





**Parent Participation in
School Governance:
A Legal Analysis of
Experiences in
South Africa and Kentucky**

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ABSTRACT: This comparative study on the educational governance systems of South Africa and the Commonwealth of Kentucky examines legal evidence from judicial decisions and administrative law to understand similarities in how school-based governance structures have been developed. We found that although school-level governance structures may provide greater opportunities for community and parental participation, each engenders a number of legal problems that compromise the decentralization of democracy to the school level. Recommendations for policymakers and practitioners are offered that may achieve this goal.



Education is an important social function that consciously weaves together responsibilities of the state, the community, and the family. Most nations engaged in systemic education reform are challenged by the need to balance countervailing forces for centralization that advances the broad interests of the state and for decentralization that gives greater voice to communities and protects individual legal rights of parents. Although education reform is



a global phenomenon in the 21st century (Björk & Alsbury, 2011), many countries find devolving authority to the local school level and installing representative democratic bodies problematic. Understanding the legal complexities of enacting educational representative democracy in the Republic of South Africa and the Commonwealth of Kentucky—both viewed as *reform states*—is the focus of this cross-national comparative study. This article provides a discussion of the history of educational reform with attention to the devolution of governance in each state, as well as an examination of evidence from legislation, judicial decisions, and administrative regulations that illustrate unique legal complexities as well as similarities encountered by each state in enacting school-based governance structures. An analysis of legal implications of the school-based governance provides a basis for offering recommendations to policymakers and practitioners who are considering a school-based approach to governance.

SCHOOL GOVERNANCE IN SOUTH AFRICA AND KENTUCKY

South Africa and Kentucky are distinctive in that both states made a commitment in the early 1990s to systemically reform their respective education systems. As part of this reform effort, the states sought to shift the locus of education decision making to the school level. In South Africa, this responsibility is placed in the school governing body (SGB); in Kentucky, it is vested in the school-based decision-making (SBDM) councils. The following sections discuss the way that each state reconfigured its education system and the legal framework that created these representative democratic structures.

SGBs in South Africa

The apartheid system in South Africa created a race-based system of education with five main national structures (see

Figure 1) [Q1] composed of approximately 17 separate systems or departments of education. Each operated under different laws and governance systems that provided little substantive coordination of the whole enterprise. Except for the White systems, there was little real parental education (Department of Education, 1995).

[Q1: Table converted to figure— please review and confirm/update.]

When the democratically elected government assumed power in 1994, the nation ended apartheid and set about developing and implementing a comprehensive suite of policies and laws to deal with its legacy of inequality, discrimination, and race-based education. One of the most urgent matters focused on addressing the wide disparity in the quality of education and the related undemocratic nature of school governance. For example, there was little provision for parent and community input in Black schools. Teachers used inappropriate and outdated pedagogical instructional materials and strategies. The local education systems were led by autocratic administrators, and financial inequalities in the system were rampant. The *White Paper on Education and Training* (Department of Education, 1995) was the first education document to emerge from the newly formed government that embodied a comprehensive set of new public education policies. The white paper unambiguously stated that parents have the primary responsibility and inalienable right to be involved in the education of their children, and it asserted the rights of parents

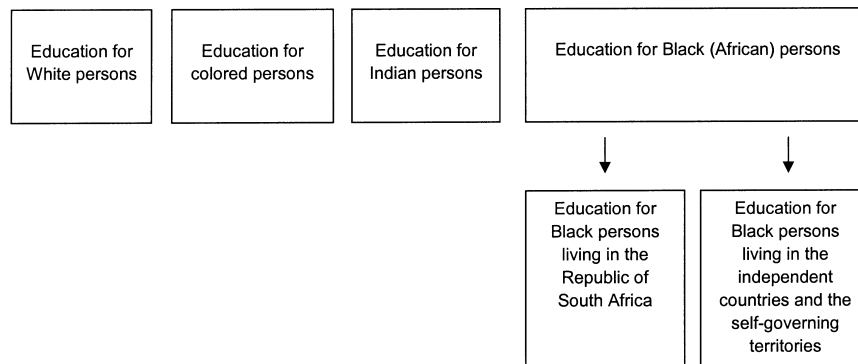


Figure 1. The apartheid education dispensation in South Africa.

and citizens as participants in the governance process. Furthermore, the white paper indicated that local communities own their schools and that the costs of education shall be borne by more than just public funds.

