

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Feeding inequality:

Access to equal education, feeder zones and former ‘Model C’ schools

Submitted in fulfilment of the requirements for the LLD degree

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DEDICATION

To my mom who taught me the meaning of an exclamation mark and instilled in me the sheer thrill of reading.

And to my dad who showed me, by example, that it is always possible to overcome.



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To my furry and calming companions on this adventure, Cuddles and Bailey.

And, to God, thank you for giving me the strength to overcome the adversities and challenges of the last five years.

DECLARATION

I, Lisa Natalie Draga, declare that the dissertation: 'Feeding inequality: Access to equal education, feeder zones and former 'Model C' schools,' is my own work and that it has not been submitted before any degree or examination in any other university, and that all sources or quotes I have used have been indicated and acknowledged as complete references.

Signed: Lisa Natalie Draga

Dated: 1 October 2023



Signed: Dr Sarah Fick

Dated: 1 October 2023



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Signed: Prof Wessel le Roux

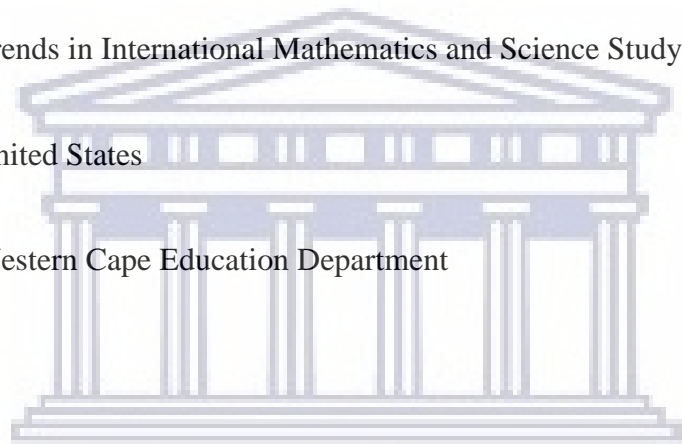
Dated: 3 October 2023



LIST OF ACRONYMS AND ABBREVIATIONS

AYC	African Youth Charter
EE	Equal Education
EELC	Equal Education Law Centre
EEO	Equal educational opportunity
FEDSAS	Federation of Governing Bodies of South Africa
GDoE	Gauteng Department of Education
HoD	Head of Provincial Education Department
HSRC	Human Sciences Research Council
HWA	Historically white areas
HWS	Historically white schools
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
KZN	KwaZulu-Natal
KZNDoe	KwaZulu-Natal Department of Education
MEC	Member of the Executive Council
NDP	National Development Plan
NEPA	National Education Policy Act

NNSSF	Norms and Standards for School Funding
PED	Provincial education department
PIRLS	Progress in International Reading Literacy Study
SAHRC	South African Human Rights Commission
SGB	School governing body
TIMSS	Trends in International Mathematics and Science Study
US	United States
WCED	Western Cape Education Department



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In this thesis the use of the term ‘black’ connotes the African, Coloured and Indian population groupings within South Africa. The ‘African’, ‘Coloured’ and ‘Indian’ terminology arises from the apartheid government’s race based classifications introduced by the notorious Population Registration Act 30 of 1950. The terms ‘African’, ‘Coloured’ and ‘Indian’ are employed when referring to one of these apartheid designated groups only.



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Abstract

South Africa's basic education system remains deeply unequal, fuelled in part by the inequitable access of black and poor children to good public schools that are overwhelmingly concentrated in more affluent 'whiter areas'. South Africa's current legislative and policy framework has resulted in schools (those in Gauteng not included) being permitted to determine their own feeder zone criteria for admission purposes. The use of geographical proximity as a criterion in the admission policies and practices of schools belies South Africa's history of segregation and its continued manifestation. It is inevitably black children who are disproportionately and adversely affected by the use of feeder zones. This study provides contextual background concerning the group areas and Bantu Education legacy that still endure. An account of some of the historical events that underpinned and informed the passing of the South African Schools Act, and which have ultimately led to much contestation in the sphere of school governance, including in the application of feeder zones in school admissions is provided. An analysis of the jurisprudence relating to the policy making functions of school governing bodies is also undertaken with a view to determining its implications for school zoning. This study endeavours to give legal meaning and content to the concept of 'equitable access' to public schooling in the South African context. The legal and policy framework relevant to feeder zones is engaged with and its impact on equitable access to schooling assessed. This study provides a narrative on the way the KwaZulu-Natal, Gauteng and Western Cape provincial education departments have addressed the inequalities arising from the application of feeder zones to date. This study also explores the possibility of heads of provincial education departments being legally required to establish non-contiguous feeder zones for schools in their provinces. An exercise in comparative analysis with the United States is undertaken to draw lessons for South Africa. The viability of the use of feeder zones to eradicate unfair discrimination and ensure equitable access to schooling in the South African education system is investigated and potential alternative and more effective models explored.

KEY WORDS: admission policies, apartheid, attendance zones, boundaries, catchment areas, desegregation, discrimination, education, equality, feeder areas, feeder zones, former Model C schools, gerrymandering, group areas, learners, neighbourhood, school choice, school governance, school governing bodies, school zoning, segregation, spatial apartheid, spatial distribution, spatial justice, urban geography, urban landscape, zoni

CHAPTER 1

MAPPING INEQUALITY:

THE INJUSTICE OF FEEDER ZONES

1.1 INTRODUCTION

Fish Hoek High School is a historically white Western Cape school nestled in the scenic valley of Fish Hoek. The valley is surrounded by ocean on the east and west and flanked by mountains to the north and south.¹ Apartheid's spatial legacy is palpable in the residential patterns of the valley which clearly evidence the forced removals of non-white families from the area following the Group Areas Act of 1954.² Not far from Fish Hoek High, rests the predominantly black township of Masiphumelele.³ Masiphumelele was formed towards the end of the 1980's in rebellion against the apartheid government's strategy to forcibly remove black Africans to the far off township of Khayelitsha, and coloureds to the closer area of Ocean View.⁴ The term Masiphumelele is a Xhosa word which means 'let us succeed together'.⁵ A term drenched in irony in a valley that remains highly segregated. Fish Hoek High's mission statement, which boldly adorns the first page of its website, proudly proclaims 'excellence right on your doorstep'.⁶ Yet another positive catch phrase seeped in irony. For Masiphumelele children, although Fish Hoek High is just a few kilometres away it might as well be far beyond the vast expanse of Atlantic Ocean which looks upon the valley. This is because the gates of Fish Hoek High remain largely shut to the children of Masiphumelele. What blocks these impoverished black children from enrolling at the school is Fish Hoek High's feeder zone policy.

In 2012 Equal Education Law Centre (EELC),⁷ after being approached by a concerned parent, conducted an analysis of Fish Hoek High's then admission policy. This analysis revealed that parts of the prestigious and picturesque area of Noordhoek (about 8km from Fish Hoek High)

¹ Mann PJ *Environmental perceptions a case study of Fish Hoek Senior High School* (unpublished Master's Thesis, University of Cape Town, 1996) 4.

² Gooskens I *Boundaries and crossing points: Geography, class and identity in the Fish Hoek valley* (2006) Working Paper No. 168 Centre for Social Science Research Social Surveys Unit Boundaries 10. The Group Areas Act 41 of 1950.

³ Institute for Justice and Reconciliation *Annual Report 2008* (2008) IJR 8.

⁴ Institute for Justice and Reconciliation *Annual Report 2008* (2008) IJR 8.

⁵ Western Cape Provincial Government 'Documenting and evaluation report, Masiphumelele Conflict Intervention August 2006 – March 2007' (2007) Western Cape Government 22.

⁶ Fish Hoek High School 'Fish Hoek High School – Excellence Right on your doorstep' available at <https://fishhoekhighschool.co.za/> (accessed 15 December 2020).

⁷ The Equal Education Law Centre is a legal NGO which specialises in education law and policy.

was included in the school's primary catchment area, sections of the touristy beach side suburb of Muizenberg (about a 9km stretch from the school) fell within Fish Hoek High's secondary zone, whilst the impoverished informal settlement of Masiphumelele fell short of the school's zoning area despite being situated a mere 5.2 km from the school.⁸ A blatant case of race based gerrymandering emerges when one examines the racially fractious nature of these shrewdly carved boundary lines. By manipulating the shape of its feeder zone, Fish Hoek High was able to deny 'undesirable' black and poor learners from Masiphumelele access to the school.

Fish Hoek High's feeder zone clause in its admission policy has since been amended. It now reads: '[p]reference will be given to learners residing south of Atlantic Road, Muizenberg'.⁹ This is an arbitrary boundary line which is hard to comprehend when studying a map of the area.

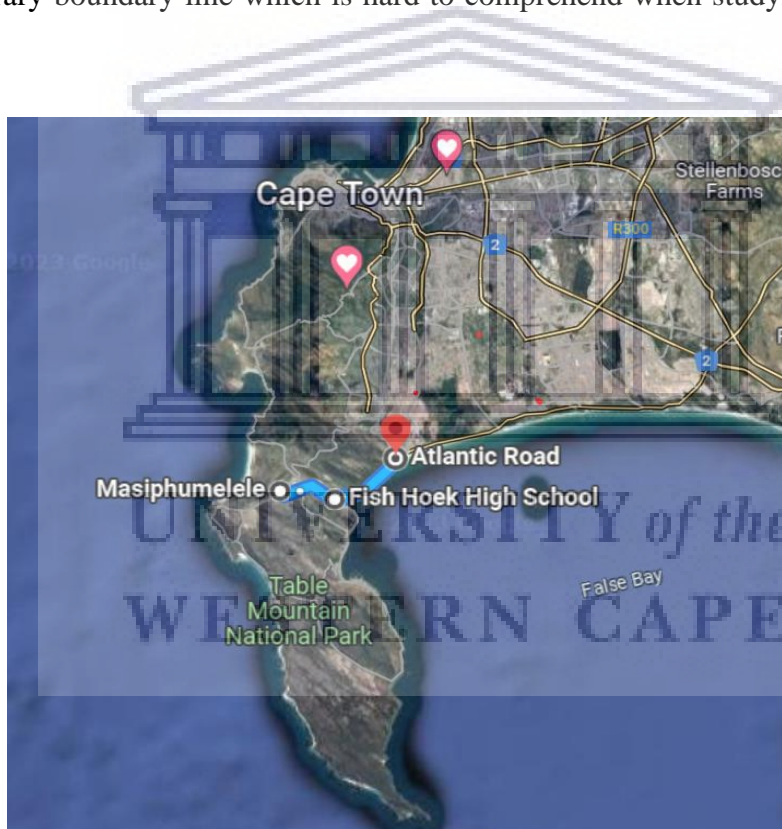


Figure 1

⁸ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) paras 19.4 and 19.5.

⁹ Section 3.1 of the Admissions Policy of Fish Hoek High School. Fish Hoek High School 'Admissions Policy' available at <https://fishhoekhighschool.co.za/school-history/admission-policy/> (accessed 15 December 2021).

One thing which is abundantly clear though, south of Atlantic Road, Muizenberg remains a 'safe' distance from Masiphumelele. Once again, this black township is conveniently excluded from Fish Hoek High's catchment area. Notably, most South African schools who apply feeder zones (a demarcated area from which a school draws its core learner intake) are based in more affluent suburbs,¹⁰ such as Fish Hoek. Across the country some of these more well-off schools consciously choose to demarcate their feeder zones in a manner that excludes poor and black communities like Masiphumelele.¹¹ Fish Hoek High's racialised feeder zone policy is therefore not an anomaly but a widespread practice that has been allowed to run rampant in South Africa's public education system as this thesis will show.

