in order to control the learner numbers of schools and co-ordinate parental preferences.' To this effect, the Commission proposes that **Paragraph 38** ought to read: 'The following principles must be applied with regard to the creation of feeder zones: ….'

The Commission welcomes the opportunity to comment on the Policy and is always open to working with the Department of Basic Education to ensure the realisation of the right to basic education.

Date: 12 March 2021