The second document to emerge, *Education White Paper 2: The Organisation, Governance and Funding of Schools* (Department of Education 1996), articulated the specific roles of parents in school governance, such as

- ❖ establishing a coherent national pattern of school governance that embodies “a major role for parents in school governance, to be exercised in the spirit of a partnership between the provincial education department and a local community” (¶ 1.11) and provides for elected representatives of parents and guardians, who should be in the majority on public SGBs (¶ 3.15);
- ❖ developing a governance policy for public schools based on the core values of democracy (¶ 3.1);
- ❖ ensuring that representative governing bodies are established in all public schools (¶ 3.1);
- ❖ recognizing that governing bodies should have substantial decision-making powers, selected from a menu of powers according to their capacity (¶ 3.1);
- ❖ affirming that teachers in public schools will be employed by the provincial education departments on the recommendation of and in consultation with governing bodies (¶ 3.1);
- ❖ agreeing that all public schools will be granted a legal personality in recognition of the responsibilities of their governing bodies (¶ 3.1);
- ❖ guaranteeing that a school governance structure should involve all stakeholder groups in active and responsible roles (¶ 3.6); and
- ❖ asserting that governance should be construed as policy determination (¶ 3.7).

In sum, the second white paper provided the operational parameters for establishing representative democracy in public education.

These two white papers articulated important policy decisions that were subsequently reflected in the South African Schools Act (SASA; Republic of South Africa, 1996b). The legislation contained provisions crucial to school governance. Importantly, the school—not the SGB—is the juristic person with legal capacity (§ 15), and governance of every public school is vested in the local SGB (§ 16), comprising a majority of parents (§ 23). Other provisions of the SASA include compelling the state to provide initial and continuing training to SGB members to capacitate them for management and leadership responsibilities (§ 19), making the school principal an ex officio member of the SGB (§ 23.1.b) and a representative of the provincial education department on the SGB (§ 16A.1.a). Furthermore, the SASA outlined three distinct types of functions (i.e., compulsory, discretionary, allocated) to be performed or exercised by SGBs. For example, chapter 4 of SASA deals with the funding of public schools and enjoins SGBs to supplement state funding, establish a school fund, pay all monies received by the school, maintain a bank account, prepare a budget and present it to parent community for approval, appoint an auditor and make records available for public inspection, and keep records and financial statements.

Although the SASA (Republic of South Africa, 1996b) included remedies should the SGBs not perform satisfactorily, the education departments in the nine provinces are constrained with regard to what they may do. For example, Section 22.1 of SASA provides that the head of a provincial department of education may, on reasonable grounds and following due process, withdraw a function of a governing body. Section 25.1 further provides that if such a head of the provincial education department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of SASA, he or she must appoint sufficient persons to perform all such functions for a period not exceeding 3 months and extendable another 3 months (§ 25.2). [Q2] The responsibility of this appointed body is to build the necessary capacity to perform functions (§ 25.4).

[Q2: “for a period of up to 3 months, extendable to another 3 months”?]

If a governing body has ceased to perform its functions, the head of department (HOD) must ensure that a new governing body is elected within a year (§ 25.3).

SGBs' powers are derived from the 1996 SASA and not from provincial education departments. The financial accountability of the SGBs is to the constituencies who elected them. Thus, the provincial education department does not have the power to summarily dissolve SGBs, hold them responsible for funds, or otherwise delimit parent responsibility for their children's education. Because there were strong expectations that the postapartheid government would not be a retreating government (Sayed, 2000) and act forcefully to turn the education system around, many anticipated conflicts would arise among it, parents, and the community with regard to religious and language issues, as well as funding of schools.

SBDM Councils in Kentucky

During the early 1980s, citizens of Kentucky expressed concern for the unacceptable condition of schools in the commonwealth. An energized group of education leaders and concerned citizens formed the Council for Better Education and then sued the state legislature for unconstitutional performance of the education system relative to the Kentucky Constitution (Alexander, 1991; *Rose v. Council for Better Education*, 1989). Although primarily seeking only changes in school funding, the council's legal action unexpectedly led to the Kentucky Supreme Court ruling in June 1989 that the entire preK–12 education system was inefficient and unconstitutional. The Court mandated the Kentucky Legislature to reform the commonwealth's education system within 9 months. After public hearings and a review of findings, the legislature passed the Kentucky Education Reform Act (KERA; 1990). A major part of KERA was the establishment of SBDM councils in each public school, intended to enhance community and teacher ownership of local schools. The Prichard Committee for Academic Excellence (1995), a

citizen advocacy organization that supported the lawsuit, asserted that “the core purpose of the school council is to change the school so that student learning will increase” (p. 43). Over the course of next several years, local boards of education enacted provisions of KERA that mandated creating SBDM councils.

By 1996 all school districts had SBDM councils that, under statute, were given control over essential school functions. For example, the statutory default membership of the SBDM council is two parents, three teachers, and the principal of the school (Kentucky Revised Statute [KRS] 160.345.2). The election procedures for these representatives depend on their positions: Only teachers may vote on the teacher representatives, and only parents may vote on the parent representatives (KRS 160.345.2). In schools where 8% or more of the students identify themselves as members of a minority race, at least one member of the council must be a minority member also. If one is not elected to the board, then the principal must organize a special election to add either a minority teacher or parent to the council. All new SBDM members must receive 6 clock hours of professional development on the council roles and responsibilities, and continuing members must receive 3 hours (KRS 160.345.6). Meetings of the council or its subcommittees are subject to the general Kentucky open meetings law and exceptions (KRS 61.810), but KERA created no new exceptions for the SBDM councils. The SBDM councils have the statutory authority to employ personnel, determine textbooks and instructional materials, allocate space, assign students to classes, and create student discipline policy, among many other functions. A unique responsibility entrusted to each SBDM council is selection of the school’s principals. While the superintendent may appoint a representative to be the chair of the SBDM council during the selection process, the full SBDM council examines all principal candidates and determines which to recommend to the superintendent for hiring the principal (KRS 160.345.h.2).