South Africa's public education system has been described as 'bimodal' when viewed against the distribution of learner outcomes across the country. What is in theory a single education system is, in reality, two separate schooling systems given this spread of learner achievement.¹² These two systems are largely split along historical-education-system and socio economic lines.¹³ Learner performance testing reveals that only about 25% of South Africa's learners attend primary and secondary schools of high quality. These learners stem from wealthier families of all races.¹⁴ Schools that catered largely to the needs of white children under apartheid, fall within this smaller category of good quality schools.¹⁵ It is often these historically privileged good schools who employ feeder zones as an admission criterion.¹⁶ The use of proximity in the school admissions process bears a poignant injustice in the South African context. This is because the apartheid government, in its effort to achieve the severing of the different race groupings in the country, pursued a policy of legislated segregation. By stealth of law both residential areas and schools were divided according to race with oppressive living and schooling conditions imposed on black people.¹⁷ These divisions persist. Schools

¹⁰ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) para 24.

¹¹ Jansen JD 'Access and Values in Education' (2001) A paper presented at the "Saamtrek" Conference on Values, Education, and Democracy in the 21st century Kirstenbosch, Cape Town 790.

¹² Spaul N 'Education in SA: A tale of two systems' *PoliticsWeb* 31 August 2012 available at <https://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 8 August 2018).

¹³ Spaul N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 438.

¹⁴ Spaul N 'Education in SA: A tale of two systems' *PoliticsWeb* 31 August 2012 available at <https://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 8 August 2018).

¹⁵ Spaul N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 438.

¹⁶ Equal Education Law Centre *Comment on the Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia & Related Intolerance 2016 - 2021* (2016) EELC 7 and 8.

¹⁷ The Group Areas Act 41 of 1950 (this version of the Act was subsequently repealed and re-enacted in 1966). Bantu Education Act 47 of 1953.

that are locally accessible to black children by and large remain historically black schools,¹⁸ and many of these schools remain notoriously dysfunctional.¹⁹ African schools in particular (the bulk of schools in the public education system) continue to be ‘largely uni-racial and poor.’²⁰ The historical, and continued, connection between residential and schooling patterns as well as whiteness and wealth in South Africa means that it is invariably black children who are adversely affected by the current use of feeder zones to regulate access to schooling.²¹

This thesis focuses on the impact and consequences of the use of geographical proximity as a criterion in the school admissions process. In particular, the research examines the impact of feeder zones on the majority of impoverished black learners’ ability to enjoy their right to basic education and to be free from unfair racial discrimination. Also researched is the possibility and viability of the use of state established feeder zones to help dismantle rather than entrench racial inequality in South Africa (transformative zoning), as well as potential alternatives to school zoning.

1.2 BACKGROUND

The below section discusses the historical context of spatial injustice and black education delivery in South Africa and the manner in which the two inter-relate and ultimately manifest to reinforce unequal education provisioning in current day South Africa. The problem with the use of geographical proximity in the school admission process is, in the process, explained.

1.2.1 Everything has to do with geography

The phenomenon of race-based boundary drawing to segregate South Africa’s white population from its non-white population has been deeply etched into the country’s soil. The racially fragmented surfaces of South Africa’s cities can be ascribed to the ruthless and systematic way

¹⁸ Yamauchi F ‘School quality, clustering and government subsidy in post-apartheid South Africa’ (2011) 30:1 *Economics of Education Review* 148.

¹⁹ Spaul N ‘Poverty & privilege: Primary school inequality in South Africa’ (2013) 33:5 *International Journal of Educational Development* 437.

²⁰ Chisholm L ‘The state of South Africa’s schools’ in Daniel J, Southall R & Lutchman J (eds) *State of the Nation: South Africa 2004-2005* (2004) 217.

²¹ Sayed Y ‘The governance of public schooling in South Africa and the middle class: Social solidarity for the public good versus class interest’ (2016) 91 *Transformation: Critical Perspectives on Southern Africa* 97. Yamauchi F ‘School quality, clustering and government subsidy in post-apartheid South Africa’ (2011) 30:1 *Economics of Education Review* 146. Ntshoe I ‘Resegregation and recreation of racism in education in a post-apartheid setting’ (2017) 23:1 *Southern African Review of Education with Production* 93-95. Bell J & Morton McKay T ‘The rise of ‘class apartheid’ in accessing secondary schools in Sandton, Gauteng’ (2011) 17 *Southern African Review of Education* 29. Ntshoe I ‘Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa’ (2009) 15:2 *Southern African Review of Education with Production* 99-101.

South Africa's black population were deprived of their land by the colonial and then apartheid regimes. Any attempt at understanding the racially inequitable impact of tying residential proximity to school admissions requires an understanding of this tragic history. Dating as far back as the 1840's the authorities in South Africa's pre Union early towns set up townships to house their African population.²² These were commonly termed 'locations'.²³ The discovery of diamonds in 1867 and gold in 1884 accelerated urbanisation,²⁴ and resulted in the emergence of new industrial towns.²⁵ This economic growth attracted a significant number of migrants in search of work on the mines.²⁶ Post 1876 the bigger mining companies applied rigid controls over African migrant labourers.²⁷ Once employed, African mine workers and the areas in which they stayed were stringently managed. This ensured that African employees could not leave their place of employment or residence nearby the mines and relocate their families to stay with them.²⁸ Requirements concerning the carrying of passes by migrant labourer's were applied to regulate their movement and undercut their ability to secure higher wages.²⁹ In the diamond unearthing area of Kimberley surfaced one of the earliest and harshest designs of labour control in the story of South Africa.³⁰ It is here where closed compounds were first built in the 1880's to house African migrant workers. These were described as 'gaol-like institutions' appearing more like a jail than a residence.³¹ This set up allowed mine-owners to exert stricter control over their unskilled African labour force,³² and guaranteed a sturdier labour supply.³³ Johannesburg would later adopt a less stringent version of this model.³⁴ As a result,

²² Freund B *The African City* (2007) 109.

²³ Davenport TRH 'The Beginnings of Urban Segregation in South Africa: The Native (Urban Areas) Act of 1923 and its Background' (1971) Occasional Paper No. 15, Institute of Social and Economic Research, Rhodes University, Grahamstown 1.

²⁴ Turok I 'Urbanisation and Development in South Africa: Economic Imperatives, Spatial Distortions and Strategic Responses' (2012) Working Paper 8: Urbanisation and Emerging Population Issues, International Institute for Environment and Development United Nations Population Fund 4.

²⁵ Mears R 'Historical Development Of Informal Township Settlements In Johannesburg Since 1886' (2011) Paper presented at the Economic History Society of Southern Africa Conference 3.

²⁶ Coles C 'Land reform for post-apartheid South Africa' (1993) 20:4 *Boston College Environmental Affairs Law Review* 709.

²⁷ Mears R 'Historical Development of Informal Township Settlements in Johannesburg Since 1886' (2011) Paper presented at the Economic History Society of Southern Africa Conference 3.

²⁸ Coles C 'Land reform for post-apartheid South Africa' (1993) 20:4 *Boston College Environmental Affairs Law Review* 709.

²⁹ Mears R 'Historical Development of Informal Township Settlements in Johannesburg Since 1886' (2011) Paper presented at the Economic History Society of Southern Africa Conference 3.

³⁰ Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 58 and 59.

³¹ Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 59.

³² Mears R 'Historical development of informal township settlements in Johannesburg since 1886' (2011) Paper presented at the Economic History Society of Southern Africa Conference 3; Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 59.

³³ Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 59.

³⁴ Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 59.

Johannesburg became extremely segregated.³⁵ The changes brought about by the discovery of precious minerals in South Africa served as the foundation for the ‘spatial engineering’ which would be inflicted on the country for years to come.³⁶

The 1904 bubonic plague and the 1918 influenza outbreak are noted as significant factors which drove the creation of ‘native locations’ in South Africa.³⁷ Mere weeks after the bubonic plague was first discovered in Cape Town in 1901, about six to seven thousand Africans were uprooted from the central city and displaced to a black township about 8 kilometres away.³⁸ With the plague as its ruse, local authorities in Johannesburg forcibly relocated Indian, coloured and African residents of the inner-city to the remote Klipspruit Farm. This farm would later expand with the creation of further African townships into what is now present-day Soweto.³⁹

The notorious Land Act of 1913,⁴⁰ continued the process of stripping African people of their land.⁴¹ The Act split South Africa into ‘two irredeemably unequal zones’.⁴² The one, constituting about 87% of South Africa’s most fruitful and productive land, was reserved for the white population. The remainder comprised barren land on the remote peripheries reserved for African people alone.⁴³ The 1913 Land Act served to implement the policy of segregating the races which was to reach its most extreme form during apartheid.⁴⁴

The Transvaal local government established the Stallard Commission in 1922. The Commission was tasked with investigating the existence of black people in towns.⁴⁵ The

³⁵ Christopher AJ ‘Segregation levels in South African cities, 1911-1985’ (1992) 25:3 *The International Journal of African Historical Studies* 568 and 569.

³⁶ Turok I ‘Urbanisation and Development in South Africa: Economic imperatives, Spatial Distortions and Strategic Responses’ (2012) Working Paper 8: Urbanisation and Emerging Population Issues, International Institute for Environment and Development United Nations Population Fund 6.

³⁷ Vestbro DU ‘Housing in the apartheid city of former South Africa’ (2012) 66:7-8 *In: Izgradnja, Journal of the Association of Civil Engineers, Geotechnical Engineers, Architects and Town Planners* 2.

³⁸ Maylam P ‘Explaining the apartheid city: 20 years of South African urban historiography’ (1995) 21:1 *Journal of Southern African Studies* 24. Swanson M ‘The sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909’ (1977) 18:3 *The Journal of African History* 393.

³⁹ Phillips H ‘Locating the location of a South African location: the paradoxical pre-history of Soweto’ (2014) 41:2 *Urban History* 311.

⁴⁰ The Natives Land Act 27 of 1913.

⁴¹ *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) 76.

⁴² Walker C ‘Critical reflections on South Africa’s 1913 Natives Land Act and its legacies: Introduction (2014) 40:4 *Journal of South African studies* 655.

⁴³ Walker C ‘Critical reflections on South Africa’s 1913 Natives Land Act and its legacies: Introduction (2014) 40:4 *Journal of South African studies* 655.

⁴⁴ *Daniels v Scribante and Another* 2017 (8) BCLR 949 (CC) 16.

⁴⁵ Apartheid Museum *Understanding Apartheid: Learner’s Book* (2006) 25. Mears R ‘Historical Development of Informal Township Settlements in Johannesburg Since 1886’ (2011) Paper presented at the Economic History Society of Southern Africa Conference 4.

