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Admission policies as enablers and disablers of children's rights to basic education: Stakeholders' perceptions

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In this article we report on a qualitative study done in Pretoria, South Africa, in which we investigated the experiences of 2 representatives of the Gauteng Department of Education (GDE); School Governing Body (SGB) spokespersons from 4 schools located in the Gauteng province, 2 representatives of the Federation of SGBs, 4 principals from 4 schools, and 4 parents from 4 schools regarding public primary schools' admission policies and practices as enablers or disablers of children's rights to basic education. Using structured, open-ended interviews, qualitative data were generated to explore the experiences of the participants on the public primary schools' admission policies and practices as enablers or disablers of a right to basic education. We argue that the implementation of school admission policies as enabler to access to basic education must be based on a system of rights and corresponding obligations established by the Constitution of the Republic of South Africa, 1996, and the various legislative and policy frameworks. The findings of the study reveal that the learner admission system in South African public schools remains problematic, which in turn aids as a disabler of children's right to basic education.

Keywords: admission policy; basic education; co-operative governance; discrimination; human rights-based approach; learner admissions; socio-economic conditions

Introduction

The right to basic education is one of the rights that confirm the dignity inherent in human beings. A lack of education and/or illiteracy has a negative effect on the dignity of a person. It is for this reason that, on 13 May 1968, an International Conference on Human Rights in Teheran made a proclamation calling for an international action to eradicate poverty and provide urgent attention to all levels of education (United Nations, 1968). Admission or enrolment of children to basic primary education is the starting point towards achieving education for all. As stated by Chürr (2015:2406), "[e]ducation furnishes people with dignity, self-respect and self-assurance, and is an important basic human right on which the realisation and fulfilment of other rights depend."

There are a number of legal and policy prescriptions in South Africa, with implications for public schools regarding their management and implementation of admission policies. These include, but not limited to the South African Schools Act 84 of 1996 (SASA) (Republic of South Africa [RSA], 1996b), the Admission Policy for Ordinary Public Schools (APOPS, Department of Education [DoE], 1998), General Notice 4138 of 2001 (GDE, RSA, 2001) on Admission of Learners to Public Schools and the National Education Policy Act 27 of 1996 (NEPA, RSA, 1996a). Moreover, section 29 of the Constitution of the Republic of South Africa, 1996, (RSA, 1996c) (hereafter referred to as the Constitution) entrenches everyone's right to a basic education.

Stakeholders, including the GDE, school governing bodies (SGBs), and parents, form a hierarchy of relationships that co-operatively should ensure the implementation of the right to education, as enshrined in s 29 of the Constitution. The intricate nature of the relationship between the SGB and the Head of the Department of Basic Education (DBE) means that there should be an efficient, effective, and sound working relationship among all stakeholders, namely principals, SGBs, parents, learners, the community, and the GDE in the province. This chain of command and accountability relate to co-operative or collaborative governance by stakeholders in different tasks, including the admission of learners.

There is a dearth of research on public primary school and learner admissions, the interpretation and appreciation of the ramifications of learner admission policies, and their implementation and relationship with the constitutionally guaranteed right to basic education. In this study we sought to explore and observe the experiences of stakeholders (SGBs, principals, the GDE representatives and parents) regarding the right to basic education through the implementation of public primary school admission policies.

Background

Any refusal or denial of learners' admission to school is a *prima facie* violation of their constitutional right to a basic education and it is inconsistent with, and in violation of, s 29 of the Constitution. General Notice 4138 of 2001 (GDE, RSA, 2001) specifically addressed the issues of admission of learners to public schools, and prohibits, in paragraph 3, unfair admission practices and requirements. Section 3 (3) of SASA 84 of 1996 states that "every *Member of the Executive Council* must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by sub-sections (1) and (2)" (RSA, 1996b). However, it still remains a point of contestation whether the right to education also creates an obligation to admit learners unconditionally. The admission policies of public schools serve as criteria whose purpose is to

help determine how and which of the learners are to be placed in a school. The placement and admission may take into account several considerations, including but not limited to, the capacity of a school to admit learners with special needs, learners with behavioural problems, and learners from a school's catchment area, language of teaching and learning, the quality of education provided and the interprovincial mobility of learners and others. Schools should ensure that they have the capacity and resources to accommodate all learners they admit into their schools.

Measures to achieve improved and quality education are addressed in the Plan of Action: Improving Access to Free and Quality Basic Education for All of 14 June 2003 (DoE, 2003). The plan addresses many issues that collectively are key to quality basic education and relate to the efficiency and effectiveness of access to basic education. It is best read with Education White Paper 6, Special Education Needs: Building an Inclusive Education System (DoE, 2001) that outlines the processes that will ensure inclusive education for all learners, and in particular the transformation of education, the promotion of social justice and equal education for all. According to the May 2015 Incheon Declaration and Framework for Action Towards Inclusive and Equitable Quality Education and Lifelong Learning for All, government ministers and other education stakeholders who gathered at the invitation of the Director-General of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Incheon, Republic of Korea, buttressed the importance of access to education and committed to its role "as main driver of development and in achieving the other proposed SDGs [Sustainable Development Goals]" (Incheon Declaration, para. 5–11, UNESCO, 2016). Likewise, the 2030 Agenda for SDGs, which replaced the Millennium Development Goals (MDGs) in 2015, addresses universal access to primary education by requiring that education authorities ensure inclusive, equitable and accessible quality primary and secondary education (Goal 4).

The requirements of co-operative or collaborative governance in public schools, which SASA is premised on (Heystek, 2011:457), are not always observed. Therefore, there has been a number of interventions by the courts in disputes related to learner admissions. Typical examples of these key decisions by the courts include *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC14 (*FEDSAS case*), *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34 (*Rivonia case*) and *Minister of Education v Harris* (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); and *Hoërskool Overvaal vs Panyaza Lesufi: The High Court Judgment,* 19 January 2018, CASE NO: 86367/2017.

The purpose of this study was to explore and understand the views and experiences of stakeholders (GDE representatives, School Governing Body Federation [SGBFED], SGBs, principals, and parents) regarding the right to basic education through the implementation of public primary school admission policies. This investigation was prompted by legal battles between SGBs and the GDE about admission issues.

Literature Review

Despite an extensive body of research on primary education in South Africa, no study that has been conducted extensively on stakeholder experiences of enabling children's rights to basic education through public primary school admission policies has been found. A scrutiny of the available literature and scholarship on basic education has revealed that many of these studies address issues regarding curriculum reform, safety and security in schools, school governance and school governing bodies, teacher development and professional training, and management and leadership. Little existing literature (Mestry, 2017) deals explicitly with the experiences of stakeholders − principals, SGBs, parents, and heads of departments regarding admission policies as enabler of children's rights to basic education through public primary school admission policies. This is so despite the issue of learner admission being one of the critical considerations towards achieving the learners' rights to basic education as demonstrated through a few decided cases in South Africa, and in other international and foreign scholarship and jurisprudence. According to Franklin and McLaren (2015:16), "School admissions policies, if unlawfully determined or implemented, can have the unfortunate and unlawful effect of maintaining segregation based on race, language, culture or socio-economic class if not properly monitored." Admitting a learner to a school could, unfortunately, also have the unintended consequence that a learner may be admitted to a school which may not be able to serve his/her educational requirements adequately (Franklin & McLaren, 2015:17).

Contextualisation of the child's right to basic education

International framework

Eide, Krause and Rosas (1995:195) argue that the importance and the peculiarity of the right to basic education results from the fact that it contains aspects of all three generations of rights, namely civil and political rights, economic, social and cultural rights, and group rights. As noted by Chürr (2015:2408) and Claude (2005:37), this right

intersects with many other rights and is not value neutral. The intersection of the right to education with other rights was concisely stated by Claude (2005:37) when he wrote the following:

> Education is intrinsically valuable as humankind's most effective tool for personal empowerment. Education takes on the status of a human right because it is integral to and enhances human dignity through its fruits of knowledge, wisdom and understanding. Moreover, for instrumental reasons, education has the status of a multi-faceted social, economic and cultural human right. It is a social right because in the context of the community it promotes the full development of the human personality. It is an economic right because it facilitates economic self-sufficiency through employment or self-employment. It is a cultural right because the international community has directed education toward the building of a universal culture of human rights. In short, education is the very prerequisite for the individual to function fully as a human being in modern society.