ANALYSIS OF SCHOOL GOVERNANCE DISPUTES

Although the scope and substance of systemic reform in South Africa is viewed as being unprecedented among nations, Kentucky's court-mandated reform is characterized as the most comprehensive in the United States. A common thread that links these reform-state experiences is the widespread public support for democratic representative government, reflected in the creation of SGBs in South Africa and SBDM councils in Kentucky.

[Q3: "the researchers" = "we"?]

The purpose here is to identify the nature and potential limitations of school-level governing bodies in South Africa and Kentucky by examining the record for legal difficulties. To do so, the researchers [Q3] conducted a traditional legal analysis for results relating to SGBs and SBDM councils (Permuth & Mawdsley, 2006). In South Africa, several lawsuits have resulted in published judicial decisions that articulate potential limitations of SGBs. Although the Kentucky judicial record is sparse, lawsuits arising as a result of the legal creation of SBDM councils and opinions issued by the Kentucky Attorney General's office provided ample legal material. Primary legal sources were analyzed to highlight many of the important legal opinions and cases. The section on South Africa includes an analysis of cases relating to important constitutional challenges to school governance, whereas the section on Kentucky examines a mixture of state supreme court, lower court, and attorney general opinions relating to SBDM councils. A discussion follows that analyzes the legal complexities of enacting school-level democracies, illustrates the similarities of experiences between both reform states, and presents recommendations for policy and practice.

Republic of South Africa

Several cases have arisen that challenge the constitutionality of state action since the formation of the SGBs (cf. Beckmann, 2009; Dieltjens, 2005; Minnaar, 2009; Mncube,

2009; Sayed, 2000; Soudien, Ngcongco, Brijraj, Mthonsi, & Dladla, 2003). The first example of conflict among SGBs involves the multiple language instruction rights of children granted in Section 19.2 of the South Africa Constitution (*Governing Body of Mikro*, 2005). An Afrikaans school in the Western Cape taught students in Afrikaans; however, 40 students wished to have English-language instruction. The educational HOD of the Western Cape Education Department sent a letter to the principal of the school on December 2, 2004 (1 month before the school was to reopen for 2005), and instructed him to admit and accommodate the 40 students. He also advised the principal that failure to implement the directive might constitute grounds for disciplinary action. The school had on several previous times refused to admit learners who wanted to be taught through the medium of English. Although the school appealed HOD's directive, it was dismissed by the minister of education. Consequently, the SGB asked the court to revise and set aside the regional HOD's English-language directive and the decision by the minister of education. Furthermore, the SGB asked the court to forbid future learners from being registered or placed at the school by the government and to declare the presently admitted English learners' registration null and void.

The judge, in setting aside the decisions of the minister of education and the HOD, made several important determinations relative to this analysis. First, the judge asserted, "It is clear that a public school's governing body is intended by the legislature to be independent of state or government control in the performance of its functions" and that "no machinery is to be found in the Schools Act for the control of a governing body by the state" (*Governing Body of Mikro*, 2005, p. 10). The judge determined that if it is first established that all other public schools in the district are full, only then can the provincial education department override the SGB's determination of a single-language school. In this case, an English-language primary school was 1.2 km away from the Afrikaans school. As a result, the students who preferred English instruction were ordered to be placed the nearby

English-speaking school. This case underscores the difficulty that the government has to act against SGBs whose action it does not particularly approve. The judge confirms in essence that an SGB is not an organ of state but rather a juristic person with legal capacity, as contemplated in the constitution of 1996 (Republic of South Africa, 1996a).

In another instructive case where the rights of the SGB were upheld, *Schoonbee and Others v. MEC for Education, Mpumalanga and Another* (2002), the chairperson of the high school SGB asked the courts to set aside a decision of the regional education HOD for Mpumalanga province to dissolve the SGB and suspend the principal and deputy principal. The HOD for the province took the action after a financial audit revealed concerns. A letter was sent by the provincial auditor general to the school requesting comment on these concerns. After requesting an extension, the HOD sent a letter to the principal requesting an explanation and threatening suspension. Finally, the chairperson of the SGB sent the letter responding to the audit. The auditor then submitted this information the HOD, who sought to dissolve the SGB and suspend the principals.