Commission proposed a structure of influx control aimed at restricting the movement of African people into urban areas.⁴⁶ As a consequence of its proposal, the Native Urban Areas Act of 1923 was passed.⁴⁷ Under this legislation, African people were only allowed within towns to the extent that their presence was required and were compelled to leave once this was no longer so.⁴⁸ That is, they were not allowed to reside in towns permanently. This legislation led to the creation of townships on the periphery of urban areas to house African workers during their stay in towns.⁴⁹ Langa in Cape Town and Lamontville in Durban were established in this way. Due to this Act, the geographical landscape of Johannesburg morphed significantly. Parnell records how the 1923 Native Urban Areas Act was ‘systematically winning the war of imprinting a racial geography onto the Johannesburg residential map.’⁵⁰

Other legislation used to effect forced removals include the Black Administration Act of 1927,⁵¹ and the Slums Act of 1934.⁵² The latter was employed in Cape Town to destroy racially diverse slums within the urban centre and to implement coloured designated housing projects on the Cape Flats—an expansive wind swept flat land area, blanketed in sand and laying southeast of the city.⁵³ Under this law, Johannesburg’s African residents were relocated to the newly established remote township in what was to be Soweto.⁵⁴ By law African people were required to be in constant possession of an identity document (dompass) indicating the legal basis for their stay in an urban area and could be prosecuted for not doing so.⁵⁵

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⁴⁶ South African History Online ‘The history of separate development in South Africa’ available at <https://www.sahistory.org.za/article/history-separate-development-south-africa> (accessed 21 May 2022).

⁴⁷ Mears R ‘Historical Development of Informal Township Settlements in Johannesburg Since 1886’ (2011) Paper presented at the Economic History Society of Southern Africa Conference, Johannesburg 4. Apartheid Museum *Understanding Apartheid: Learner’s Book* (2006) 25.

⁴⁸ Mears R ‘Historical Development of Informal Township Settlements in Johannesburg Since 1886’ (2011) Paper presented at the Economic History Society of Southern Africa Conference, Johannesburg 4.

⁴⁹ South African History Online ‘List of laws on land dispossession and segregation’ available at <https://www.sahistory.org.za/article/list-laws-land-dispossession-and-segregation> (accessed 21 May 2022). Maylam P ‘The rise and decline of urban apartheid in South Africa’ (1990) 89:354 *African Affairs* 75. Centre on Housing Rights and Evictions *Business as Usual? Housing Rights and ‘Slum Eradication’ in Durban, South Africa* (2008) COHRE 28.

⁵⁰ Parnell S ‘Winning the battles but losing the war: the racial segregation of Johannesburg under the Natives (Urban Areas) Act of 1923’ (2002) 28:2 *Journal of Historical Geography* 262.

⁵¹ The Black Administration Act 38 of 1927.

⁵² The Slums Act 53 of 1934.

⁵³ Strauss M ‘A historical exposition of spatial injustice and segregated urban settlement in South Africa’ (2019) 25:2 *Fundamina* 153.

⁵⁴ Worden N *The Making of Modern South Africa: Conquest, Apartheid, Democracy* 5 ed (2012) 69.

⁵⁵ Blacks (Urban Areas) Consolidation Act 25 of 1945.

Racially discriminatory public housing practices at state hands also entrenched racial segregation in South African cities.⁵⁶ These practices would eventually be legalised in 1943.⁵⁷ White-middle class suburbia played their role in cementing racial segregation through housing covenants in the private housing market which prohibited the sale of homes to coloureds and Indians within certain neighbourhoods.⁵⁸ One such instance, involved a group of residents in Rondebosch in the south of Cape Town who used racially restrictive clauses with success in their housing deeds to maintain the white character of their neighbourhood block.⁵⁹ Prior to 1950 most of Johannesburg's 20th century suburbs were zoned through the use of these covenants.⁶⁰

The apartheid government launched a particularly brutal and systematic attempt at achieving racial segregation between 1950 and 1991 which mutated the country's urban residential patterns drastically.⁶¹ The 1950 Population Registration Act assigned different race types to South Africans.⁶² The three major being European (White), Native/Bantu (African) and Coloured.⁶³ The enforced separation of these different racial categories was intended to reinforce white supremacist ideology.⁶⁴ The Population Registration Act represented one of the apartheid government's first significant legislative efforts aimed at ensuring racial segregation.⁶⁵ The Group Areas Act,⁶⁶ (also introduced in 1950) was intended to dislodge

⁵⁶ Mabin A 'A century of South African Housing Acts 1920-2020' (2020) 31 *Urban Forum* 462. Maylam P 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) 21:1 *Journal of Southern African Studies* 27. Mabin A 'Comprehensive segregation: The origins of the Group Areas Act and its planning' (1992) 18:2 *Journal of Southern African Studies* 408.

⁵⁷ Housing Amendment Act 38 of 1943. Maylam P 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) 21:1 *Journal of Southern African Studies* 28.

⁵⁸ Freund B *The African City* (2007) 113. The first anti-Asiatic housing covenant written into a title deed in Durban was drafted in 1892 See Christopher AJ 'Apartheid and urban segregation levels in South Africa' (1990) 27:3 *Urban Studies* 432. The use of these discriminatory covenants would become quite common in Durban. Christopher AJ 'Apartheid and urban segregation levels in South Africa' (1990) 27:3 *Urban Studies* 432 and 426.. Maylam P 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) 21:1 *Journal of Southern African Studies* 27. See also Christopher AJ 'Segregation levels in South African cities, 1911-1985' (1992) 25:3 *The International Journal of African Historical Studies* 569 and 570. Christopher AJ 'Racial land zoning in urban South Africa' (1997) 14:4 *Land Use Policy* 312.

⁵⁹ James W 'Group areas and the nature of apartheid' (1992) 5:1 *South African Sociological Review* 43.

⁶⁰ Christopher AJ 'Segregation levels in South African cities, 1911-1985' (1992) 25:3 *The International Journal of African Historical Studies* 569 and 570.

⁶¹ Christopher AJ 'Monitoring segregation levels in South African cities: 1911-1996' (2001) 83:3 *South African Geographical Journal* 249.

⁶² Population Registration Act 30 of 1950.

⁶³ Christopher AJ 'Racial land zoning in urban South Africa' (1997) 312. The 'coloured' category, was further divided into additional racial categories.

⁶⁴ Baldwin A 'Mass removals and separate development' (1975) 215.

⁶⁵ Parry E & Amanda van Eeden 'Measuring racial residential segregation at different geographic scales in Cape Town and Johannesburg' (2015).

⁶⁶ The Group Areas Act 41 of 1950. The Act was repealed and replaced by the Group Areas Act 77 of 1957 and later the Group Areas Act 36 of 1966. Population Registration Act 30 of 1950.

coloured and Asian inhabitants from the country's urban centres and to establish a string of separate mono racial neighbourhoods.⁶⁷ Under the legislation all towns and cities were to be zoned according to racial categories.⁶⁸ Via the authority of this Act, government forcibly removed significant numbers of non-white South Africans from their homes in conveniently situated areas and dumped them usually in far-off and under-developed areas on the periphery of cities.⁶⁹ In one of the most notorious mass displacements, 55 000 coloured people and those of Indian descent living in the prime location of District Six were forcibly removed and displaced to areas on the Cape Flats,⁷⁰ such as Manenberg, Lavender Hill and Hanover Park.⁷¹ The African residents of District Six suffered a similar fate,⁷² and were strewn into townships like Langa and Gugulethu.⁷³ In excess of half of Durban's residents would be relocated under duress via the Group Areas Act,⁷⁴ destroying in the process racially diverse communities.⁷⁵

The Act ensured that a 'substantial buffer zone' usually separated non-white townships from the closest white suburb.⁷⁶ Townships were laid out and constructed in a way that they could easily be fenced in should an uprising occur.⁷⁷ Over the 1950s and 1960s these apartheid conceived townships were built in several of South Africa's urban areas on a massive scale.⁷⁸ By the time the Group Areas Act was repealed in 1991,⁷⁹ the apartheid apparatus had virtually succeeded in its attempts to achieve complete residential separation of the African and coloured



⁶⁷ Christopher AJ 'Segregation levels in South African cities, 1911-1985' (1992) 25:3 *The International Journal of African Historical Studies* 572.

⁶⁸ Christopher AJ 'Racial land zoning in urban South Africa' (1997) 312.

⁶⁹ Morris A 'Continuity or Rupture: The City, Post-Apartheid (1998) 760.

⁷⁰ Turok I 'Urbanisation and Development in South Africa: Economic Imperatives, Spatial Distortions and Strategic Responses' (2012) Working Paper 8: Urbanisation and Emerging Population Issues, International Institute for Environment and Development United Nations Population Fund 11.

⁷¹ Hungwe MS 'Factors behind urban land justice and inequality in Cape Town' (2017) 18:1 *ESR Review Economic and Social Rights in South Africa* 5.

⁷² *Daniels v Scribante and Another* 2017 (8) BCLR 949 (CC) 20.

⁷³ Hungwe MS 'Factors behind urban land justice and inequality in Cape Town' (2017) 18:1 *ESR Review Economic and Social Rights in South Africa* 5.

⁷⁴ Chari S 'State racism and biopolitical struggle: The evasive Commons in twentieth-century Durban, South Africa' (2010) 20:108 *Radical History Review* 83.

⁷⁵ Maharaj B 'Segregation, desegregation and de-racialisation: racial politics and the city of Durban' in Freund B, Padayachee V et al (eds) (*Durban Vortex: South African City in Transition* (2002) 177.

⁷⁶ Morris A 'Continuity or Rupture: The City, Post-Apartheid (1998) 759 and 760. See also Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 70.

⁷⁷ Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 70.

⁷⁸ Maylam P 'The rise and decline of urban apartheid in South Africa' (1990) 89:354 *African Affairs* 70.

⁷⁹ Abolition of Racially Based Land Measures Act 108 of 1991.

populations from South Africa's white population.⁸⁰ At the point of repeal, a mere 8.6% of South Africa's urban population lived in an area which had not been designated to their race.⁸¹

Christopher explains how the group areas legacy remains alive and kicking in South African town and cities.⁸² Tragically, the 'post-apartheid city' bears a remarkable resemblance to the apartheid one.⁸³ South Africa's urban areas are considered as some of the most segregated and unequal places on earth.⁸⁴ In today's South Africa, large expanses of formal and informal black township housing riddle the country's urban spaces and are set physically apart from historically white areas (HWA), largely by distance, but also by main high ways, train tracks and rivers.⁸⁵ The majority of black families still live in these townships.⁸⁶ This urban setting bears particular significance for education provisioning.⁸⁷ It is against this racially distorted landscape that the use of feeder zones in the school admissions process must be analysed and understood. Considerations of spatial inequality and South Africa's history of spatial injustice must form a key aspect of any attempt at redressing the deep inequities that plague South Africa's public education system.

This thesis focuses on the urban setting because the problem of exclusionary feeder zones is most acute in urban areas.⁸⁸ In particular, this thesis concentrates on the Western Cape, KwaZulu-Natal and Gauteng. These three provinces have been chosen because they are home to South Africa's three largest urban centres — Durban, Cape Town and Johannesburg. In each of these cities the link between geography and schooling remains extremely tight and thus make for fitting consideration.⁸⁹

⁸⁰ Christopher AJ 'Monitoring segregation levels in South African cities: 1911–1996' (2001) 83:3 *South African Geographical Journal* 252 and 253.

⁸¹ Christopher AJ 'Towards the post-apartheid city' (1999) 28:4 *Espace Géographique* 302.

⁸² Christopher AJ 'The slow pace of desegregation in South African cities, 1996–2001' (2005) 2318.

⁸³ Christopher AJ 'The slow pace of desegregation in South African cities, 1996–2001' (2005) 2305.