It is evident from the literature that the inviolability of the right to basic education must be protected and promoted as one of the objectives of the conception of human rights. It is submitted that in regulating the right to basic education, states should not approach this in a manner that would limit the exercise of this right or make the realisation of the right to basic education impossible. The regulation of the exercise of the right to basic education must, therefore, be consistent with the state's obligation under both international and regional law.

African continental and regional frameworks

From a continental perspective, the African Charter on Human Rights and Peoples' Rights (ACHRP), sometimes referred to as the Banjul Charter, was adopted by the Organization of African Unity (OAU) in Nairobi, Kenya, on 27 June 1981 and came into force and effect on 21 October 1986. Article 17 (1) of the ACHRP states that "every individual shall have the right to education" (OAU, 1981). The Charter has been central in the evolution of human rights instruments in Africa. Importantly, the ACHRP provides a framework for the establishment of the African Commission on People and Human Rights as a supervisory mechanism that was later supplemented by the African Human Rights Court.

South African constitutional and legislative frameworks relevant to the right to basic education

The literature reviewed shows that the Constitution elevates the status and urgency of the right. The right to basic education is immediately realisable. It is not, as in the case of a number of other socio-economic rights, made subject to progressive realisation within available resources (Berger, 2003:235). Section 29 of the South African Constitution guarantees the right to a basic education. The relevant provisions of s 29 of the Constitution state the following:

1) Everyone has the right −
   a) to a basic education, including adult basic education; and
   b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
2) 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
   c) the need to redress the results of past racially discriminatory laws and practices.

The right to basic education must be realised and promoted on an equal basis in line with s 9 of the Constitution, generally called the equality clause. Section 9 (2) of the Constitution reads as follows: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken" (RSA, 1996c).

Sections 2A and 2C of General Notice 4138 of 2001 (GDE, RSA, 2001) prohibit discrimination and refusal to admit learners to public schools by stating the following:

Admission policies for schools must not unfairly discriminate against any learner in any way, and in particular −

a) a school must admit learners without unfairly discriminating on grounds of race, ethnic or social origin, colour, gender, sex, disability, sexual orientation, religion, conscience, belief, culture, language, pregnancy, human immunodeficiency virus (HIV)/acquired immunodeficiency syndrome (AIDS) status, or any other illness;
b) a governing body of a school may not administer any test related to the admission of a learner to a school, or direct or authorise the principal or any other person to administer such test; and
c) no learner may be refused admission to a school or discriminated against in any way on the grounds that his or her parent -
   i. is unable to pay or has not paid the school fees, registration fee or deposit determined by the governing body;
   ii. does not subscribe to the mission statement of the school and code of conduct of the school; or
   iii. has refused to enter into a contract in terms of which the parent waives any claim.

Section 4 of the APOPS (DoE, 1998), states as its purpose "to provide a framework to all provincial departments of education and governing bodies of public schools for developing the admission policy of the school." Relevant to this study is s 9 of the

same Act. It states that "[t]he admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission" (DoE, 1998).

Prohibition of discrimination in public school admission policies and practices is an important departure from the apartheid school system that was based on racial division and exclusion. The state has a constitutional obligation to ensure that children are indiscriminately admitted to public schools and are provided with adequate education. Arendse (2011:120) provides a brief, yet enlightening analysis of the right of access to basic education and how it must and should be realised in South Africa. He argues that no child should be denied admission to public primary schools because of the child's socio-economic background and that South Africa is obliged to make free primary education accessible to impoverished children. Murungi (2015:3162) asserts that "Section 29 of the Constitution, which grants everyone the right to education, is one of the most hotly debated sections of the Bill of Rights for a range of reasons, including its significance for the realisation of other rights." It is important that s 29 uses the word "everyone", thus making the right available to everyone.

Admission to a public primary school does not necessarily translate into the enjoyment of the right to basic education. It is important to note that children may not be able to enjoy their right to basic education if not first admitted to a public school. Section 5 of SASA emphasises that learners should be admitted to public schools without being discriminated against in any way, whereas s 29 of the Constitution emphasises the right to a basic education. The challenge here is that admission to public schools could easily be impeded if schools do not take into consideration the importance of the right to basic education.

Conceptual Framework

For the purposes of this study, two concepts that underpin the approach were considered on how the study was understood, planned and executed. These included co-operative governance and appropriate rights-based concepts. Moreover, the conceptual framework chosen was supported by key conceptual principles that include access to education and stakeholder co-operation and collaboration.

Human rights-based approach (HRBA)

According to the Office of the United Nations High Commissioner for Human Rights (2006:15), "[a] human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights." The attributes of this conceptual approach are that it identifies who the holders and/or custodians of the rights to basic education are, and what their entitlements are. It places corresponding duties and obligations on the state to make the enjoyment of the right possible through public primary schools' admission policies and practices. The basic human right to education is guaranteed in s 29 of the Constitution. However, the regulatory powers of the SGB and the Head of Department (HOD) find themselves at cross-roads once there is an issue of denial of admission to the school by the SGB or when the HOD takes it upon himself or herself to admit a learner to a school. It has been confirmed by case law (*the Rivonia Primary school case*) on school admission policies that the implementation of admission policies must also ensure that the objectives and processes involved are carried out taking into account the relevant rights to a basic education in the Constitution. Such actions or processes also address the learners' human rights.

Co-operative governance

Co-operative governance or networked governance, to use the words of DeGroff and Cargo (2009:49), is the sharing of different duties and responsibilities among the stakeholders, who have in certain cases been noted to interfere in one another's powers. Co-operative governance in higher education in South Africa has been extensively discussed (Cloete & Kulati, 2003:231), particularly with regard to a governance model that involves state supervision as contained in the 1997 White Paper on Higher Education (Cloete & Kulati, 2003:231). Co-operative governance is equally relevant to the administration of basic education in South Africa. South African education legislation such as SASA, and related policies and regulations have vested the governance of public schools with some important powers, including the making of admission policies, in SGBs.

SGBs are required to exercise these powers and implement the policies in co-operation with the DBE, the principal and the parents. The nature of the relationship, argues Maluleke (2015:46), is such that the provincial department and SGBs are jointly in charge of the "planning, decision-making, and control of admission of learners in public schools as part of the decentralisation of powers, authority and functions." The interrelationship between principals, SGBs and the GDE has informed the concept of co-operative governance in this study. The choice has also been informed by Constitutional Court decisions including the *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC14 (*FEDSAS* case), that adjudicated a power conflict regarding learner admissions between the powers

of the SGB and those of the HOD. Co-operative governance in schools has not been without its challenges and needs to strike an appropriate balance of relations, as has been noted by Maluleke (2015:47). The DBE and the GDE, for example, are "co-responsible" (with the DBE determining norms and standards and the GDE providing education) for the delivery of education to citizens in their respective spheres of operation (Maluleke, 2015:6).

Co-operative governance is also contemplated in Chapter 4 of the Constitution. Maluleke (2015:1) notes that the Constitution "categorises education as a Schedule 4 function"; thus, education is in essence a concurrent function and responsibility of the national and the provincial authorities who must share the locus of control in education albeit with "distinct accountability for the delivery of education to citizens" (Maluleke, 2015:6). Interesting to observe is the point that co-operative governance is critical to service delivery (Maluleke, 2015:2), which in the context of this study would entail ensuring that public school leaners are provided with equal and fair access to education as a service. Maluleke's (2015:2) comment that education is the responsibility of the national and provincial authorities that must share the locus of control in education, albeit with distinct accountability, is somewhat misleading. Although it is true that education is a concurrent function, it should be noted that it is a "functional area of concurrent national and provincial legislative competence" in terms of Schedule 4 of the Constitution. What is shared is the competence to make policies, but the duty to provide schools and education rests with the provincial authorities while the DBE is responsible for the implementation of the law for the various functions in education.