Upon review, Judge Moseneke examined the relationship between the principal and the financial assets of the school. He also considered the role of the SGB in this regard and the question to whether the principal could be viewed as the accounting officer of the school. He found that although the principal and second senior deputy principal sat as members of the SGB, they did not act for the SGB; they were, however, expected to assist the SGB. If the HOD was dissatisfied by how financial matters were handled by the principal, the SGB must be asked to explain each financial issue lest it earn the displeasure of the HOD. Judge Moseneke also found a disproportionality between the acts or conduct of the SGB and the administrative action that was actually taken, namely to dissolve the SGB. In the judge's view, the dissolution was disproportionate to the conduct. Furthermore, that the regional head of education failed to provide specific reasons for the suspensions and the dis-

solution was unjustifiable and thus fatal to his case against the local SGB.

Finally, in something of a reversal of inaction from the previous case, a bus window was smashed in one of the more famous educational cases from South Africa (*Maritzburg College v. C.R. Dlamini*, 2005). Three students on the bus were found to be involved with alcohol at the time, two smelling of it and the third having a bottle of brandy in his kitbag. Two of the students were suspended, and the SGB recommended expulsion to the regional HOD in KwaZulu-Natal province. Twenty-one months passed without action from the HOD, despite numerous calls and a meeting. Eventually, out of sheer desperation, the SGB approached the high court for a declaratory order against the regional HOD, who contended that Section 9.1.a of the schools act did not allow for learners to be suspended for more than one week and that the interim suspension pending a decision on expulsion was unlawful.

At trial, Judge Combrinck found that the HOD was incorrect in relying on the provisions of Section 9.1.a of the schools act and that the school correctly applied the provisions in its disciplinary determinations. The court criticized the unresponsive bureaucratic attitude of the public official by stating,

I find it disturbing (to put it mildly) that a public official had to be galvanized into action to do his duty only when served with a court application. Even more disturbing is his attitude as spelt out in paragraph 11 of his answering affidavit, quoted earlier in this judgment, that there is “no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me. (p. 18)[94]

)[O4: This opening quote has no closing quote.]

The court declared the decision of the governing body to be lawful and gave a punitive costs award in favor of the school.

The *Maritzburg* case (2005) is illustrative of many other cases that indicate that the state is inclined to make it difficult for SGBs to carry out their functions properly. There are frequent examples of policy disregard, unnecessary red tape

and lethargy, errors in law, and suggestions of ulterior motives playing a role in decisions. Several cases provide further examples of such problems and suggest a lack of transparency, accountability, and responsiveness on the part of government: *Despatch High School v. Head of Department of Education* (2003), *Jonkers v. Western Cape Education Department* (1999), *Head of Department of Education, Limpopo Province v. Settlers Agricultural High School* (2003), *Douglas High School and Others v. Premier, Northern Cape* (1999), and *Queens College Boys High School v. MEC, Department of Education, Eastern Cape Government* (2008). Furthermore, *Settlers* (2003) and *Head of Western Cape Education Department v. Governing Body of Point Highs School* (2008) are landmarks in this regard. In both cases, the HOD in question refused to appoint the person whom the SGB had recommended as principal. The HOD relied on a separate statute, Section 6.3.g.iii of the Employment of Educators Act, No 76 of 1998, to say that a “suitable person” must be appointed. However, the courts set aside the HOD’s appointments of other candidates.

[Q5: “disputes among SGBs, HODs, and MECs” (i.e., among all three groups) or “between SGBs, on the one hand, and HODs and MECs, on the other” (i.e., between two)? Also, please spell out “MECs” here.]

In areas of SGB determination, such as the application of codes of conduct for learners and the appointment of educators, where HODs are reluctant to endorse recommendations by SGBs, litigation often results (see Prinsloo, 2006; Smit, 2008). It is clear that there may be more disputes between SGBs and HODs and MECs [Q5] and that the courts have thus far seen to it that the principles of administrative action are upheld.

Commonwealth of Kentucky

During the 1990s, the decentralization and devolution of decision making to the school level were characteristics of the national education reform movement in the United States (Peterson, Marks, & Warren, 1996; Wyman, 2000). However, Kentucky arguably took the concept further than any other state by providing statutory responsibilities over hiring and curriculum (Russo, 1995). After KERA was en-

acted, the Prichard Committee for Academic Excellence (1995) published a report that examined the implementation of the law. Conclusions drawn from empirical evidence gathered by the two task forces were optimistic about SBDM implementation, yet the reports also offered an array of recommendations for ongoing implementation improvement. These findings were affirmed by scholars who conducted independent studies of SBDM councils in different contexts and with different study participants. For example, Lindle, Gale, and Curry-White (1996) found that SBDM councils were generally well received by the public and were implementing core functions articulated in the statute despite budgetary constraints. Daniel and Shay (1995) found little resistance among teachers to the implementation of SBDM councils. In addition, Kannapel (1995) examined SBDM implementation in rural areas, while Logan and Byers (1995) looked at SBDM council activities in vocational schools. They, like Van Meter (1994), were prescient in their concerns about implementation voids, confusion among agencies on their proper advisory role, and a serious challenge of gaining real parental involvement. Over the years, these types of concerns about implementation of school- or site-based governance structures have often been raised across the United States, leading Gok, Peterson, and Warren (2005) to conclude, "This reform is turning out to be more difficult to implement than once thought" (p. 2).