⁸⁴ Agence française de développement *Policy Dialogues: Social Housing and Spatial Inequality in South African Cities* (2021) 41 AFD.

⁸⁵ Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 52.

⁸⁶ Motala, S, Dieltiens, V & Sayed, Y (eds). *Finding Place and Keeping Pace: Exploring Meaningful and Equitable Learning in South African Schools* (2012) 12.

⁸⁷ Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 52.

⁸⁸ Nevertheless, suggestions could be used in rural areas as well.

⁸⁹ Parker A, Hamann C & de Kadt J 'Accessing quality education in Gauteng: Intersecting scales of geography, Educational Policy and Inequality' (2021) 32 *Urban Forum* 151. Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 110. Naidoo AGV, Eeden A, Much Z 'Spatial variation in school performance, a local analysis of socio-economic factors in Cape Town' (2014) 3:1 *South African Journal of Geomatics* 84. Samuel M and Sayed Y 'Inside and outside the school gates: Exploring marginalisation in KwaZulu-Natal schools in South Africa' (2003) 34:1 *IDS Bulletin* 91.

1.2.2 Weaponising education

Anti-apartheid stalwart, Steve Biko, famously wrote ‘the most potent weapon in the hands of the oppressor is the mind of the oppressed.’⁹⁰ The minds of the oppressed is precisely what both the colonialist and apartheid government sought to control through the use of racially segregated schooling. These regimes wielded education as a weapon of mass destruction which they inflicted with devastating success against generations of black South Africans. The use of feeder zones based purely on geographical proximity by South Africa’s historical white schools (HWS) reinflicts such devastation. To appreciate the egregious extent of this reinflicted injury, requires an appreciation of the history of segregated schooling in South Africa.

The Union government followed a stringent policy of socially segregating whites from non-whites.⁹¹ As a component of this policy, the government developed a scheme for schooling African people termed ‘native education’.⁹² In 1935, the government established the Inter-departmental Committee on Native Education,⁹³ to make recommendations concerning the management of native education.⁹⁴ The report of the committee captures the policy of native education as such:

‘The Education of the White child prepares him for life in a dominant society and the education of the black child for a subordinate society.... Limits [of native education] form part of the social and economic structure of the country.’⁹⁵

The core aim of native education was to disadvantage African children through a mediocre curriculum, badly trained teachers and a poor learning environment.⁹⁶ It was under the Union government that South Africa first witnessed an official separate syllabus for white and black primary school children.⁹⁷ Native education was intended to strengthen prevailing perceptions of white superiority whilst at the same time instilling in African children the idea that the subordinate position they occupy in society could be ascribed to their substandard mental

⁹⁰ Biko S *I Write What I Like* Stubbs A (ed) (1978) 68 and 92.

⁹¹ Tabata IB *Education for Barbarism* (undated) 12.

⁹² Tabata IB *Education for Barbarism* (undated) 12.

⁹³ Christie P & Collins C ‘Bantu Education: Apartheid ideology or labour reproduction?’ (1982) 18:1 *Comparative Education* 64.

⁹⁴ Kgware WM ‘In Search of an Educational System: A Critical Appraisal of the Past and Present Administration of Bantu Education’ (1961) An inaugural address delivered on the occasion of the acceptance of the Chair of Practical Education, Series C No. 8, Publications of the University College of the North, Pietersburg 10.

⁹⁵ Hirson B *Year of Fire, Year of Ash: The Soweto Revolt: Roots of a Revolution?* (1979) 25.

⁹⁶ Dube E ‘The relationship between racism and education in South Africa’ (1985) 55:1 *Harvard Educational Review* 93.

⁹⁷ Jansen J ‘Curriculum as a political phenomenon: Historical reflections on black South African education’ (1990) 59(2) *The Journal of Negro Education* 199.

status.⁹⁸ The native education system was marked by significant numbers of unqualified teachers,⁹⁹ (many of whom lacked a secondary education),¹⁰⁰ understaffing, insufficient funding, overcrowded classrooms, a scarcity of equipment, inadequate infrastructure,¹⁰¹ with ‘very poor’ ventilation and lighting,¹⁰² and a dearth of basic facilities.¹⁰³ School ‘[a]ssembly halls, cloak rooms, wash basins, or the facilities which modern school hygiene demands’ were all in rare supply.¹⁰⁴ Furniture and books too, were uncommon.¹⁰⁵ Dr Wollheim of the South African Institute of Race Relations, after conducting inspections of African rural schools, described the deplorable learning conditions experienced by African children in his 1943 report:

‘Buildings in most cases consist of tin shanties or wattle daub huts into which are crammed two or three times the number of pupils which the room should hold. The equipment is correspondingly pitiful... The salaries paid to teachers are likewise appalling... The teachers are seriously overloaded, and one teacher will occasionally be found to be teaching from eighty to one hundred pupils in two or three different standards all in the same room.’¹⁰⁶

By the end of the 1940s South Africa’s education system could simply not cope with delivering schooling to the expanding urban populace.¹⁰⁷ The country’s racially segregated system in its entirety was staring at the prospect of complete collapse.¹⁰⁸ Phillips states that the ruling regime was well aware that the party’s official policy of relocating urban African people and distributing them into the rural parts of the country, was unachievable. According to Phillips, the actual strategy for preserving white supremacy in the face of an increasing black urban presence was therefore to dominate the working class, exploit the possibilities offered by their

⁹⁸ Dube E ‘The relationship between racism and education in South Africa’ (1985) 55:1 *Harvard Educational Review* 93.

⁹⁹ Jansen J ‘Curriculum as a political phenomenon: Historical reflections on black South African education’ (1990) 59(2) *The Journal of Negro Education* 200.

¹⁰⁰ van der Porl J ‘Native Education in South Africa’ (1935) 34:136 *Journal of the Royal African Society* 319 and 320.

¹⁰¹ Leonie A *The development of Bantu education in South Africa, 1652-1954* (unpublished doctoral thesis, Montana State University, 1965) 98.

¹⁰² Horrell M *African education, some origins and developments* (1963) Johannesburg: Institute of Race Relations 55.

¹⁰³ Jansen J ‘Curriculum as a political phenomenon: Historical reflections on black South African education’ (1990) 59(2) *The Journal of Negro Education* 200.

¹⁰⁴ Horrell M *African education, some origins and developments* (1963) 55.

¹⁰⁵ Christie P & Collins C ‘Bantu education: Apartheid ideology or labour reproduction?’ (1982) 18:1 *Comparative Education* 62 and 63.

¹⁰⁶ Hirson B *Year of Fire, Year of Ash: The Soweto Revolt: Roots of a Revolution?* (1979) 40.

¹⁰⁷ Phillips A ‘Bantu Education’ (1999) 6:2 *The Review: A Journal of Undergraduate Student Research* 23.

¹⁰⁸ Christie P & Collins C ‘Bantu Education: Apartheid ideology or labour reproduction?’ (1982) 18:1 *Comparative Education* 65.

labour and regulate the social and political aspects of their being.¹⁰⁹ Enter Bantu Education. In 1951, the master plan of introducing Bantu Education as an inferior form of education for African children was laid bare.¹¹⁰ Discussing apartheid education policies, the South African Minister of Native Affairs, Dr Hendrik Verwoerd, maintained that no place existed for Africans

‘in the European community above the level of certain forms of labour ... What is the use of teaching the Bantu child mathematics when it cannot use it in practice? That is quite absurd. Education must train people in accordance with their opportunities in life, according to the sphere in which they live’.¹¹¹

In line with this Verwoerdian vision, the Bantu Education Act was introduced in 1953.¹¹² Under the Act all bantu schools within the country would now fall under the command of the Department of Native Affairs at the national level.¹¹³ The Act empowered the Minister of Native Affairs to determine whether a ‘bantu community school’ (a school founded or sustained by a bantu authority/tribe/community/native council) would receive a government subsidy from funds appropriated or reserved by parliament for native schooling.¹¹⁴ The Minister also enjoyed control over whether government subsidies would be allocated to assist with the building or maintaining of a bantu community school.¹¹⁵ Moreover, the Minister had wide and unbridled power to suspend, decrease or withdraw any government support or subsidy offered in this way.¹¹⁶ The Minister was further empowered to determine whether government subsidy could be assigned to the creation or maintenance of government operated bantu schools.¹¹⁷ The Minister had full discretion to shut or ‘disestablish’ any government run bantu schools.¹¹⁸ Similarly, the Minister had control over whether to make ‘grants-in-aid to any native school’,¹¹⁹ and to withdraw or lessen any such grant once made.¹²⁰ The Act prohibited anyone from building, operating or maintaining a non-governmental native/bantu school except where formally registered.¹²¹ This meant that no educational institution could be created or run in the

¹⁰⁹ Phillips A ‘Bantu Education’ (1999) 6:2 *The Review: A Journal of Undergraduate Student Research* 24.

¹¹⁰ Phillips A ‘Bantu Education’ (1999) 6:2 *The Review: A Journal of Undergraduate Student Research* 23.

¹¹¹ Verwoerd 1955 quoted in South African History Online ‘Soweto forty years on: The Black student rebellion of 1976 by Professor Noor Nieftagodien’ available at <https://www.sahistory.org.za/archive/soweto-forty-years-black-student-rebellion-1976-professor-noor-nieftagodien> (accessed 29 August 2022).

¹¹² Bantu Education Act 47 of 1953 (Bantu Education Act).

¹¹³ Section 2 of the Bantu Education Act.

¹¹⁴ Section 6(1)(a) of the Bantu Education Act.

¹¹⁵ Section 6(1)(b) of the Bantu Education Act.

¹¹⁶ Section 6(1)(b) of the Bantu Education Act.

¹¹⁷ Section 7(1)(a) of the Bantu Education Act.

¹¹⁸ Section 7(1)(a) of the Bantu Education Act.

¹¹⁹ Section 8(1) of the Bantu Education Act.

¹²⁰ Section 8(2) of the Bantu Education Act.

¹²¹ Section 9(1) of the Bantu Education Act 47.

absence of the Minister's approval.¹²² Any person who admitted an African person to a school not registered under the legislation committed a crime and would be heavily fined if convicted, and imprisoned if unable to pay.¹²³ The same applied where anyone created, operated or maintained an unregistered native/bantu school.¹²⁴ The legislation further ensured that government selected and oversaw school boards and committees,¹²⁵ to prevent the rise of alternatives to bantu schooling.¹²⁶ The Act left it to the Minister to draft regulations concerning the content of education.¹²⁷ The Bantu Education Act thus served to give government complete control over African education and to squeeze out any potential avenues for African children to enjoy a solid education.

A single syllabus was forced on African learners,¹²⁸ which taught concepts of racial hierarchy ('the colour-caste system') and the belief that the inferior position they occupied in society was both legitimate and natural.¹²⁹ Outside of the ideological dimensions of Bantu Education, the system also had economic undercurrents.¹³⁰ Industrial expansion had created a demand for semiskilled workers within factories.¹³¹ Bantu Education functioned as a means to churn out low skilled labour to meet these capitalist needs.¹³² The syllabus was therefore geared at preparing African children to serve these demands and to frustrate their ability to compete with white South Africans.¹³³ The curriculum was designed to inculcate in African people 'appropriate work attitudes' including 'diligence and punctuality'.¹³⁴ The curriculum thus served to reinforce white supremacy and the political and economic dominance of white South

¹²² Hirson B *Year of Fire, Year of Ash: The Soweto Revolt: Roots of a Revolution?* (1979) 45.