Using co-operative governance as an important aspect of the chosen conceptual framework of this study, an investigation into how best to strike a balance between the different stakeholders while aiming to maintain their distinct and yet interdependent roles was conducted. The benefit of the co-operative governance (government) concept is that it seeks to ensure on-going good relationships between the stakeholders that are all committed to one common goal even in their distinctiveness. This is stated in related policies and by-laws and communicated and implemented through circulars.

Research Methodology

A qualitative research approach was employed in this study using the interpretivist paradigm. Linked to the interpretivist paradigm, a phenomenological research design was employed. Cohen and Crabtree (2006) explain an interpretivist paradigm as the sharing of beliefs about nature and reality. It employs relativist ontology (which proposes that reality is constructed inter-subjectively through meaning and understanding) and transactional or subjectivist epistemology, which assumes that we cannot separate ourselves from what is true. Creswell (2013:76) explains that a phenomenological study describes the common meaning several individuals of their lived experiences of a concept or a phenomenon. He further explains that the basic purpose of phenomenology is to reduce individual experiences with a phenomenon to a description of the universal essence.

A qualitative approach was chosen because it allowed us to engage in robust dialogue with the participants to construct collaboratively a meaningful reality regarding their experiences of enabling (realising) children's rights to basic education through public primary school admission policies. It further enabled us to engage with the participants through structured face-to-face interviews. Participants' responses helped in understanding their views and shared experiences in primary school admission policies.

The population of the study was public primary schools in the GDE. Data were collected through the use of structured face-to-face interviews. Secondary data were reported in the form of Case Law. For example, the *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC14 (*FEDSAS* case) and the Rivonia primary school case. Four public primary schools in the Northern District of the Gauteng province were selected as the sample because they gave access to schools with different challenges. Only schools involved or having been involved in an admission dispute were selected, partly to eliminate inclusion of all the public primary schools but mostly to elicit valuable information that assisted in answering the primary research question: *What are stakeholder experiences of the realisation of the children's right to basic education through the implementation of public primary school admission policies?* Selection included schools that have had their admission disputes adjudicated by courts of law. Assistance from the provincial DBE was sought in identifying participating schools. Table 1 depicts the category and the number of participants.

Table 1 Description of participants

Participants	Number of participants
Gauteng Department of Education (GDE)	2 provincial
School Governing Bodies (SGBs)	Four 4th quantile
Federation of SGBs	2
School principals	Four 4th quantile
Parents	4 each from each school
Total number of participants	18

These participants were selected because of their close involvement (as they all had interest in the admissions of learners into basic public primary schools) with public primary school admission policies in one way or the other. Parents of Grade 1 learners were specifically chosen because of the challenges that schools and parents experience during this critical stage of compulsory schooling, particularly during the admission phase. Except for the representatives of the GDE and Federation of SGBs (whom were approached because of the nature of their positions in the Department and the Federation), all the participants (SGBs, principals and parents) were selected from the same four schools.

After the sites and individuals to interview had been identified, interviews were conducted with the participants. Interview questions were formulated in such a way that, for example, principals were asked the same questions as the parents and the SGBs. Appointments were made prior to accessing the site and were confirmed 24 hours later. Ethical clearance to conduct interviews was granted by the University. This was ethically imperative as it demonstrated basic respect for my participants. The interviews were audio recorded with the consent of the participants, and notes were taken at the same time. Each interview was conducted with the highest level of confidentiality in a secure and private setting, preferably in the participants' offices or any place that was suitable for them. This was to guarantee that the interview environment was conducive and that the interviewees would be able to speak frankly and openly during the interview. In addition, ethical considerations were explained to the interviewees prior to the interview, which included, informed consent, voluntary participation, and safety in participation, privacy and trust.

The analysis of data took the form of preparing and organising them for analysis and thereafter coding them into themes and reflecting them in figures, tables and discussion (Creswell, 2013:180).

Results

In this study the interview questions were centred around the following key themes, which were aligned to the research questions:

Theme 1: The state's obligations regarding the right to a basic education in terms of s 29 of the Constitution;

Theme 2: The impact of the Gauteng Online Admission System on Learners' basic rights to education;

Theme 3: Admission policies as a key enabler of the right to a basic education;

Theme 4: Critical challenges in the Learner Admissions to Public Primary Schools policies and the impact of the policies on the right to a basic education;

Theme 5: Recourse to the courts in disputes emanating from implementation of the Learner Admissions to Public Primary Schools policies;

Theme 6: Understanding and operationalisation of co-operative governance canons in school admissions.

The division of interview questions into themes was important for alignment with the data analysis. The breaking up of qualitative data into manageable themes helps in dealing effectively and efficiently with the data analysis.

The State's Obligations regarding the Right to a Basic Education in Terms of Section 29 of the Constitution

In order to establish how participants understood the state's obligations regarding the right to basic education in terms of s 29 of the Constitution, the participants were asked to state what they thought about the right to basic education, what the right entailed and how this right was to be realised. All participants reflected on the importance of the right to basic education as enshrined in the Constitution. GDE 1, for example, was of the opinion that it was the responsibility of the authorities to ensure that every child had access to education without being hampered by challenges such as poverty, transportation to school, and many other challenges. This view and observation were consistent, in part, with the view that the right to basic education as enshrined in s 29 of the Constitution may be defined or explained in both broad and narrow sense (Beckmann & Phatudi, 2012:475; Chürr, 2015:2410; Murungi, 2015:3166; United Nations Committee on Economic, Social and Cultural Rights [CESCR], 1999). Skelton (2013:2) and UNESCO (2011) state that the Constitutional Court in *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (7) BCLR 651 (CC) gave meaning to and underscored the extent of the right to basic education as contained in s 29 (1) (a) of the Constitution when it stated that "[u]nlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'…. The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible" (*Juma Musjid* case, para. 37).

Views expressed by participants echo the United Nations CESCR General Comment 13 as the content of the right to basic education, namely: *availability*: not only must education be free, but it must also be supported by adequate infrastructure

and well-trained educators. In our opinion and given the ongoing admission disputes in schools and the courts, availability of school places is a continuing problem in the GDE and has resulted in several court cases. *Accessibility* means access to education must be free from all forms of unfair discrimination, and intentional and positive steps must be taken to ensure that learners who have been marginalised do have fair access to the education system. *Acceptability* means that the content of education must be fit for purpose, particularly, it must be socially relevant and culturally appropriate; be of good quality dispensed by professionally qualified educators, and the schooling environment must be safe for all stakeholders. *Adaptability* means that education must be adapted to suit particular contexts. These are commonly referred to as the 4As of the content of the right to basic education.

SGBFED 1, however, spoke in depth about how Blacks and Whites have been treated and the continuing plight of Black learners when seeking admission to former Model C and White schools. Likewise, SGBFED 2 spoke at length about the socio-economic condition in South Africa and stated that "*... we got to seriously look into ... socio-economic impact on the quality of education*." Responses of SGBFED 2 was scathing in part regarding the discharge of the state's obligation to ensure the realisation of the right to basic education, and raised a number of concerns. SGBFED 2 particularly noted the lack of capacity of schools in certain provinces, with some "[s]*chools ... being placed under more and more pressure each year to accept more learners than the school's capacity allo*ws." This view was shared by SGB 1 who stated that "*the GDE has failed the people of South Africa by not investing sufficiently in building new schools and in upgrading the ... quality of township schools…*." In essence SGB 1 considered the state as having failed in its implementation measures for the realisation of the rights enshrined in s 29 of the Constitution. In this regard, principals, parents, and SGBs were in agreement that the state has not been particularly impressive with the discharge of its obligations regarding the realisation of the right to basic education. There is a need for clear policies and procedures to regulate the implementation of s 29 of the Constitution, in order to "*ensure that learner admissions are done fairly and the right to basic education is respected*" (SGB 4). Stasz and Van Stolk (2007:1) note that a similar framework has been set up in the United Kingdom with the School Admissions Code enacted to regulate "admissions in the state school's system, including Academies, Trust Schools, and Boarding schools" and acting as a framework to "set admission standards that promote fair admissions and equal access." The views of parents on the obligation of the state pursuant to s 29 of the Constitution are supported by Skelton (2013:3) who argues that the right to basic education is "an immediately enforceable right, not subject to progressive realisation."