Kentucky's SBDM councils have experienced a unique yet similar set of issues as the SGBs in South Africa. In contrast to the South African Legislature, the Kentucky Legislature did not go so far as to make SBDM councils entirely separate entities from other elements of the education system. Thus, Kentucky has not seen the direct judicial confrontations between the Kentucky Department of Education (2004, 2011) and SBDM councils; however, the issues that have arose in the legal disputes and documents are frequently similar to those seen in South Africa.

While the SBDM law (KRS 160.345) does mandate the existence of the SBDM council, it does so within the context of the district board of education. Each local school board has

been given “general control and management of the public schools in its district” (KRS 160.290). Thus, SBDM councils are distinct from SGBs in South Africa because they are authorized by local school boards and share power with them. The Kentucky Supreme Court weighed in on this delicate balance of governance in 1994 when, in a 5–2 opinion, it decided that a local board of education cannot subject all SBDM decisions to board of education approval (*Board of Education of Boone County v. Bushee*, 1994). In interpreting KRS 160.345 (the SBDM-authorizing statute), the Court said, “The obvious intent here is to have the decisions affecting the individual schools within the district to be made by persons most affected by what occurs at that school” (p. 814). Finding the SBDM council to be an “independent authority” from the school board, the Court found that SBDM decisions are not subject to the board of education’s direct oversight.

However, some limitations on the independence of SBDM councils have been imposed. In the same time frame as the court rendered its opinion on the *Board of Education of Boone County v. Bushee* (1994), the Kentucky attorney general issued guidance giving school boards legal oversight of all SBDM decisions based on the limitations contained in KRS 160.345. In permitting such legal review, the attorney general stated, “Since a school council generally does not have access to legal counsel to review its policies for lawful compliance with the quagmire of federal and state laws,” the school district may review SBDM policy for legal compliance and avoidance of liability (Ky. Att’y Gen. Op. [KAGO] No. 94-29, 1994).^[Q6] In addition, the Office of the Attorney General issued specific guidance stating that an SBDM council may not vote itself out of existence (KAGO No. 94-51, 1994). Thus, while the school board cannot directly review every SBDM policy, it can review policy on legal grounds, and school boards can continue to control crucial elements of SBDM councils, such as their structure.

Case law about what governance elements SBDM councils have control over are instructive and point out the often-

[Q6: Attorney general opinions cited in text only (no need to repeat in ref list) and abbreviated as KAGO akin to KRS for readability.]

confusing line between SBDM authority and school board authority. For example, a SBDM council wanted to change how an existing parking lot was used and wanted to build a new one with its own funds. Only the former, not the latter, is permissible (KAGO No. 91-215, 1991). SBDM councils were granted authority over how “school space [is used] during the school day” (KRS 160.345.2.j), but school boards are given control over “all public school property of its district” (KRS 160.290.1). Another distinction is apparent regarding SBDM councils’ curricular authority in determining the extent to which each concept is delivered to children; namely, the SBDM council was given the authority to eliminate or transfer employees by implication, even though such duties are typically the domain of the school board (KAGO No. 96-38, 1996).

Another area of concern emanates from how the SBDM law aligns with federal education policy. For example, while legal precedent for school dress codes is somewhat clear for school boards, a federal court had to consider and ultimately allow SBDM councils to enact detailed dress code restrictions under the First Amendment under their statutory authority to control the learning environment (*Long v. Board of Education of Jefferson County*, 2000). Even the Kentucky attorney general’s office was confused by the issue of whether or not SBDM members, particularly parents, were school officials for purposes of the federal Family Educational Rights and Privacy Act. If they were deemed school officials (as local board members are), then they could view student records as part of their task to examine student data. Although this was the initial conclusion of the attorney general’s office (KAGO No. 93-5, 1993), its opinion changed within the year (KAGO No. 93-35, 1993) in determining that SBDM members were not school officials and thus not authorized to examine student records—thus making the task of improving student learning all the more difficult for SBDM councils because they are barred access to student records data.