¹²³ Section 9(3) of the Bantu Education Act.

¹²⁴ Section 9(3) of the Bantu Education Act.

¹²⁵ Section 12(1) of the Bantu Education Act.

¹²⁶ Tomlin H 'Contesting ideologies and the struggle for equality: Reconsidering the politics of education in South Africa' (2016) 14:6 *Policy Futures in Education* 848.

¹²⁷ Section 15(1) of the Bantu Education Act 47 of 1953.

¹²⁸ Phillips A 'Bantu Education' (1999) 6:2 *The Review: A Journal of Undergraduate Student Research* 24.

¹²⁹ Christie P & Collins C 'Bantu education: Apartheid ideology or labour reproduction?' (1982) 18:1 *Comparative Education* 65. Ndimande BS 'From Bantu Education to the fight for socially just education' (2013) 46:1 *Equity & Excellence in Education* 23.

¹³⁰ Ndimande BS 'From Bantu Education to the fight for socially just education' (2013) 46:1 *Equity & Excellence in Education* 22.

¹³¹ Phillips A 'Bantu Education' (1999) 6:2 *The Review: A Journal of Undergraduate Student Research* 24.

¹³² Christie P & Collins C 'Bantu education: Apartheid ideology or labour reproduction?' (1982) 18:1 *Comparative Education* 65.

¹³³ Thobejanea TD 'History of apartheid education and the problems of reconstruction in South Africa' (2013) 3:1 *Sociology Study* 1 and 2.

¹³⁴ Christie P & Collins C 'Bantu education: Apartheid ideology or labour reproduction?' (1982) 18:1 *Comparative Education* 65.

Africans.¹³⁵ In this way, Bantu Education also operated as a mechanism for suppressing violent political uprisings.¹³⁶

Bantu Education was of an extremely poor standard. Teachers were ordinarily poorly trained, classrooms were overcrowded,¹³⁷ and there was a systematic scarcity of textbooks, stationary,¹³⁸ and equipment.¹³⁹ In stark contrast, HWS were fully equipped courtesy of the state,¹⁴⁰ and white children benefited from low learner to teacher class ratios.¹⁴¹ Annual government expenditure on educating white children far outstripped that incurred on African children's schooling. At the height of apartheid, the government spent more than ten times per child on educating white children in comparison with their spending on African children's schooling needs.¹⁴² Although the starkest divisions were between African and white educational provisioning,¹⁴³ the government also spent less on educating Indian and coloured children in comparison to their white counterparts.¹⁴⁴ Under apartheid, educational provisioning was administered through several separate education departments all fragmented along the lines of race and ethnicity. Each department constituted a bureaucracy unto itself, governed by separate laws and run by separate staff.¹⁴⁵ Four provincial education departments together with the national Department of Education and Culture were responsible for administering the education of white children. African schooling in the ten independent 'homelands' were administered through the particular ministry for homeland education. The national Department of Education and Training based in Pretoria managed African education beyond the homelands. Coloured education was managed by a national Own Affairs Ministry in Cape Town and Asian Education by a national Own Affairs Ministry in Durban. In addition,

¹³⁵ Chisholm L 'Apartheid education legacies and new directions in post-apartheid South Africa' (2012) 8 *Storia delle donne* 85.

¹³⁶ Ndimande BS 'From Bantu Education to the fight for socially just education' (2013) 46:1 *Equity & Excellence in Education* 22.

¹³⁷ Johnson WR 'Keystone of Apartheid' (1982) 13:3 *African Education and Social Stratification* 221 and 222.

¹³⁸ Fiske E and Ladd H 'Racial equality in education: How far has South Africa come?' (2005) Working Paper Series SAN 05-03 Terry Stanford Institute of Public Policy, Duke [unnumbered].

¹³⁹ Johnson WR 'Keystone of Apartheid' (1982) 13:3 *African Education and Social Stratification* 221 and 222.

¹⁴⁰ Horn A & Henning S 'Dimensions of change in white South African education, 1990-1992' (1997) 88:3 *Tijdschrift Voor Economische en Sociale Geografie* 273.

¹⁴¹ Hofmeyr J & Hall G *The National Teacher Education Audit: A synthesis report* (Johannesburg, Edupol) (1995) [unnumbered].

¹⁴² Fiske E & Ladd H 'Racial equality in education: How far has South Africa come?' (2005) Working Paper Series SAN 05-03 Terry Stanford Institute of Public Policy, Duke [unnumbered].

¹⁴³ Thobejanca TD 'History of apartheid education and the problems of reconstruction in South Africa' (2013) 2.

¹⁴⁴ Chisholm L 'Apartheid education legacies and new directions in post-apartheid South Africa' (2012) 8 *Storia delle donne* 88.

¹⁴⁵ Carrim N 'Anti-racism and the 'new' South African educational order' (1998) 28:3 *Cambridge Journal of Education* 303.

the Department of National Education managed ‘national policy, sport, cultural and library services.’¹⁴⁶ Given this multiplex structure, it was usual for there to be as many as six of these departments functioning with their distinct administrative systems in one urban area alone.¹⁴⁷

When the new democratic government assumed power in 1994, it found itself heir to a deeply unequal, highly fractured and profoundly discriminatory education system characterised in accordance with race.¹⁴⁸ Schools in most ‘urban working-class communities’ still endure significant class sizes and appalling facilities.¹⁴⁹ Large disparities in schooling resources between black and white schools continue to reflect historical inequities.¹⁵⁰ As explained above, urban areas remain largely segregated according to the areas assigned to racial groups during apartheid. It is in historically black areas that the black schools that were so deprived during apartheid are situated. It is understandable why these entrenched schooling inequities would drive black parents to flee township schools in search of a better education for their children in HWS located in more distant and affluent areas.¹⁵¹ The use of geographical proximity as a criterion in the school admissions process must therefore also be evaluated and comprehended in the context of the enduring legacy of Bantu Education within South Africa’s basic education system, and the desperate desire of black parents to obtain a quality education for their children in decently resourced and properly functioning schools. To understand the qualified autonomy conferred on schools to determine their own feeder areas requires an examination of the historical roots of former Model C schools in South Africa. It is to this that this chapter next turns.

1.2.3 Historical background of former Model C schools

Plans by the apartheid government to influence the blueprint of a new South African public education system were assiduously afoot in the flurry that accompanied President Nelson

¹⁴⁶ Nel E and Binns T ‘Changing the geography of apartheid education in South Africa’ (1999) 84:2 *Geography* 119 and 120.

¹⁴⁷ Nel E and Binns T ‘Changing the geography of apartheid education in South Africa’ (1999) 84:2 *Geography* 120.

¹⁴⁸ Lemon A ‘Redressing school inequalities in the Eastern Cape, South Africa’ (2004) 30:2 *Journal of Southern African Studies* 270.

¹⁴⁹ Yamauchi F ‘School quality, clustering and government subsidy in post-apartheid South Africa’ (2011) 30:1 *Economics of Education Review* 155.

¹⁵⁰ Ndimande BS ‘‘It is a catch 22 situation’: The challenge of race in post-apartheid South African desegregated schools’ (2009) 2:1 *International Critical Childhood Policy Studies Journal* 123.

¹⁵¹ Ndimande BS ‘Race and resources: Black parents’ perspectives on post-apartheid South African schools (2012) 534 to 536. Msila V ‘The education exodus: The flight from township schools’ (2005) 2:2 *Africa Education Review* 173-174 and 175.

Mandela's release from prison and the protracted negotiations that followed.¹⁵² By the end of 1990, the Minister of White Education announced that parents of children in HWS would be allowed to vote on the future governance structure of their schools. These parents could vote for their schools to continue catering exclusively to white children or to take on the character of one of three different models. The Model A option allowed for conversion to complete private status and state assets such as school buildings and equipment would be sold off or leased to these newly converted private schools at market value or less. These 'new' private schools would receive a state subsidy covering almost half of their operational costs and equal to that provided to private schools at the time. Schools electing Model B would remain state funded, but admissions policies were to be determined by a management council subject to the learner population remaining 50% + 1 white. Under Model C, HWS would assume state aided status with a management structure responsible for daily school operations, including the appointments of teachers and the generation of school fees. The state subsidy received by these schools covered salaries which amounted to approximately 80% of their operating budget.¹⁵³ However, Model C schools would be required to maintain a majority white student population and ensure preferential admission to white children from select geographical areas (feeder areas).¹⁵⁴

The apartheid government was aware that, with a democratic transition imminent, white parents would have to pay fees to preserve their schools' advantageous conditions.¹⁵⁵ The Model C structure therefore conferred more autonomy on schools and represented a trade-off in terms of which white parents would take on some of the financial burden of educating their children and, in exchange, would receive 'greater parental voice' on the admission of 'other

¹⁵² Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 45-51. Christie P & McKinney C 'Decoloniality and 'Model C' schools: Ethos, language and the protests of 2016' (2017) 21:3 *Education as Change* 168-169.

¹⁵³ Christie P & McKinney C 'Decoloniality and 'Model C' schools: Ethos, language and the protests of 2016' (2017) 21:3 *Education as Change* 168. Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 47-48. Tikly L & Mabogoane T 'Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa' (1997) 43:2-3 *International Review of Education* 162. Bell J & Morton McKay T 'The rise of 'Class apartheid' in accessing secondary schools in Sandton, Gauteng' (2011) 17 *Southern African Review of Education* 33.

¹⁵⁴ Christie P & McKinney C 'Decoloniality and 'Model C' schools: Ethos, language and the protests of 2016' (2017) 21:3 *Education as Change* 168. Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 48. Horn A & Henning S 'Dimensions of change in white South African education, 1990-1992' (1997) 88:3 *Tijdschrift Voor Economische en Sociale Geografie* 274.

¹⁵⁵ Pampallis J 'Education reform and school choice in South Africa' in Plank N & Sykes G (eds) *Choosing Choice: School Choice in International Perspective* (2003) 146.

population groups' to their children's schools.¹⁵⁶ Model C schools were required to uphold a traditional ethos of 'Christian national education' and the language of instruction would be English and Afrikaans only.¹⁵⁷ The public school grounds and buildings that these schools had made use of were legally transferred to them free of charge to be returned to the state in the event of their closure.¹⁵⁸

When the 1991 academic year began HWS were, for the first time since 1948, legally allowed to enrol black children.¹⁵⁹ The following year the apartheid government, facing financial strain, compelled all HWS to convert to 'Model C'. Two years later, the seeing in of South Africa's 1994 interim Constitution with its non-discriminatory vision spelt the end to racial quotas.¹⁶⁰ It is these good schools, post democracy that have come to be termed 'former Model C' in every day speak. It is also this history that scholars have criticised as preserving the interests of the white minority and ensuring that inequality in public education remains skewed in white favour far beyond South Africa's democratic transition.¹⁶¹

Those critical of the enduring effects of the Model C school legacy point out that strong interest groups within the apartheid apparatus were able to use their political power during deliberations on the structure of a future South African public education system to secure the schooling privileges that had thus far been enjoyed by white South Africans.¹⁶² Through this power

¹⁵⁶ van Zyl C *The De Lange Report; Ten Years On* (1991) 44. The De Lange report was the product of an investigation by the Human Sciences Research Council into education in South Africa.