The Impact of the Gauteng Online Admission System on Learners' Right to Basic Education

GDE 1 touted the online system as important for several reasons, including: making the admission processes much easier and efficient; and providing innovative ways of dealing with admissions. GDE 1 also supported a system that is fair, transparent and equitable, and making the government the chief custodian of the information on the admission of learners. According to GDE 1, in this way the government is allowed to take charge of the process as part of its constitutional obligation to ensure that everyone realises the right to a basic education. Participants seemed to support the introduction of the online admission system as a welcome measure in general. However, when asked about the efficiency and efficacy of the Gauteng online admission system, parents and SGBs particularly identified a few challenges associated with their socio-economic dispositions; and computer illiteracy. Parent 1, Parent 2 and Parent 4 said that they preferred the "*old way*" of applying to schools because the online admission process was rather cumbersome and frustrating. Parent 3 went so far to describe the online admission system as a "*disaster*" and a disappointment that has failed South African children. Principal 1, for instance, hinted that the implementation of the online admission system has been challenging because some parents were never educated about using the online system. Hence most of them would come to the school to ask what online is and how it works, in the process creating burdensome responsibilities for schools. Admittedly, rural areas with weak internet connectivity, no internet connectivity and no electricity will be placed at a significant disadvantage compared to leaners in urban and peri-urban districts. South Africa is reportedly having the highest computer illiteracy in Africa, (Siemens, 2017). This revelation raises a major concern that migration to a fully online learner admission system may lead to exclusions, dissatisfaction and despondency among many parents. SGBFED 2 complained that the online process "*completely excludes…the school's admission policies, contrary to the ruling by the Constitutional Court in the Rivonia Primary School Case that, in any decision on admissions, the HOD must be guided by the school's policy*." SGBFED 1 thus proposed a dual system of online and manual admission processes until all the online system challenges were addressed or resolved. This proposal was borne out of his concern that some parents may find it difficult or expensive to access

online application platforms to register their children, thus impacting negatively on the right of the children to be at school.

In sum, the online system has not been without its challenges and teething problems, with learners seeking admission. As Lubisi (2018:para. 6) wrote:

> The situation these 30 000 pupils (and their parents) find themselves in is a repeat of what happened at the beginning of the 2017 school year. Then, there was chaos as thousands of pupils had not been accepted to schools of their choice, while others were directed to schools far from their homes, causing frustration for parents who had to contend with parting with lots of money for transport.

Admission Policies as Key Enabler of the Right to a Basic Education

Schools' admission policies as enablers or disablers mean that the realisation of the right to a basic education is largely dependent on the appropriateness and the regulation of the policy itself. GDE 1 bemoaned the admission policies that were implemented inconsistently, discriminatory and using Afrikaans as exclusion tool. GDE 1 specifically pointed out that the "*majority of our* [admission] *policies*" have not been consistent with the daily changes in societies. The issue of Afrikaans was recently at the centre of the dispute between the GDE and Hoërskool Overvaal in the *Hoërskool Overvaal* case. In this case, the district director instructed the principal of the school to place 55 Grade 8 learners in the school for the 2018 academic year, bearing in mind that the school was believed to be a single medium Afrikaans school. The SGB argued that the school was full to capacity and that the neighbouring English medium schools had the capacity to admit the 55 English speaking learners. The SGB further argued that the district director's instruction was procedurally flawed and that it also offended the school's language policy. Prinsloo ordered that the instruction issued by the District Director to the principal to place 55 learners at the school for the 2018 academic year be set aside. It would seem that the North Gauteng High Court in ruling in favour of Hoërskool Overvaal implicitly took into account the United Nations CESCR General Comment 13, particularly the issue of availability as the content of the right to basic education and admission as an enabler of this right. In terms of availability, the school must have the capacity for adequate infrastructure and well-trained educators. The North Gauteng High Court ruling in the *Hoërskool Overvaal* case was subsequently appealed unsuccessfully in the Constitutional Court. The Constitutional Court dismissed the appeal by the GDE against the judgment of the North Gauteng High Court, and highlighted the failure of the Gauteng Member of the Executive Council (MEC) of Education to consider all relevant circumstances and factors including determining if English medium neighbouring *Hoërskool Overvaal* "such as General Smuts and Phoenix high schools, which both fall in the same feeder zone as Hoërskool Overvaal had enough capacity to admit the pupils" (para. 29.1).

All the parents interviewed agreed that admission policies were key disablers to the enjoyment of the right to basic education. Likewise, these parents also argued that school admission policies and practices may become stumbling blocks towards the rights to basic education. Parent 2 noted that the sibling and feeder zone criteria remained problematic, and "*used to deny children spaces at schools most convenient for parents from their workplace*." Parent 1 and 4 both argued that the feeder zone system (as enforced by the Provincial government) was not effective. Parent 1 gave an example of the "*school populated by learners who are not from the area, whilst learners from the area are struggling to get placed at local schools*." The problem of the feeder-zone approach to learner admission was challenged in the *FEDSAS* case as having an exclusionary effect on previously disadvantaged persons living in poor communities. The issue of language was raised specifically by Parent 3 who stated that Black parents had no choice but to take their children to areas far from home because their children cannot cope with Afrikaans at Afrikaans medium schools.

Another admission guideline such as the feeder zone was pointed out by participants as inhibitors to the right to basic education. At the heart of many of the discussions was the fairness of the admission policies and criteria used to determine placement of children. Both SGBFED 1 and SGBFED 2 added that criteria for admission, whether stratified or classified according to different variables, including feeder zone, appeared to be one of the contested issues. They both agreed that the feeder zone system as a criterion must be extended and not abolished and that the proximity-to-school threshold must be more than 5 km. However, the issue of the feeder zone must be implemented with great circumspect, including considering the capacity of the school within the feeder zone following the Constitutional Court ruling in the *Hoërskool Overvaal* case. The fact that a school is in a feeder zone does not necessarily mean that *it has* and *should have* the capacity to admit learners. The capacity of the school to accommodate the learner must be one of the determining factors to admit learners.

The need for the fairness of admission policies as enablers to the right to basic education was echoed by SGBs. According to SGB 3, admission policies should be a catalyst for the enjoyment of the right to basic education "*needs to be fair, it needs to be orderly and it needs to be*

focused on ensuring that the school serves the local community, whether residence or people living within the local community…." The sentiment was shared by SGB 2. However, responses of participants seemed to suggest that fairness was relative and needed to be considered on a case-by-case basis. To this end, Principal 1 said that schools should do their best to consider individual learner situations, and to bear in mind that a child is more important than a policy. According to Principal 3, her school used the "*sibling-in-school"* criterion to prioritise its admission of learners, before recourse to the proximity and radius criteria. The implementation of this criterion was that if a learner did not have a history of siblings in the school, he or she should be considered a List B applicant. We believe that the sibling criterion can have an inhibiting effect on the admission chances of learners. Principal 4 stated that schools' admission policies did have an impact on the realisation of the right to basic education. In particular, she indicated that to favour the feeder zone system, the siblings at school and the proximity of the home to school should be the key criteria to decide admission. Her position and argument were based on the safety and security of the child. She said, for example, that if the child was enrolled at a school in the area of the parent's workplace and travelling with the parent, such child would have to wait for the parent to leave work and be fetched from school. Her security concern was that the learner had been waiting at school without teacher supervision, compromising the much-needed safety and security of learners at schools.

Critical Challenges in the Learner Admissions to Public Primary School's Policies and the Impact of the Policies on the Right to a Basic Education

In the problem statement of the study and the literature review a myriad of issues and challenges related to the management of learner admissions and its impact and effect on the right to basic education were identified. Participants were asked about the experienced and perceived challenges in the schools' admission policies and practices, and how they impacted on the right to basic education. Some responses reflected on what had already been learnt from data from the literature review and documentary analysis. Some of the challenges were juxtaposed from the challenges and problems experienced during the apartheid schooling system. GDE 1 said that schools were being placed under more and more pressure each year to accept more learners than the school's capacity allowed. SGBFED 2 also stated that where there were enough schools, these schools did not all provide a good quality education, bringing pressure to bear on the good schools because parents wanted access for their children to good schools, which in essence disabled the learners to their right to basic education. All parents interviewed highlighted the lack of enough good schools and the capacity of the existing schools to accommodate their children as a serious challenge.