Another area of concern focuses on the eligibility of individuals who serve on the SBDM councils. The Kentucky

Supreme Court was asked to answer whether the antinepotism statutory prohibition applied to parent members of SBDM councils who were related to district employees and whether that was a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution (*Kentucky Department of Education v. Risner*, 1996). After the Court determined that it was not a violation, the elimination of nepotism became a sufficient rational basis upon which to oust the spouses of elementary teachers from the high school and middle school SBDM council. Furthermore, the minority membership provision in the SBDM law has given rise to a number of questions over the years. Of particular note was the relatively odd determination that if a special election were necessary to elect a minority member (KRS 160.345.2.b), only parents of minority students were permitted to take part in the election (KAGO No. 94-60, 1994). Also, guidance has been issued on who is a relative (KAGO No. 90-102, 1990), that a teacher cannot vote for her or his son to fill a principal position at the school (KAGO No. 93-50, 1993), and that a teacher can vote as a teacher in one SBDM election and as a parent in another SBDM election (KAGO No. 93-49, 1993).

Finally, perhaps the issue that has most frequently been the subject of protracted debate concerns the authority of the SBDM council to hire the school principal (see KAGO No. 95-10, 1995). The Kentucky Supreme Court considered this issue in *Young v. Hammond* (2004). In two consolidated cases, the Court was asked to consider whether the SBDM law permitted superintendents to cull the list of prospective principal applicants to only those recommended by them before sending the list to the SBDM council. The Court determined that such a recommended list was not permitted under state law. The SBDM council was entitled to choose the principal from all candidates meeting the minimum eligibility criteria; to do otherwise “would undermine the primary goal of decentralization of authority and would be at odds with KERA’s stated goal of shared decision-making authority” (p. 901). Because of the highly controversial nature of

this determination, the Kentucky Legislature has returned to the issue on numerous occasions. It recently passed a law that permits superintendents to narrow the list to three acceptable candidates from which the SBDM council may choose (Kentucky Senate Bill 12 of 2011, relating to principal selection).

Implications and Recommendations for Practice

Although several important differences exist between SGBs in South Africa and SBDM councils in Kentucky, there are several legal implications for implementing school-based democratic governance structures. This following discussion focuses on the similarities between the school governance models in South Africa and Kentucky, details the legal implications emerging from that comparison, and offers recommendations for policy and practice in key areas, including participation, competence, variability, the role of the principal, defining the bounds of governance, and outside legal opinions.

Participation. The issue of participant willingness to serve on school-based governance councils is of concern to policymakers and educational reformers. For example, in South Africa, researchers have identified a general reluctance on the part of parents to attend meetings during which SGBs members are elected. Dieltjens (2005) speculates that the initial individuals who helped to determine how parents should be given voice in the decision-making processes and who influenced policy documents such as the white papers and the promulgation of the SASA may have made fallacious, intuitive assumptions that parents would welcome the establishment of SGBs and would be eager to serve on them. An alternative explanation may be equally valid—namely, a lack of widespread participation may be influenced by parents' unfamiliarity with the principles of representative governance (i.e., SGBs), the logistics of electing representatives, and understanding how their expertise may be utilized.

Similar issues have been observed in Kentucky. For example, parents and teachers are required to conduct their own SBDM elections without assistance from school administrators and in accordance with state election laws. Election advantages may be gained by some well-organized parent groups (e.g., band boosters, athletic boosters, assistant coaches) who may have undue influence or control, as the largest parent group in the school typically holds the election (*News-Democrat and Leader*, 2005). A testament to the challenge facing school-based representative democracies may be seen in the complex legal questions that have arisen regarding who is eligible to vote (KAGO No. 93-49, 1993). Furthermore, Russo (1995) points out that this issue becomes increasingly complex when student participation on school-based councils is attempted. Thus, promoting and then translating participation into legally permissible representation remains a significant practical and legal hurdle for states engaging in school-based governance.

Competence. To serve on an SBDM council in Kentucky, individuals must have a total of 6 clock hours of training (KRS 160.345.6). In South Africa, while the law mandates training, some researchers question whether it is actually happening, and some challenge its adequacy (Bush et al., 2006; Bush & Joubert, 2004). Although it is expected that the law must strike a proper balance between necessary background knowledge and parental time constraints, the legally ensured baseline of competency is very low. Thus, the practical approach is generally to provide information and to hope for the best. For instance, while SBDM council members in Kentucky are required to be given information on the Kentucky open meetings law (KRS 160.345), the potential for violations is expansive. For example, if three teacher members of the SBDM council sit at the same table while in the school lunchroom and discuss curricular changes, it is likely a technical open meetings violation. This situation gives credence to the statement issued by the Kentucky attorney general's office acknowledging that SBDM councils were in no position to comply with the "quagmire of federal and state laws" (KAGO No. 94-29, 1994).

Because of the lack of legal expertise, the use of imagined power (Beckmann & Prinsloo, 2006)¹ by government officials and members of SGBs may lead to litigation or may defeat the purposes of the decentralization of certain powers to SGBs (Beckmann & Prinsloo, 2009). In other instances, ignorance or inadequate understanding of powers and functions or a refusal (derived from party political and other convictions) to obey policy and law provisions contributes to the failure of these most basic forms of representative democracy. Even if unintentional, “school councils, like school boards, tend to micromanage, trying to control many decisions that are more appropriately—and more efficiently—made by others” (Wyman, 2000, p. 260). To mitigate against the lack of competence, Gok and colleagues (2005) offer several suggestions for leaders of school councils that center on the training and building of effective leadership teams. In this regard, policymakers and practitioners who are committed to highly effective representative governance systems may consider the need for building the capacity of parents, teachers, and community citizens to perform their roles. This will require opportunities for SBDM council and SGB members to be supported by ongoing, language-appropriate, and robust professional development opportunities delivered by departments of education, universities, nongovernment agencies, and professional associations.