¹⁵⁷ Christie P & McKinney C 'Decoloniality and 'Model C' schools: Ethos, language and the protests of 2016' (2017) 21:3 *Education as Change* 168.

¹⁵⁸ Christie P & McKinney C 'Decoloniality and 'Model C' schools: Ethos, language and the protests of 2016' (2017) 21:3 *Education as Change* 168. Pampallis J 'Education reform and school choice in South Africa' in Plank N & Sykes G (eds) *Choosing Choice: School Choice in International Perspective* (2003) 146. Lemon A & Stevens L 'Reshaping education in the new South Africa' (1999) 84:3 *Geographical Association* 224.

¹⁵⁹ Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 45.

¹⁶⁰ Tikly L & Mabogoane T 'Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa' (1997) 43:2-3 *International Review of Education* 162. Bell J & Morton McKay T 'The rise of 'class apartheid' in accessing secondary schools in Sandton, Gauteng' (2011) 17 *Southern African Review of Education* 33.

¹⁶¹ Bell J & Morton McKay T 'The rise of 'class apartheid' in accessing secondary schools in Sandton, Gauteng' (2011) 17 *Southern African Review of Education* 32 and 33. Ntshoe I 'Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa' (2009) 15:2 *Southern African Review of Education with Production* 90. Carrim N & Sayed Y *Open Schools: Reform or Transformation* (1991) Upbeat, South African Research Service 21 to 24 Available at <http://webcache.googleusercontent.com/search?q=cache:Dfsw3SC5Kk0J:www.sahistory.org.za/archive/open-schools-reform-or-transformation+&cd=1&hl=en&ct=clnk&gl=za> (accessed 1 August 2018). Tikly L 'Governmentality and the study of education policy in South Africa' (2003) 18:2 *Journal of Education Policy* 270.

¹⁶² Pampallis J 'Education reform and school choice in South Africa' in Plank N & Sykes G (eds) *Choosing Choice: School Choice in International Perspective* (2003) 146. Lemon A & Stevens L 'Reshaping education in the new South Africa' (1999) 84:3 *Geographical Association* 105.

dynamic these stakeholders were seemingly able to ensure that issues regarding school autonomy and the establishment of community driven school governing bodies (SGBs) remained at the fore of discussions.¹⁶³ The growth of grassroots community mobilisation in black communities during apartheid as a means to advance education there also served as impetus for education provisioning to occur at the local level.¹⁶⁴

Significant powers were ultimately conferred on all SGBs under the education policy and legislative framework that was to follow. This level of defined autonomy has ensured that SGBs, either subtly or not so subtly, can continue to use their acquired powers to make decisions that preserve their school's 'traditional Christian ethos' and favours certain languages of instruction to the exclusion of black children. Hence the underlying purpose of the Model C schooling structure remains essentially as is to the benefit of white minority privilege.¹⁶⁵ It is this treacherous history which has allowed former Model C's schools to use the generous levels of qualified autonomy legally bestowed on them to implement racially exclusionary school zoning policies and practices. In so doing, these schools have been able to frustrate the attempts of black and poor learners to gain access to them.¹⁶⁶

1.2.4 School governing bodies, Heads of Department, and admission policies

The South African Schools Act (the Schools Act) forms the legislative backbone of education provisioning in South Africa.¹⁶⁷ The Act distinguishes between school governance, which is vested with the SGB,¹⁶⁸ and the 'professional management of a public school' performed by the principal 'under the authority of the HoD'.¹⁶⁹ The Act provides no definition of 'governance' or 'professional management'. It does, however, set down particular governance responsibilities of SGBs as well as particular functions of principals. SGB's tasks include

¹⁶³ Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 49 and 53-54. Ntshoe I 'Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa' (2009) 15:2 *Southern African Review of Education with Production* 90.

¹⁶⁴ van Leeve Y 'Executive heavy handedness and the right to basic education a reply to Sandra Fredman' 199 (2013) *Constitutional Court Review* 201.

¹⁶⁵ Tikly L & Mabogoane T 'Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa' (1997) 43:2-3 *International Review of Education* 162. Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 50 and 51. Brown K "'New" educational injustices in the "new" South Africa: A call for justice in the form of vertical equity' (2006) 44:5 *Journal of Educational Administration* 515.

¹⁶⁶ See sections 6.1 to 6.4 below.

¹⁶⁷ The South African Schools Act 84 of 1996 (Schools Act).

¹⁶⁸ Section 16(1) of the Schools Act.

¹⁶⁹ Section 16(3) of the Schools Act.

promoting the best interest of the school they are charged with governing,¹⁷⁰ endeavouring to guarantee the delivery of quality education to every child enrolled there,¹⁷¹ developing a mission statement for the school,¹⁷² adopting a code of conduct to which all learners must adhere and,¹⁷³ determining the school's language and admission policies.¹⁷⁴ The principal on behalf of the Head of Department of Education (HoD) must, amongst others, manage 'educators and support staff',¹⁷⁵ perform functions that are delegated by the HoD,¹⁷⁶ implement policy and legislation,¹⁷⁷ and administer the admission process.¹⁷⁸

The Schools Act therefore seeks to strike a balance between decentralised (SGB) and centralised (principal on behalf of HoD) power. The Act, however, fails to draw a clear line between the concepts of school governance and professional management. This awkward balancing exercise between decentralisation and centralisation has inevitably culminated in contestations between SGBs and HoDs around who has the final authority over school policies, including admission policies. The South African courts have served as the battle ground for many of these conflicts.¹⁷⁹ At the centre of these battles rests the state's obligation to guarantee an adequate education for all, on the one hand, and SGB's interest to safeguard their defined autonomy under the Schools Act, on the other. Romantic notions of grassroots participation in school governance which informed the enactment of the Schools Act did not account for the inherent tension between SGBs, occupied with preserving the best interest of the particular learner body, and HoDs who must ensure universal access to a basic education. SGBs have therefore been able to tap into their qualified statutory autonomy to create new mechanisms for excluding certain learners from gaining access so as to preserve their privilege.¹⁸⁰ One such mechanism is the design and implementation of feeder zones.¹⁸¹

¹⁷⁰ Section 20(1)(a) of the Schools Act.

¹⁷¹ Section 20(1)(a) of the Schools Act.

¹⁷² Section 20(1)(c) of the Schools Act.

¹⁷³ Section 8(1) of the Schools Act.

¹⁷⁴ Sections 6(2) and 5(5) respectively.

¹⁷⁵ Section 16A(2)(a)(ii) of the Schools Act.

¹⁷⁶ Section 16A(2)(a)(iv) of the Schools Act.

¹⁷⁷ Section 16A(2)(a)(vi) of the Schools Act.

¹⁷⁸ Section 5(7) of the Schools Act.

¹⁷⁹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC). *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC). *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

¹⁸⁰ Sayed Y 'Decentralisation and the construction of inclusion education policy in South Africa' (2005) 35:2 *Compare: A Journal of Comparative and International Education* 118.

¹⁸¹ Shandu P 'Stepping in the right direction towards fully realising the constitutional promise of section 29(1)(A) of the Constitution' (2019) 13 *Pretoria Student Law Review* 199.

1.2.5 South Africa's engine of unequal opportunity: Schools, neighbourhoods and school achievement

In post-apartheid South Africa, race and an apartheid inherited education system based on race, continues to be the most dominant factor influencing educational achievement.¹⁸² HWS within the education system are functional and able to impart the requisite skills on children attending them. Historically disadvantaged schools, however, remain dysfunctional and unable to do the same.¹⁸³ These former black schools continue to be under-resourced, plagued with administrative difficulties and, in the worst, lacking in a culture of teaching and learning.¹⁸⁴ Yamauchi explains how the neighbourhood in which a school is located impacts on access to quality schooling in South Africa:

[N]eighbourhood factors matter in South Africa as agents with similar socio-economic backgrounds are likely to be clustered over space. This happens partly because apartheid created inequality in income opportunities (correlated with population groups) and also introduced spatial separation by population group, and partly because even after the abolition of apartheid, financial constraints became important in residential location choice, which determines access to income and educational opportunities... Both historical constraints as well as financial constraints matter in terms of access to quality education.¹⁸⁵

Yamauchi shares insight on how post-apartheid urban geography conspires with persistent socio-economic inequities to ensure that black children, in the main, continue to attend historically disadvantaged and largely dysfunctional schools and that the learner demographics in these schools remain unchanged.¹⁸⁶ Historically black and deprived schools are located in areas that remain heavily populated by black people. In excess of 80% of dysfunctional schools are based in rural sections of the country and within African townships. Given that these

¹⁸² Van der Berg S 'Apartheid's enduring legacy: Inequalities in education' (2007) 16:5 *Journal of African Economies* 850.

¹⁸³ Spaull N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 438.

¹⁸⁴ Zoch A 'The Effect of Neighbourhoods and School Quality on Education and Labour Market Outcomes in South Africa' (2017) A working paper of the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch 3.

¹⁸⁵ Yamauchi F 'School quality, clustering and government subsidy in post-apartheid South Africa' (2011) 30:1 *Economics of Education Review* 155.

¹⁸⁶ Spaull N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 438.

schools are located in more impoverished ‘black areas’, it is inevitable that impoverished black learners are more likely to be enrolled in them.¹⁸⁷

Whether a black child attends a school historically intended for their race group or a former white school has a significant bearing on their academic performance. Fintel’s research, aimed at approximating the causal effect on the school performance outcomes of disadvantaged learners as a result of attending HWS, illustrates as much.¹⁸⁸ Her research entailed analysing a representative sample of information relating to 266 schools in eight provinces across South Africa.¹⁸⁹ She concluded that black children attending schools historically allocated to their race group, ‘perform significantly worse on average’ in comparison with those sampled black children enrolled in HWS.¹⁹⁰ Fintel does, however, acknowledge that those black children enrolled in HWS were typically from more affluent households than their black peers in historically black schools.¹⁹¹

Earlier findings from an extensive research project conducted by a social policy research group in the economics department of Stellenbosch University, makes a similar discovery in the context of literacy scores. Findings from this research showed that ‘African language learners’ from the same socio-economic setting attending HWS performed ‘substantially better’ in reading than their equivalents in historically disadvantaged schools. These researchers viewed this as implying that ‘these children may be able to achieve a substantial improvement in educational outcomes by simply moving from a historically black school to a historically white or Indian school.’¹⁹² Admittedly, there are other factors that may account for this discrepancy in reading competency. This includes the possibility that these African language learners may have been selected by HWS because of their academic prowess.

In a more recent study, Zoch makes use of various data sets to develop a wealth index to be used for identifying neighbourhood wealth. After comparing this ‘neighbourhood wealth’

¹⁸⁷ Mlachila M & Moeletsi T ‘Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa’s Education System’ (2019) WP/19/47 The International Monetary Fund 35.

¹⁸⁸ von Fintel M *Social Mobility and Cohesion in Post-apartheid South Africa* (unpublished MPhil Economics thesis, University of Stellenbosch, 2015).

¹⁸⁹ von Fintel M *Social Mobility and Cohesion in Post-apartheid South Africa* (unpublished MPhil Economics thesis, University of Stellenbosch, 2015) 14. The author was unable to survey Gauteng schools at the time.

¹⁹⁰ von Fintel M *Social Mobility and Cohesion in Post-apartheid South Africa* (unpublished MPhil Economics thesis, University of Stellenbosch, 2015) 17.

¹⁹¹ von Fintel M *Social Mobility and Cohesion in Post-apartheid South Africa* (unpublished MPhil Economics thesis, University of Stellenbosch, 2015) 17.