GDE 1 identified admission bottlenecks created by an influx to what are generally regarded as high performing quality schools as one of the key challenges to leaner admission. GDE 1 suggested the introduction of *specialised* schools to ease the admission influx. This suggestion is in addition to the admission by GDE 1 that feeder zone systems worked better in certain circumstances, but that they distorted learner admission processes and perpetuated the unfair apartheid school admission policy as noted by the Constitutional Court. As has been the case in other African countries like Malawi, participants have indicated that in Gauteng too the disparities between schools have led to the "migration of parents in search of schools that are better ..." (Makori, Chepwarwa, Jepkenei & Jacob, 2015:91). GDE 2, however, stated that learner data shows that the learner achievement gap across schools is reducing substantially and the distribution of quality is also getting better. Empirical literature has reported on the *perceived poor quality* of certain schools, particularly previously Black schools, which have been subjected to segregation education policies. Logan and Burdick-Will (2016:135), for example, argue that race, class, neighbourhood, and school quality are all highly interrelated in the United States (U.S.) educational system.

In their analysis of the *FEDSAS* case and its ramifications, Venter and Kgori, (2017:662–667) highlight that the South African education system was previously used as a tool for discrimination, division, and oppression of Blacks. SGB 1, for example, identified the historical imbalances regarding learner attraction to schools, due to the racial divide existing under the apartheid schooling system. His argument was that challenges did not emanate from the admission policy as such, but represented a scramble of parents for admission of their children to better resourced schools, particularly the former Model C schools, with better infrastructure and skilled educators.

The apartheid era remains the prominent problem in our education system (Venter & Kgori, 2017:668).

SGB 3 expressed views that were diametrically opposed to that of SGB 1. SGB 3 raised a concern that the GDE would ask schools to deviate from their perfectly working admission process. In this regard SGB 3 noted a situation where a parent appealed to the Department to be advantaged over parents who were ahead of her or him on the waiting list, creating an unfair advantage for that parent. SGB 3 has criticised this practice as illegitimate use and abuse of power and

authority. At closer inspection, the views and responses of SGB 3 mirrors the arguments raised in the *Hoërskool Overvaal* and *Rivonia* cases, and the need to act according to the requirements of procedural fairness and in good faith as has been required by the courts (Rivonia case, par. 73). This was reinforced by SGB 3 who stated that the Department was abusing its powers, usurping the powers of the SGBs and acting unlawful with regard to the implementation of schools' admission policies. In fact, SGB 3 explicitly stated that the causes of problems experienced regarding the implementation of the admission policies in public schools lay with the Department and its officials not adhering to its own policies, regulations and procedures; the parents not applying on time; and the SGBs and their admissions policies, to the extent that the policies were not aligned with the Constitution and court judgments.

GDE 1 also identified the inability of school management to regulate admission processes properly, and the abuse of school admission policies through politicising, attempts at excluding other races through acts of nepotism and corrupt practices. Interestingly, GDE 1 identified that schools paid little attention to the academic ability of the learner in the admission criteria, and admitting a learner because the learner was the best cricket or rugby player, thus fitting into the sporting excellence profile of the school.

GDE representatives also addressed the language barrier, in particular Afrikaans, as one of the disablers to access basic education. According to Stoop (2017:3), "[t]his can be attributed to the age-old misconception that national unity can only be built around a single language." Stoop made an important observation that perhaps answers the question why South African children are not taught in their mother tongue. He stated that "[t]o put it differently, the cardinal importance of mother-tongue education is recognised in s 29 (2). However, mother-tongue education will be possible only if such education is reasonably practicable" (Stoop, 2017:6). It is my view that this will not be practicable in a South African education system that is still trying to redress many other education imbalances of the past to offer mother-tongue education for all 11 official languages. Also, it may not be fair that only Afrikaans learners are offered education in their mother tongue. Franklin and McLaren (2015:16) warn that unlawful and improper implementation of school admission policies may lead to "the unfortunate and unlawful effect of maintaining segregation based on race, language, culture or socio-economic class if not properly monitored."

With regard to the question of language, the consideration of the best interest of the child as addressed in s 28 of the Constitution and the remarks of the Constitutional Court in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) case are instructive. In this case, which has been labelled a double-edged sword (Van der Rheede, n.d.) the Constitutional Court re-affirmed the right of the Ermelo High School SGB to formulate its own language policy by stating "[o]rdinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come from it" (Ermelo High School Case, para. 57). The Court ruled, however, that the SGBs must use this right not to serve the narrow education interests of a specific school only, but rather that of the entire community. The Court stated in particular "[t]he governing body ... is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution" (Ermelo High School Case, para. 80).

Interestingly, SGBFED 1 said that the challenges experienced were not developmental, but rather transformational. This view was echoed by GDE 1, who deplored some admission policies and practices as degenerating transformation in schools. Past school admission practices in South Africa were based on variables such as skin colour and language, a sentiment shared by researchers (Beckmann & Phatudi, 2012; Skelton, 2013; Venter & Kgori, 2017).

Some of the school principals were concerned about the SGBs' capacity and ability to implement admission policies. Principal 2 suggested, for example, that there should be certain requirements addressing knowledge and education when choosing the SGB since the SGB plays an important role in admission policy formulation and implementation. Principal 4 argued that the lack of policy or guidance on the criteria to choose members of the SGB has compounded the challenges because principals end up with SGBs that did not understand the regulations, policies, and procedures. Thus, leaving an additional responsibility on principals not only to make them aware of these policies and regulations, but to teach them the meaning and purport of those. It would seem that the view of the majority of principals was that SGBs needed some formal training in policy development, interpretation, and implementation. Training has been proposed by researchers, who are of the view that the decentralisation of education authority and powers to different stakeholders including SGBs required support of the stakeholders in their new capacity. Tsotetsi, Van Wyk and Lemmer (2008:385) argue that "[i]n

view of the complex functions prescribed for school governing bodies (SGBs) in South African schools, sound training should be provided for proper discharge of the multiple duties bestowed upon them to avoid the so-called 'muddling-through' approach."

Principal 1 stated that regulations containing the criteria were both cumbersome and unclear. This has often been the source of frustration, anger, upset, and other sorts of contestations. Aggravating the problem was that parents did not always understand admission policies and related regulations. There have been instances, for example, of parents whose children had been allocated to a school by the online system. The parents would go to a different school and insist that the child be admitted by the same school (Principal 1). Also, that parents were more interested in their children being admitted to a school, and were less concerned with following processes or meeting established criteria.

Principal 3 expressed a concern about the 5 km radius intake requirement. According to Principal 3, this was problematic for schools that were in areas where there were not many learners. She noted that as an intervention the school then had to get learners from nearby areas or townships. Similarly, Principal 4 indicated that there was a problem with the influx of learners from other areas outside of the school's location. She revealed that a school admitted 1,203 learners of which only 28 were from the immediate surrounding areas.

Parents and some of the other participants raised a number of challenges with regard to school admission policies. What parents considered as challenges, of which one was the feeder zone system, were evident from the central role that parents played in some of the precedent-setting cases that came before the courts. For instance, parents took part in the *FEDSAS Case* as friends of the court. The parents' position in this case was that the feeder zone system would exclude historically poor Black learners who would primarily live in historically poor and marginalised Black areas from admission or enrolment into affluent areas (Govender, 2016). Parent 2 claimed that children from poor families and/or with less educated parents were sometimes disadvantaged by the schools' admission policies and procedures. This was problematic because the right of access to basic education also entailed that no child should be denied admission to public primary schools because of the child's socio-economic background (Arendse, 2011:120). All the parents who were interviewed referred to discriminatory admission policies and practices as challenges. To this end, it was apparent in the case of *Matukane and others vs Laerskool Potgietersrus*, 1996 (3) SA 223 (TPD) that approached the court alleging that Black children were being discriminated against in the school's admission policy, and ultimately obtained a declaratory order prohibiting the use of admission policy criteria that were based on race, ethnic or social origins, culture, colour or language. Parent 1 in particular stated that in "*some schools' admission has been determined by whether a parent can pay a bribe to an admitting official, including a bride to jump waiting list and the child to be placed under Admission List A*." Parent 2 and Parent 3 said that the feeder zone was not working because their children were still not admitted to schools near their homes. They also mentioned that children sometimes had to go to English-medium schools because the schools in the proximity of the children's home were Afrikaans schools. Thus, language still appears to be an impediment in schools. All the parents who were interviewed mentioned that the online learner application and admission processes were mentioned problematic and challenging towards realising learners' access to basic education.