Variability. School-level governing bodies in South Africa and Kentucky vary widely in the nature and scope of responsibilities. In South Africa, for instance, “because of the greater managerial expertise among the parents, former model C schools operate more effectively than other schools; and there are also vast differences between urban and rural schools” (Mncube, 2009).**[97]** This also appears to be the case in Kentucky. In urban and suburban school districts, SBDM councils receive greater levels of administrative support. For example, recording SBDM meeting minutes is typically facilitated and financed through a fixed process. Another point of variability is observed in South Africa where there is a lack of formal education or low levels of literacy among parent members of SGBs. Because the language of

[Q7: If available, please include page no. of quote per APA.]

government is primarily English—a language that is not the home language of the majority—parents consequently struggle to make sense of official documents and training that is available only in English (Rangongo, 2011). The variability in literacy levels and language may make parents vulnerable, compelling them to accept interpretations and guidance offered by the school principal on SGB matters. A lack of trust between SGB members and the principal could contribute to conflict and a toxic relationship between the school's administration and its governing body (Mahlangu, 2005).

These cases have several implications for policymakers and practitioners. It is evident that policymakers should anticipate the need for publicizing, as well as explaining, the nature and purpose of school-based governance structures. They should also plan to support election processes and ensure that legislated roles do not conflict with those relegated to other levels of representative governance or with the roles of government agencies, such as departments of education. If they are to succeed, policymakers should support practitioner-level efforts to make school-level governance structures work. Recognizing the nature of variability suggests the need to ensure competence among members to perform as representatives of parents and teachers.

Role of the principal. One of the most important similarities between South Africa and Kentucky is the critical role that the principal plays in instructionally effective schools and the viability of SGB and SBDM governance structures. An important issue facing both governance structures is the locus of authority for hiring the principal as well as how the job of the principal is defined relative to the various boards or counsels. These issues are frequently disputed, as evidenced by the lawsuits and legislation in both reform states. For example, in Kentucky, where the school principal is typically the chair of the SBDM council, the attorney general's office has stated that "school counsels have authority to set policy . . . and the principal is authorized to administer the policy" (KAGO No. 93-55, 1993, p. 1). As discussed previously, the principal is subject to the authority of the local

school board and the school-level SBDM council. The potential for conflict is evident.

In the case of South Africa as noted by *Schoonbee* (2002), the school principal is used by the regional department of education as its proxy in SGB meetings. Although the SASA does not give the department of education control over SGBs, asking principals to serve as proxy gives them a regulatory aura and places them in an untenable position. Furthermore, recent amendments to Section 16 of the SASA require the principal to report any administrative or financial mismanagement to both the SGB and the regional HOD. This reporting requirement may make it difficult for principals to establish and maintain cordial working relationships with SGB members. It is evident that lawmakers created multilayered representative governing systems but failed to sort out how they related to one another, thus resulting in years of legal wrangling to sort it out.

An important research finding on highly effective schools is that the principal is key to school success and student academic achievement (Leithwood et al., 2010). The principal is also key to the success of school-based governance councils and, as such, should be viewed as a source for resolving the complexities that often accompany implementation of SBDM council. Although some authorizing legislation may create role conflicts for principals, their commitment to the school and to student learning is widely accepted. The purpose of school councils is to give parents a voice in how their children are educated, and in this regard parents share common ground with the school principal. This perspective is often lost in the rough-and-tumble world of community politics and legal disputes that arise when these governance structures are implemented. Children are the reason for the existence of these entities, and it is important that we stay focused on improving student learning.

Bounds of governance. Perhaps the most obvious implication of this comparative analysis is that the ill-defined boundaries on the legal authority for decision making between several layers of educational governance can create

conflict and litigation that may undermine the purpose of devolving authority to the school level. For example, several Supreme Court decisions in Kentucky and South Africa were necessary to provide some guidance to disputing parties as to where the legal bounds of authority lie. Sometimes the boundaries can seem remarkably arbitrary, such as the SBDM council's ability to control existing parking lots but not to build new ones in Kentucky (KAGO No. 91-215, 1991). Furthermore, creating multilayered decentralized representative governance structures have challenged policymakers and practitioners with regard to how they relate to one another as well as how they are aligned with centralized educational authorities. The student records opinions in Kentucky illustrate this conundrum. Analysts speculate that when the SBDM law was passed, few legislators thought of the student privacy implications embodied in the federal Family Educational Rights and Privacy Act of 2011. In this one instance, we have two conflicting attorney general's opinions and continuing ambiguity regarding the issue.