¹⁹² Van der berg S, Burger C, Burger R et al ‘Low Quality Education as a Poverty Trap’ (2011) A working paper 25/11 of the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch 7.

construct with the 2014 matric schooling results and the spatial distributions of race in Johannesburg and Cape Town, Zoch concludes that the apartheid legacy has resulted in ‘a strong correlation between the neighbourhood a school is based in and the average school results it produces.’¹⁹³

Naidoo, van Eeden and Much, making use of quantitative geographical methods, conducted an analysis on the location of 261 schools in the Cape Town metropolitan area and matric pass percentages.¹⁹⁴ These scholars concluded that (with some deviation) the sampled schools were geographically ‘clustered’ according to school performance, with higher achieving schools bunched together and several lower achieving schools also grouped in this way.¹⁹⁵ These scholars identified a relationship between a number of socio-economic characteristics of the locations surrounding the school and school achievement levels, with the dominant factor contributing towards performance variation being employment. Schools located in areas where a significant percent of people were employed yielded better matric pass levels than schools based in places with low employment rates.¹⁹⁶

Spaull, in his research on the factors that have a major impact on South African learner’s reading and mathematics performance, conducted an analysis of data gathered from the Southern and Eastern African Consortium for Monitoring Educational Quality (SACMEQ) III grade 6 survey.¹⁹⁷ SACMEQ is a collaborative network involving education ministries, researchers and policy makers that carry out standardised surveys to gauge the calibre of schooling in eastern and southern regions of Africa.¹⁹⁸ Spaull admits that it is challenging to unravel the ‘multi-directional causation between socio-economic status, geographical location, school-quality and student performance’.¹⁹⁹ This is because, amongst others, one is confronted with the conundrum of whether good schools increase learner performance and that strangely

¹⁹³ Zoch A ‘The Effect of Neighbourhoods and School Quality on Education and Labour Market Outcomes in South Africa’ (2017) A working paper of the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch 8-9.

¹⁹⁴ Naidoo AGV, Eeden A, Much Z ‘Spatial variation in school performance, a local analysis of socio-economic factors in Cape Town’ (2014) 3:1 *South African Journal of Geomatics* 91. The analysis involved the 2010 matric pass rates.

¹⁹⁵ Naidoo AGV, Eeden A, Much Z ‘Spatial variation in school performance, a local analysis of socio-economic factors in Cape Town’ (2014) 3:1 *South African Journal of Geomatics* 91.

¹⁹⁶ Naidoo AGV, Eeden A, Much Z ‘Spatial variation in school performance, a local analysis of socio-economic factors in Cape Town’ (2014) 3:1 *South African Journal of Geomatics* 91.

¹⁹⁷ Spaull N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 4.

¹⁹⁸ Spaull N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 4.

¹⁹⁹ Spaull N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 11.

enough those learners are wealthy or, wealthier learners are academically stronger as a result of their home situation. The latter meaning, already ‘clever’ learners attend wealthier schools. Spauld posits that it is most probably a mixture of the two.²⁰⁰ Spauld’s research reveals that a school’s broader socio-economic position has a stronger effect on learner achievement than a child’s individual position.²⁰¹ That is to say, a child’s socio-economic status counts far less for their achievement than the school they attend. Spauld argues that enrolling an impoverished child in a wealthy school is ‘likely to more than compensate’ for any adverse consequences arising from an impoverished home situation.²⁰²

Msila asserts that the majority of children attending township schools remain there because their parents simply cannot afford a better option.²⁰³ Sadly, these are the learners likely to be most vulnerable to poor academic achievement given the extreme poverty they endure. For those black parents who are financially able to move schools, their decision to do so is fuelled by their views of better educational facilities and resources in HWS than those of the local township schools,²⁰⁴ as well as smaller class sizes,²⁰⁵ the increased safety factor,²⁰⁶ and the greater sports offerings associated with HWS.²⁰⁷ However, most black families, as a result of the group areas legacy, continue to reside in areas outside of the HWA where the overwhelming majority of HWS are based.²⁰⁸ When they attempt to enrol their children in these schools they risk a real possibility of rejection on the basis of not residing within the school’s feeder zone. Impoverished black children are confronted by this barrier to quality schooling because ‘the

²⁰⁰ Spauld N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 11.

²⁰¹ Spauld N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 16.

²⁰² Spauld N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 16.

²⁰³ Msila V ‘The education exodus: The flight from township schools’ (2005) 2:2 *Africa Education Review* 175 and 186.

²⁰⁴ Ndimande BS ‘Parental ‘choice’: The liberty principle in education finance’ (2006) 24:2 *Perspectives in Education* 149. Ndimande BS ‘Race and resources: Black parents’ perspectives on post-apartheid South African schools, Race Ethnicity and Education (2012) 15:4 *Race, Ethnicity and Education* 534, 535 and 536.

²⁰⁵ Ndimande BS ‘Race and resources: Black parents’ perspectives on post-apartheid South African schools, Race Ethnicity and Education (2012) 15:4 *Race, Ethnicity and Education* 536.

²⁰⁶ Kanyopa TJ & Hlalele DJ ‘The learning experiences of learners transitioning from rural and township schools to ex-Model C schools’ (2021) 16(1) *The Independent Journal of Teaching and Learning* 97.

²⁰⁷ Neluvhola, TG *Education management: Implications of learner migration amongst selected secondary schools in Limpopo Province* (unpublished master’s thesis, University of South Africa, 2007) 39.

²⁰⁸ Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 53.

concept of a “feeder zone” is currently common place within the school admissions process [in South Africa] and is institutionalised in many SGB policies.’²⁰⁹

Some black families go so far as to purchase a house in strategic areas in an effort to access superior educational opportunities.²¹⁰ Others, of lesser means, make use of fake addresses.²¹¹ Pienaar and McKay point out how ‘educated [and] financially secure people actively selected to reside in neighbourhoods with schools that had small classes and high test scores.’²¹² Moving house in the name of educational opportunities has become so prominent in South Africa that one estate agent mogul has sought to capitalise on this by releasing a voluminous guide on the top schools in five South African provinces and the feeder zones accompanying these schools.²¹³ The purpose of the guide is to aid prospective home buyers seeking to have their new address fall within the feeder area of their desired schools.²¹⁴ This is because ultimately the ‘opportunity for better education is geographically correlated with land prices.’²¹⁵ Allowing for such school shopping in the form of house shopping facilitates the commoditisation of public education. Access to quality schooling should be a public resource enjoyed by all not a product affordable only to those privileged enough to live in the affluent neighbourhoods in which HWS are based. As will be discussed in Chapter 7, the reality is that moving to a better neighbourhood to access a better school remains financially unattainable for most black families. Apartheid spatial injustices are therefore, through the use of SGB determined and geographically focused feeder zones, replicated in the public education system and in society at large. Feeding apartheid inequities in this manner runs contrary to the vision of achieving spatial justice by the year 2030, as espoused in South Africa’s National Development Plan (NDP). The NDP is a long-term plan dedicated to eradicating impoverishment and shrinking inequality in South Africa.²¹⁶ The NDP declares that

²⁰⁹ Equal Education Law Centre *Comment on the Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia & Related Intolerance 2016 - 2021* (2016) EELC 7.

²¹⁰ Fleisch B & Woolman S ‘South Africa’s unintended experiment in school choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act create the enabling conditions for quasi-markets in schools’ (2006) 18:1 *Education and the Law* 46.

²¹¹ See section 2.7 below.

²¹² Pienaar R & McKay T ‘Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa’ (2014) 32(1) *Perspectives in Education* 108.

²¹³ PropertyFox *School Feeder Zones: 2018 Guide* (2018) PropertyFox.

²¹⁴ PropertyFox *School Feeder Zones: 2018 Guide* (2018) PropertyFox 3.

²¹⁵ Yamauchi F ‘School quality, clustering and government subsidy in post-apartheid South Africa’ (2011) 30:1 *Economics of Education Review* 150.

²¹⁶ The National Planning Commission ‘National Development Plan 2030 – Our future, Make it Work’ (2012) 34.

‘[t]he historic policy of confining particular groups to limited space, as in ghettoisation and segregation . . . must be reversed to ensure that the needs of the poor are addressed first rather than last’.²¹⁷

1.2.6 The right to basic education, the protection against unfair discrimination and remedial action

The right to basic education receives extensive protection under regional and international law.²¹⁸ Both the Universal Declaration of Human Rights,²¹⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR), recognise a right to education without restriction.²²⁰ The United Nations Convention on the Rights of the Child too recognises a child’s right to be educated.²²¹ The Constitutional Court has referenced these international instruments in its framing of the right to basic education in section 29(1)(a) of South Africa’s Constitution.²²² This section provides that ‘everyone has the right to a basic education, including adult basic education’. The Constitutional Court has made clear that the right to basic education is an immediately realisable right, as is apparent from the wording of the section.²²³ This means that the right is an unqualified right that can only be limited via the general limitations clause in section 36 of the Constitution.

Section 9(1) of the Constitution provides that ‘[e]veryone is equal before the law and has the right to equal protection and benefit of the law.’ When viewed together with section 29(1)(a) of the Constitution this suggests that everyone has the right of equal access to a basic education.²²⁴ That is to say, impoverished black children living in historically black areas have to right to enjoy an adequate education as much as their counterparts staying in HWA. This, in

²¹⁷ The National Planning Commission ‘National Development Plan 2030 – Our future, Make it Work (2012) 277.

²¹⁸ Article 17 of the African (Banjul) Charter on Human and Peoples’ Rights, 1981 (1986) 21 ILM. 58; Article 3 of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC); Article 26 of the Universal Declaration of Human Rights, 1948 UN General Assembly Resolution 217 A (III), A/RES/3/217 A, 10 December (1948); Article 13 of the International Covenant on Economic, Social and Cultural Rights, 1966 United Nations General Assembly Resolution 2200A (XXI) (1976); Article 28 of the Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1990).

²¹⁹ Article 26 of the Universal Declaration of Human Rights, 1948 UN General Assembly Resolution 217 A (III), A/RES/3/217 A, 10 December (1948).

²²⁰ Article 13 of the International Covenant on Economic, Social and Cultural Rights, 1966 United Nations General Assembly Resolution 2200A (XXI) (1976).

²²¹ Article 28 of the Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1990).

²²² *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 40 to 44.

²²³ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 37.

²²⁴ See section 3.6 below.

turn, suggests that the state is duty bound to ensure equal access to a basic education.²²⁵ This raises the question whether feeder zones that turn on geographical proximity operate to entrench racial inequities in schooling access and thus violate the constitutional guarantees entrenched in sections 9(1) and 29(1)(a). Chapters 2, 3 and 4 all contain a focus on this issue.

Section 9(3) of the Constitution provides that '[th]e state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race'. This raises the question whether SGBs of HWS, as organs of state, are unfairly discriminating against impoverished black learners through the use of feeder zones based solely on geographical proximity. This question will be considered in detail in Chapter 8.

Section 9(2) of the Constitution explains that '[t]o 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'. Feeder zones present as a potential mechanism that the state can employ to advance racially equitable access to schooling. This possibility will also be considered in Chapter 8.