The interviews with parents revealed a pattern of stratification of schools' admission criteria that were as in countries of the Organisation for Economic Co-operation and Development (OECD, 2012:44). In an approach almost similar to that in the OECD countries where parents and children were given more autonomy and authority to choose schools that better met their educational needs or preferences (OECD, 2012:44), the Gauteng online admission application requires of parents to list schools in order of their preferences. Furthermore, the outcome of the application allowed the parents to choose which school they finally would like their children to be accommodated at. However, it was clear from the responses that some criteria militated against the learners' rights to basic education. Some parents were still battling to understand and articulate the online application system. For instance, Parent 3 stated that she did not understand why, if schools were provided in order of preference, parents still had to choose the school they preferred over others.

Many of the challenges were not isolated and specific to South Africa. Some countries, despite their developed status, faced similar political and socio-economic challenges to learner admissions and the right to basic education. The OECD, in its 2012 study on school management and access to education, reported similar challenges (OECD, 2012). However, unlike in the countries identified by the OECD, the Gauteng education authorities did not like the OECD "give more autonomy and authority to parents and students to choose schools that better met their educational needs or preferences" (OECD, 2012:44).

From the above discussion and responses, one can surmise that in general the challenges related to the four A's of admission as contained in the General Comment of the CESCR, in particular that

of *accessibility* and *acceptability*. It may also be argued that school admission policies and implementation may not be acceptable if access was hindered by the absence of African languages. In this regard *accessibility* would mean that access to education must be free from all unfair discrimination, including language discrimination, and that the system must be transformed to ensure that previously disadvantaged and marginalised groups had fair access to the education system. Moreover, it could be argued whether teaching learners, who have never been exposed to the language at home, being taught in Afrikaans despite their struggling with the language as being appropriate and fit for the purpose of access to basic education. GDE 2 addressed at length the language issue, in particular Afrikaans, as an inhibitor to access to a basic education, particularly because it disadvantages non-Afrikaans speaking learners.

Judicial Intervention in Disputes Emanating from Implementation of the Learner Admissions

To date a number of admission disputes and/or matters incidental thereto had to be resolved by the courts. Some of the cases that attracted much media attention and some scholarly reviews include the *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC14 (*FEDSAS* case), *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34 (*Rivonia case*); *Minister of Education v Harris* (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); *Hoërskool Overvaal* case. The participants were asked what they thought the impact of the court cases relating to public school's learner admission policies was in practice. GDE 1 admitted that "[t]*here are many grey areas in the schools' admission regulations that sometimes necessitate the intervention of the courts*." However, GDE 1 expressed concern of the destabilising effect of frequently litigated school admission issues. As an alternative, GDE 1 proposed the introduction of the admission ombudsman to deal specifically with admission disputes and other issues as a pre-condition to approaching the courts for further relief. It would seem that the GDE had a love-hate relationship with the courts in respect of resolving learner admission disputes. For example, expressing his displeasure at the GDE losing its Constitutional Court appeal in *Hoërskool Overvaal* case, MEC Lesufi (2018:para. 6) reportedly stated that "[w]e don't need the court to help us build a non-racial South Africa. Those who want to build a non-racial society must do so where they are."

The representatives of the two federations acknowledged judicial intervention and the role of emerging jurisprudence relating to public schools' learner admission policies and practices disputes. SGBFED 2 stated that judicial intervention was there to clarify issues and give clear guidelines to both SGBs and departmental officials where uncertainty regarding the interpretation of legislation relating to the admission procedure existed. It is through the courts, as was evident in the *Rivonia* case, that the roles of the various parties involved in the admission procedure were clearly outlined. It is beyond any debate that SGBs must be guided by jurisprudence when drafting and implementing the policies. Moreover, it has been confirmed by various cases that the Department can only act when it has the legislative authority to do so, according to SGBFED 2. Responding to the question whether he agreed that the *Rivonia Primary School* case had set a precedent in how SGBs should implement their admission policies to promote access to education, SGBFED 1 said that it had some impact; particularly of taking away powers of the SGBs regarding decision-making on admission. SGBFED 1's view, and incorrectly so, is that the court in *Rivonia Primary School* case set a negative precedent of gradually chipping away SGBs' powers as evidenced by the amendments intended to be brought by the Basic Education Laws Amendment Act (BELA, DBE, RSA, 2017).

SGB representatives, who considered the courts as arbiters of issues affecting the best interest of the child, were more appreciative of judicial intervention. According to SGB 2, for example, "*the courts are needed, especially when admission statutes and related policies and procedures are wrongly interpreted*." However, SGB 1 preferred an approach that allowed the exhaustion of all internal remedies and processes first, stating that parties should not rush to approach the courts.

All parents interviewed also appreciated the intervention and assistance of the courts in learner admission disputes. But, the nuances of the parents' responses differed according to their views on access to certain schools, particularly those that were traditionally White schools by African learners or non-Afrikaans-speaking learners. Parent 1 and Parent 4 stated that the courts were their best chances of having their children admitted to schools, if the principals and SGBs declined their applications. Parent 4 noted specific instances where children were declined admission because of the language barrier. Likewise, Parent 2 and Parent 3 saw no harm in approaching the courts to have their children's rights to basic education enforced. However, Parent 3 stated that it was unfair for parents to spend money approaching the courts in order to enforce the rights that children are given by the Constitution. In essence, the parents suggested that not all the court battles were in the best interests of the children, particularly when matters could have been resolved amicably.

The general view of the parents was that the intervention of the courts or rather recourse to the courts was important to ensure justice in primary school learner admissions. To this end, one must highlight some of the key court rulings following parents of learners who had been refused admission approaching the courts for relief. In *Matukane and others vs Laerskool Potgietersrus*, 1996 (3) SA 223 (TPD), for example, the court ruled in favour of a parent who argued that Black children were discriminated against by the school admission policy. Consequently, the school was mandated not to refuse any learner on grounds of race, ethnic or social origins, culture, colour or language.

Understanding and Operationalisation of Co-Operative Governance in School Admissions

Collaboration and co-operative governance are key features in relevant legislation such as SASA, and has been central to court cases deciding on school governance (*FEDSAS case*; *Rivonia* case; *Hoërskool Overvaal* case). Also, it has been a subject of academic discourse in several scholarly publications as evidenced in the literature review (Du Plessis, 2016; Heystek, 2011; Maluleke, 2015). The discussions with and the responses of different participants were proof that a serious issue of power imbalance existed among stakeholders. Moreover, it seemed that stakeholders were struggling to grasp the meaning and purport of the concept of co-operative governance.

Regarding the issue of co-operative governance in admission practice in public primary schools, GDE 1 was of the view that the HOD *"has an aerial view of the entire school while the SGB has a narrow one*." However, in a rather controversial stance, GDE 2 stated that the *Rivonia Primary School* case ruling resulted in the SGBs being irrelevant. In my view, this was a misunderstanding of the court's ruling. As observed by Dieltiens and Enslin (2002:10), the Constitutional Court ruling in the *Rivonia Primary School* case sought to balance the powers of the stakeholders by setting out a clear and authoritatively delineating of the limits of the role of the SGBs and that of the national and provincial Departments of Basic Education (Maluleke, 2015:6). The Constitutional Court in the *Rivonia* case called for a balancing act when determining the roles of the parties; and not the rendering of the SGB redundant. The view expressed by GDE 2 was indicative of the different ways that stakeholders interpreted and understood the legislative and policy framework relating to learner admissions within the framework of co-operative governance. GDE 2 refused to acknowledge the critical importance and application of co-operative governance in school governance context, unlike GDE 1. GDE 2 said with great emotion that "*co-operative governance relates to spheres of government and not to SGBs, as they are not governmen*t. *Thus, this co-operative governance concept does not apply in relation to SGBs*." According to GDE 2, principals were subordinates of the HOD, and that principals not carrying out admission instructions of the HOD would be considered to have breached their conditions of employment. GDE 2 showed a lack of understanding of the meaning and purport of co-operative governance upon which SASA is premised (Heystek, 2011:457). Highlighting the same issue, Du Plessis (2016:10) points as flawed the state's position that only SGBs needed to be accountable to the state when in fact, he argues, it is the SGBs that are obliged to hold the state accountable. There is a lack of understanding that the SGBs, principals and the Department are "co-responsible and bear equal but distinct accountability" (Maluleke, 2015:6), which requires an efficient, effective, and sound working relationship among these education stakeholders (Van der Merwe, 2013:240).