Although legal boundary disagreements in Kentucky may be viewed as trivial and arbitrary, those faced by educators in South Africa have caused the bureaucratic system to come to a standstill (Maritzburg, 2005). Furthermore, because of a lack of articulation in statute, the judiciary is left to make odd and arbitrary determinations, as seen in the *Mikro Primary School* case (2005), where the judge gave only the provincial department of education intervention authority in language medium schools when other schools in the area are full. Although this may be a practical resolution, from a legal standpoint it is likely to cause future litigation, as the underlying structural issue of oversight authority was left unresolved.

Conducting comparative analysis heightens attention to the tendency of policymakers to assume that the representative governance systems they have created will work together in a seamless manner. Also, comparative analysis heightens realization that flaws in legislation intended to advance democratic ideals often compromise its end. Given the complexity

of election laws, it is evident that legislation largely enabling parent councils should include exceptions to traditional legal policies. Although it is important to practice good government, there is simply no practical way for these councils to comply with all of these highly complex legal parameters that are typically written for state-level boards and commissions. Failing to create these necessary exceptions creates a nearly certain noncompliant branch of government.

Difficult lessons have been learned and suggest that the legislative processes should include analyses of how governing bodies interact with one another and other governmental entities. Failure to launch authorizing statutes and regulations in this manner may increase the likelihood that questions will be litigated in the courts at considerable public expense and tragically diminished expectations for representative democratic processes.

Impartial outside legal opinions. One of the inescapable conclusions from the research in Kentucky is how helpful the Office of the Attorney General has been in resolving disputes related to SBDM councils. Its role was particularly critical during the years immediately following KERA (1990) when it issued dozens of opinions that resolved a large array of implementation issues without the participants needing to resort to the judicial system. The attorney general opinions were an outlet for questions from nearly every relevant party, such as

- ❖ legislators (KAGO No. 90-102, 1990; KAGO No. 94-60, 1994),
- ❖ the Legislative Research Commission (KAGO No. 93-52, 1993),
- ❖ the Department of Education (KAGO No. 93-55, 1993; KAGO No. 94-41, 1994),
- ❖ local boards of education (KAGO No. 94-29, 1994),
- ❖ law firms (KAGO No. 93-49, 1993),
- ❖ district superintendents (KAGO No. 92-88, 1992),
- ❖ school principals (KAGO No. 92-57, 1992),
- ❖ teachers union representatives (KAGO No. 91-137, 1991; KAGO No. 94-8, 1994), and
- ❖ parents (KAGO No. 91-148, 1991).

While the issues presented were typically not covered in statute or regulation, the Office of the Attorney General was instrumental in providing opinions on novel issues regarding the intent of the General Assembly in passing the SBDM law as a part of KERA. Having access to an impartial, outside interpreter would be advisable for states considering implementing a school-based governance structure. This role is crucial for gaining clarity and resolving disputes during implementation stages.

Analysis of these cases suggests that successful implementation of school-level governance systems may require having access to impartial legal advice outside the judicial system. Access to outside legal opinions may be sought out by lawmakers as they are promulgating legislation, as well as by practitioners who are involved in early implementation stages. Assistance may be obtained from an array sources, including legislative council services, the Office of the Attorney General, local universities, professional organizations, partner elements of government, and parent who may have legal expertise.

CONCLUSION

School-level representative governance systems such as SGBs and SBDM councils are investments in the future, but they come with a heavy legal price. Based on an examination of the legal evidence, it is clear that in South Africa and Kentucky, little is known about the effectiveness of these governance structures or how they contribute to improving schools or advancing students' academic achievement. Empirical evidence must be collected to answer these questions and make needed improvements to these school-based democratic structures.

Democracy at this scale will inherently be accompanied by multiple legal difficulties, some of which are articulated in this article; others are anticipated. These legal difficulties, if left unresolved, have the potential for not only paralyzing educational systems but also detracting from schools' focus on stu-

dent learning. Although school-based governance may be legally challenging, it offers parental and community participation benefits that are viewed by many as being worth the cost. To accomplish this, policymakers must continue to seek out ways to create effective representative democratic systems that not only enable community structures to focus on meeting the educational needs of children but also comply with the democratic needs for open and effective government. **JSPR**

NOTE

1. The phrase was coined by Hattingh J in *Suid-Afrikaanse Onderwysunie* (2001). The judge castigated the free state head of department for designing a procedure to redeploy educators, which was “a scandalous display of imagined power.” He criticized the motive for implementing the procedure as “utterly shocking and testified to scandalous and condescending conduct.” He described the procedure as “unambiguously *mala fide* and an utterly unsuitable manner of behaving towards employees.” The head of department “shamefully” disregarded provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and acted *mala fide* and *ultra vires*.

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