Responses by representatives of the Federation of SGBs showed that the issue of co-operation between the Department and the SGBs remained complex. SGBFED 1 noted as a concern the involvement of the HOD in learner admission issues, which followed the top-down approach implemented during the apartheid era. SGBFED 1 essentially complained about the erosion or usurpation of powers of the SGBs by the Department. This complain was not unfounded considering the proposed changes to SASA on the role of the SGBs vis-à-vis that of the Department (Lesufi, 2017:21). Ideally, such an amendment of powers of the SGB must be directed at making the SGB more transparent, more responsive and more accountable to the broad South African community of learners that they are meant to serve (Woolman, 2013:339). Demonstrating the application of co-operative governance, SGBFED 2 said that co-operative governance required of the HOD to act reasonably and procedurally fair when amending a school's decision or deviating from a school's policy. Likewise, SGBFED 2 stated that members of SGBs must comply with the requirements for fair administrative action when making learner admission decisions. The need for administrative and procedural fairness was highlighted by the Constitutional Court in *Rivonia Primary School* case when it warned that "a decision to overturn an admission decision of a principal, or depart from a school's admission policy, must be exercised reasonably and in a procedurally fair manner" (para. 58).

SGB 1, for example, said that he agreed with the ruling of the High Court in the *Rivonia Primary School* case instead of the ruling of the Constitutional Court. SGB 1 said that "*you cannot talk about the power of SGBs to deal with*

admission of learners because they never had the real decision-making powers, and that the MEC is a suitable person to exercise decision-making powers in learner admission disputes." It was quite interesting that the views of SGB 1 supported giving powers to the Department in contrast to the position taken by the representatives of the Federation of SGBs and as reflected in cases like the *Federation of Unions of South Africa (FEDUSA)* case. This begs the question: How aligned are the mandate and responsibilities of the SGBs and Federation of SGBs? SGB 3 was critical of the GDE expressing concern that the Department needed to "*guard against the abuse of their powers and processes as mandated by the Constitutional Court in the Rivonia* case."

The *Hoërskool Overvaal* case demonstrated the realities of the operation of the concept of co-operative governance or the misunderstanding thereof. In this case, other than that the school had no capacity, Judge Prinsloo in the *Hoërskool Overvaal* case issued a very scathing ruling against the Department based on other issues, including failure to act lawfully, rationally, fairly and reasonably in terms of s 6 of the Promotion of Administrative Justice Act (PAJA) of 2000. The *Hoërskool Overvaal* ruling, in my view, like many other cases regarding school admission contestations, goes to the heart of the question of the nature and the extent of powers of both the SGBs and the Department in matters of learner admission. Furthermore, the case brings into question the operationalisation of co-operative governance between the Department and the SGBs.

Of all the representatives of SGBs interviewed, the most scathing criticism of how the GDE exercised its powers in the light of the need to co-operate with SGBs came from SGB 3. SGB 3 bemoaned the fact that the GDE did not follow up on what had been decided by the courts regarding the implementation of admission policies and the need for power deference between the SGB and the GDE according to the circumstances of the case. In SGB 3's view, the GDE continued to fail to acknowledge and appreciate the partnership between it and the SGBs. Also, that the GDE did not promote the relationship of trust and mutual respect in seeking solutions to the problem of placing learners when there were insufficient places in schools. Thus, he proposed that the courts must be forceful in ensuring that there was better co-operation between the GDE and the SGBs. SGB 3 said that part of acting lawfully and rationally was for the Department to consult and discuss its placement decisions with the schools before implementation, which was not happening. The lack of trust and co-operative relationship, in my view, posits itself as one of the critical challenges in school admission practices. This view was shared by SGBFED 1 who stated that the GDE must avoid following a top-down approach experienced during the apartheid era.

Principals 2 and 3 indicated that there were challenges with regard to co-operative governance and the Department's top-down approach. Parents interviewed also regarded co-operation and joint decision-making as indispensable to the smooth running of the schools, particularly regarding the issue of learner admission. Parents 3 and 4 voiced a concern that SGBs sometimes did not observe the need to co-operate with all stakeholders and that admission policies were stratified along racial considerations. Parent 4 berated SGB decisions "*after consultations*" with the parents and not "*in consultation*" with the parents.

Discussion

Participants gave similar and divergent responses to the interview questions. Nevertheless, no significant differences were found among the responses regarding the need of admission policies to act as enablers to access basic education.

Firstly, it was evident from all the responses that school admission policies needed to be evaluated to ensure access to quality education for each and every school-going learner, and ultimately the responsibility of the HOD to ensure the placement of learners. It was also clear that the public primary school system was still fraught with unfair and discriminatory practices (some reminiscent of the apartheid era) that subsequently resulted in disputes with the GDE with regard to the admission of learners. A need to redefine the functions and roles of stakeholders, particularly SGBs, was recommended. Interviews conducted with the representatives of the Federation of SGBs highlighted a marked difference between the roles and day-to-day responsibilities of SGBs, on the one hand, and the Federation of SGBs on the other. The latter appeared greatly pre-occupied with issues relating to the powers of the SGBs and how these powers are threatened by amendments proposed in the South African Education Law (SAELA). SGBFED 2, for example, expressed a view that the proposed amendment to the appointment of principals was designed to start a process of gradually disempowering the SGBs. Although the importance and the role of SGBs and of the SGBFEDs cannot be over-emphasised, it has to be acknowledged that some of the responses suggested strong political inclination and overtones when discussing the issues of school admission policies.

Secondly, remarking on the *Hoërskool Overvaal* case, one of the Department's representatives alleged that the SGB was anti-transformation and was perpetuating the practices of the past that were designed to marginalise children from previously disadvantaged groups. The issue of alleged discriminatory admission

practices, particularly in the former Model C schools, remain a problem. SGB 3, for example, spoke greatly in support of the Department and the MEC, and opined that giving powers to the SGBs has been the cause of a lack of transformation in certain "*purely Afrikaans*" schools. Some responses rebuked the alleged discriminatory admission practices in former Model C schools, and that Black learners were often excluded under the guise of language policy to retain whiteness in the schools. SGB 1, for example, stated that it was the GDE that "…*has failed the people of South Africa by not investing sufficiently in building new schools and in upgrading the … quality of township schools*…." Furthermore, SGB 1 stated that there has been too much unwarranted focus on power and politics instead of finding solution to ensure that all learners had access to basic education. In my view these contestations attest to how racialised and politicised public primary schools' admission policies and practices in South Africa have become, and also provide some insight into the past apartheid school governance from which the current administration is trying to break away.

Thirdly, any study that looks into public primary school admission policies and practices as enablers to the right of basic education as expressed in s 29 of the Constitution necessitates the need to understand the core content of the right, and understand how this immediately enforceable right (Skelton, 2013:4) is or should be realised. According to Merabe (2015:41–42), the core content of the right means in essence "that essential element without which a right loses its substantive significance as human right" and "is a tool for identifying those elements of the normative content of a human right that contains minimum entitlements." Collectively the responses addressed the issue of public primary school admissions policies and practices as disablers to children's right to a basic education. Specifically, some responses addressed the core content of the right to be admitted to basic primary education as envisaged in s 29 of the Constitution. What was evident from the presentation of the responses of all the participants was that some of these responses, particularly on criteria for admission and other considerations, including the authority to implement public primary schools' admission policies, resonate with some of the views in the literature review in this study. Some responses focused on admission policies and practices as enablers or disablers of learners to benefit from the constitutionally guaranteed right to education. In some OECD countries, for example, school admission criteria considerations include elements such as academic performance, religious affiliation, relationship with other family members who have attended, and parents' endorsement of the school's instructional or religious philosophy (OECD, 2012:40). Some of the responses in this study confirmed the assertion that school admission criteria in these jurisdictions were in part similar to those that are/have been at play in some South African public schools' admission practices. However, unlike in the countries identified by the OECD, the Gauteng education authorities do not "give more autonomy and authority to parents and students to choose schools that better meet their educational needs or preferences" (OECD, 2012:44).

Fourthly, a consistently recurring theme or point of discourse was how the GDE was working towards ensuring the realisation of the right to basic education through public primary school admission policies, although not always at the preferred speed or with the best expected outcome. SGBFED 2, for example, referred to the proposed amendments to SASA through BELA as indicative of the disregard of the principles of co-operative governance in basic education. Interestingly, SGBFED 2 seemed to support the Department stripping the SGBs of their powers to decide on learner admissions as was the issue in *Rivonia Primary School* case. I am of the opinion that the admission criteria set by the different schools and the administration of admission policies and process are interwoven. It is, therefore, important that the inviolability of such right be protected and promoted as one of the objectives of the conception of human rights. As noted in the literature review, the right to admission to public education is not guaranteed only in the Constitution, but human rights instruments in Africa also address the rights of children to basic education, notably the ACHRP, which in Article 17 (1) states that "every individual shall have the right to education" (OAU, 1981). Also, the African Charter on the Rights and Welfare of the Child (ACRWC) in Article 11 (1) states that "every child shall have the right to education" (African Union, 1990).

Equally important to note from the findings is the requirement of co-operative governance among the stakeholders which remains a contentious matter (Dieltiens & Enslin, 2002; Du Plessis, 2016; *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14; Heystek, 2011; *Hoërskool Overvaal vs Panyaza Lesufi*: *The High Court Judgment*, 19 January 2018, CASE NO: 86367/2017; Maluleke, 2015; *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)). At the heart of this sometimes contentious relationship is the issue of the degree and extent of the powers of the relevant role players to determine and implement school admission policies. I deduced

from some responses of both the SGBs and the principals that in certain schools there was confusion about the differentiated functions of the SGBs and the principals. GDE 2, for example, stated that the ruling in the *Rivonia Primary School* case rendered the role of the SGBs "*irrelevant*." Also, it would seem that in certain schools there was cross-usurpation of functions between the SGB and the principal. SASA (1996) s 16(1) and s 16(2) specifically differentiate the functions of the SGBs and the principals (RSA, 1996b). Academic discourse and interviewees' responses regarding co-operative governance and the continuation of court battles regarding the implementation of admission policies can also be explained as shrouded in elements of the power-relation, instead of consideration of an efficient and sound working relationship (Van der Merwe, 2013:240). The proposed BELA has also re-ignited the debate that the relationship between the Department and the SGBs was a top-down relationship, which, according to the SGB Federation's representatives, was against the spirit and purport of co-operative governance. To quote Maluleke (2015:6), both the Department and the SGBs are "co-responsible and bear equal but distinct accountability" to matters of school governance and particularly learner admissions.

In the fifth place, the responses supported the choice of the HRBA when determining the State's obligation towards the realisation of the right to basic education; its protection, and promotion thereof. For instance, Parent 4 and Parent 2 argued that the proximity and the 5 km radius rule did not justify their children not being admitted to schools that provided them with better and quality education. The same arguments were made by SGB 4, for instance, against the Gauteng online admission system, and that the system benefited mainly affluent families and those who had access to computing services. In essence, it has been argued by participants, particularly principals and parents, that the Gauteng online admission system had in certain circumstances the unintended effect of going against the objective of the HRBA to public primary schools' admission policies and practices. Some participants argued that the online admission system was prematurely implemented, poorly managed, and becoming a factor inhibiting admission policies playing their rightful role in securing access to children's right to a basic education.

In the last instance, the issue of capacity of the school to admit learners was a thorny issue, and took a place at the centre of admission policies as enablers to the children's right to basic education. In my opinion, with regard to capacity, reference should not only be about the numbers or quantitative capacity as it was in the *Hoërskool Overvaal* case. It is submitted that what can be deduced from the responses of the interviewees is that capacity should be understood from both the perspective of the satisfaction of the four A's of admission and the core content of the right to education. Admission of a learner to a school without proper infrastructure or properly trained and qualified educators to offer quality education (Xaba, 2006:567), for example, amounts merely to the provision of a hollow and meaningless access to the right to basic education. This view was confirmed by the Constitutional Court in the *Hoërskool Overvaal* case when it dismissed the appeal by the GDE against the judgment of the North Gauteng High Court, and confirmed that Hoërskool Overvaal had no capacity to accommodate English-speaking learners. The Constitutional Court chastised the Gauteng MEC for Education for failing to consider all relevant circumstances and factors including determining if English-medium neighbouring schools "such as General Smuts and Phoenix High Schools, which both fall in the same feeder zone as Hoërskool Overvaal, had enough capacity to admit the pupils" (para. 29.1).

Recommendations

Based on the finding of this study, I make the following recommendations:

- Ensure a clear and unambiguous understanding by stakeholders of the function of admission policies in public schools.
- Introduce measures and systems aimed at ensuring that core responsibilities of stakeholders regarding development and implementation of school admission policies are clearly defined and delimited.
- Provide expert advice to stakeholders on statutory framework and case law regarding admission policies of public primary schools.

Conclusion

From the results and discussion of the findings above, it can be concluded that access to basic education is indisputably a constitutionally guaranteed right pursuant to s 29 of the Constitution, and that the realisation of this right has not been without great challenges. In particular, school admission policies play a central role as enablers or disabler to the right to basic education. While admission policies and legislative frameworks have been in existence for some time now in South Africa, the growing case law on school admission practices attests to a system fraught with problems and challenges. However, a myriad of challenges has been identified affecting the role that admission policies must play as enablers to the right to basic education. The school admission crisis in Gauteng has seen the Department and schools pitted against each other in some unpleasant battles. Experiences of stakeholders also point to a system in crisis and

towards a boiling point of awakening the ugly side of transformation and race relations in public schools regarding the admission of learners. Furthermore, the situation has not been helped in anyway by the lack of knowledge, skills and expertise of SGBs and principals; the formulation and continuation of the apartheid legacies including discriminatory admission policies; lack of infrastructure and capacity of certain schools; and the socio-economic circumstances of parents. Various stakeholders in the basic education environment, namely principals, government officials, and SGBs have inadequate understanding and competency to deal with the plethora of enabling legislation, policies and procedures governing primary school admission policies and practices. This inadequate competency and/or lack of understanding of the necessary legal and regulatory framework on learner admission impacts negatively on the constitutionally protected right of learners to basic education when they deal with learner admission and placement issues.

The relationship among these stakeholders is sometimes strained and often characterised by allegations of usurpation of one another's powers and functions, and absence of co-operation and consultation. Although collaborative and co-operative governance by stakeholders is mandated by the Constitution and SASA, it was revealed that the respective stakeholders did not always observe the basic tenets of co-operative governance in exercising their responsibilities and decision-making powers. The stakeholders were not well versed in the nature and purport of their delegated authority. This was also apparent from the interview responses provided by the participants.

The above conclusions are collectively supported by the various court rulings made with respect to learner admission and the exercise of powers and functions as bestowed on principals, SGBs and the HOD. Notable examples are the *FEDSAS* case; the *Rivonia* case and the *Hoërskool Overvaal* case. The *Hoërskool Overvaal* for example, launched a scathing criticism of the Department and cast doubt on the ability and the bona fides of the stakeholders to discharge their duties and responsibilities regarding learners' right to a basic education.

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Author's Contributions

Sibanda wrote the manuscript and provided data for Table 1 on page 12. She also conducted all the interviews and analysed and interpreted the data collected.

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