1.2.7 Learning from the United States

Despite obvious differences between South Africa and the United States (US), this thesis draws from the US experience regarding school zoning in making recommendations. This is because experts and ordinary onlookers alike have noted the similarities between the US and South Africa as regards the immense role played by race in moulding these countries' development.²²⁶ Parallels can be drawn between the US and South African legacies of race based educational inequalities. In the northern and western areas of the US the origins of segregated schooling is situated in ethnically segregated housing designs.²²⁷ The pervasiveness of segregated neighbourhood patterns across the US is, as with South Africa, no historical accident.²²⁸ As early as 1870, when African American families migrated northward, the cities to which they

²²⁵ See section 3.6 below.

²²⁶ Tihanyi K 'Racial integration in the USA and South Africa: lessons in a comparative perspective' (2007) 11:2 *International Journal of Inclusive Education* 178.

²²⁷ Ehrlander M *Equal Educational Opportunity: Brown's Elusive Mandate* (2002) 16. Isaacs D 'Realising the right to education in South Africa: Lessons from the United States of America' (2010) 26:2 *South African Journal on Human Rights* 364.

²²⁸ Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *APaper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 3. M and Crowder K *Cycle of Segregation: Social Processes and Residential Stratification* (2017) 7 and 10. Rothstein R 'The Myth of "de Facto" segregation' (2019) 100:5 *Phi Delta Kappan* 36. Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 127.

relocated had designated areas where they could and could not stay.²²⁹ In 1917 the United States Supreme Court (US Supreme Court) held city ordinances permitting such residential segregation unconstitutional.²³⁰ In the wake of its ruling racially restrictive housing covenants appeared.²³¹ Under these covenants white homeowners concluded contracts barring the sale of their homes to minorities.²³² This practice was struck down by the US Supreme Court in 1948.²³³ Despite this ruling, African American families still encountered challenges in accessing homes in white areas. Federal, state and local government agencies deliberately adopted and implemented discriminatory housing policies aimed at ensuring the residential separation of blacks and whites.²³⁴ Federal public housing projects for middle income white American families were calculatingly located in predominantly white neighbourhoods. Contrastingly, high-poverty ‘black ghettos’ were chosen to accommodate the low-income black population.²³⁵ Under the authority of city housing policies, suspect public works projects were rolled out. As a result of these projects, black populations within the US were dislocated from their homes in mixed neighbourhoods and resettled in a condensed manner.²³⁶ Many mixed neighbourhoods were dismantled in this way.²³⁷ Federal and local US officials also used infrastructure such as highways to physically segregate African Americans.²³⁸ The examples discussed above are but a few of the historical policies and practices which solidified racially segregated neighbourhood patterns in the US.²³⁹ This, in turn, has resulted in the fierce

²²⁹ Charette A ‘Creating Equitable Student Outcomes: How Housing and Education Policy are Intertwined’ (2017) 6.

²³⁰ *Buchanan v. Warley* 245 U.S. 60 (1917).

²³¹ Silva C ‘Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle’ *The Seattle Civil Rights & Labor History Project, University of Washington* 2009 available at https://depts.washington.edu/civilr/covenants_report.htm (accessed 18 May 2020).

²³² See Orfield G & Gándara P ‘Housing and School Segregation and Intergenerational Inequality in the U.S.’ (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 13 and Kushner JA ‘Apartheid in America: An historical and legal analysis of contemporary racial residential segregation in the United States’ (1979) 22:4 *Howard Law Journal* 562 and 563.

²³³ *Shelley v. Kraemer* 334 U.S. 1 (1948).

²³⁴ Krysan M and Crowder K *Cycle of Segregation: Social Processes and Residential Stratification* (2017) 5, 7 and 10.

²³⁵ Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s public schools’ (2018) 16 *Northwestern Journal of Human Rights* 127 and 128. Rothstein R ‘Why our schools are segregated’ (2013) 70:8 *Educational Leadership* 53. Krysan M and Crowder K *Cycle of Segregation: Social Processes and Residential Stratification* (2017) 7. Rothstein R ‘The myth of “de Facto” segregation’ (2019) 100:5 *Phi Delta Kappan* 37.

²³⁶ Kushner JA ‘Apartheid in America: An historical and legal analysis of contemporary racial residential segregation in the United States’ (1979) 22:4 *Howard Law Journal* 559 and 560.

²³⁷ Kushner JA ‘Apartheid in America: An historical and legal analysis of contemporary racial residential segregation in the United States’ (1979) 22:4 *Howard Law Journal* 559 and 560.

²³⁸ Wilson EK ‘Toward a theory of equitable federated regionalism in public education’(2014) 61:5 *UCLA Law Review* 1428 and footnote 55. Rothstein R ‘Why our schools are segregated’ (2013) 70:8 *Educational Leadership* 53. Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 53.

²³⁹ Bans were also placed on extending federal housing loans to individuals if this would lead to ‘undesirable racial or nationality groups’ moving into a neighbourhood. See Krysan M & Crowder K *Cycle of Segregation: Social Processes and Residential Stratification* (2017) 7 and 8.

persistence of racially segregated schools there.²⁴⁰ Both the US and South Africa have historically used education as a weapon of oppression. In the US, this weapon was turned against southern-based African Americans and in South Africa, against black South Africans.²⁴¹ Both the southern US and South Africa established racially separated schooling through state-sanctioned segregation.²⁴² Both spent less per capita on the education of African American and black children respectively.²⁴³ African American children in the southern states were educated in dilapidated wooden infrastructure, under abysmal conditions. In contrast, their white counterparts were taught in contemporary brick structures.²⁴⁴ Black South African children, as with their African American counterparts in the south, learnt in under resourced and government neglected schools.²⁴⁵ Both southern based African American and black South African children suffered overcrowded classrooms.²⁴⁶ Both had little in the way of suitable books and other substantive educational benefits.²⁴⁷ African American children in the south

²⁴⁰ Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 93. Rothstein R 'the myth of "de facto" segregation' (2019) 100:5 *Phi Delta Kappan* 36.

²⁴¹ Walker VS & Archung KN 'The segregated schooling of blacks in the Southern United States and South Africa' (2003) 47:1 *Comparative Education Review* 21.

²⁴² Books S and Ndlalane T 'What the U.S. Could Learn from South Africa about Education and Social Justice' (2011) 25:1-2 *Educational Foundations* 84. Walker VS & Archung KN 'The segregated schooling of blacks in the Southern United States and South Africa' (2003) 47:1 *Comparative Education Review* 21.

²⁴³ Makoni S, Moody CD Sr & Mabokela RO "'Separate but equal": A comparative analysis of provision for education of blacks in the United States and South Africa' (2001) 34:3 *Equity and Excellence in Education* 47 and 48. Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 169 and 175. Walker VS and Archung KN 'The segregated schooling of blacks in the Southern United States and South Africa' (2003) 47:1 *Comparative Education Review* 21. Sellers Diamond AA 'Constitutional comparisons and converging histories: Historical developments in equal educational opportunity under the Fourteenth Amendment of the United States Constitution and the New South African Constitution' (1999) 26:4 *Hastings Constitutional Law Quarterly* 869.

²⁴⁴ Makoni S, Moody CD Sr & Mabokela RO "'Separate but Equal": A Comparative Analysis of Provision for Education of Blacks in the United States and South Africa' (2001) 34:3 *Equity and Excellence in Education* 48. Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 175.

²⁴⁵ Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 175.

²⁴⁶ Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 169 and 175.

²⁴⁷ Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 3. Walker VS and Archung KN 'The segregated schooling of blacks in the Southern United States and South Africa' (2003) 47:1 *Comparative Education Review* 21. Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 169 and 175.

received an inferior curriculum,²⁴⁸ designed to entrench white privilege.²⁴⁹ This subpar syllabus had its origins in post-slavery endeavours to provide African Americans with the type of education that would ensure their subservience to whites. The object was to groom them to be better servants and labourers.²⁵⁰ This racialised sub-par syllabus was transplanted to the British colonies, especially South Africa.²⁵¹ In South Africa, it appears to have later morphed into an especially egregious shape in the form of Bantu Education, as discussed earlier in this chapter.²⁵²

In the US south, legally enforced racially segregated schooling persisted until the US Supreme Court ruled it unconstitutional in the famous 1954 decision of *Brown v Board of Education of Topeka (Brown I)*.²⁵³ In South Africa, the interim Constitution spelt its end.²⁵⁴ Following the inertia by school authorities to desegregate their schools in line with *Brown I*, the US Supreme Court in *Brown v Board of Education of Topeka (Brown II)*,²⁵⁵ ordered school authorities to implement affirmative steps to desegregate schools ‘with all deliberate speed’.²⁵⁶ In the wake of school desegregation court orders in the US the ‘Jim Crow South’ resorted exceedingly to the use of school boundaries to virtually preserve segregated schooling.²⁵⁷

Different attempts, with varying success, were made by the US to integrate schools in American cities following *Brown I* and *II*.²⁵⁸ These attempts, some of which are documented

²⁴⁸ Malisa M & Missedja TQ ‘Schooled for servitude: The education of African Children in British colonies, 1910–1990’ (2019) 3(3):40 *Genealogy* 4. Thompson-Dudiak M ‘Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems’ (2019) 49:1 *California Western International Law Journal* 170 and 175.

²⁴⁹ Walker VS and Archung KN ‘The segregated schooling of blacks in the Southern United States and South Africa’ (2003) 47:1 *Comparative Education Review* 21 and 25.

²⁵⁰ Malisa M & Missedja TQ ‘Schooled for servitude: The education of African children in British colonies, 1910–1990’ (2019) 3(3):40 *Genealogy* 4.

²⁵¹ Malisa M & Missedja TQ ‘Schooled for servitude: The education of African Children in British colonies, 1910–1990’ (2019) 3(3):40 *Genealogy* 4.

²⁵² Thobejanea TD ‘History of apartheid education and the problems of reconstruction in South Africa’ (2013) 1 and 2. Berger E ‘The right to education under the South African Constitution’ (2003) 26 *College of Law, Faculty Publications* 616.

²⁵³ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 495 (1954).

²⁵⁴ Walker VS and Archung KN ‘The segregated schooling of blacks in the Southern United States and South Africa’ (2003) 47:1 *Comparative Education Review* 21.

²⁵⁵ *Brown v Board of Education of Topeka (Brown II)* 349 U.S. 294 (1955) 349 U.S. 300.

²⁵⁶ *Brown v Board of Education of Topeka (Brown II)* 349 U.S. 294 (1955) 301.

²⁵⁷ Tegeler P & Hilton M ‘Disrupting the Reciprocal Relationship Between Housing and School Segregation’ (2017) *Paper presented at A Shared Future 2*.

²⁵⁸ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954). *Green v County School Board of New Kent County* 391 U.S. 430. *Milliken v. Bradley* 418 U.S. 717 (1974). *Monroe v Board of Commissioners of City of Jackson* 391 U.S. 450 (1968).

in Chapter 9, include freedom of choice plans,²⁵⁹ controlled choice plans,²⁶⁰ pairing and clustering of schools,²⁶¹ as well racial ratios, school reassignment and busing.²⁶² These various approaches to desegregation present potential alternative solutions to the use or exclusive use of feeder zones based on geographical proximity as criteria for determining admission to South African public schools. As such, they merit exploration.

More recently there have been attempts by some school authorities in the US to engage in school zoning as a desegregation technique.²⁶³ Some US experts have also examined the impact of attendance zones on the degree of racial integration in some US schools.²⁶⁴ Attempts in the US to use attendance zones as a method of desegregation may possibly serve as an approach worthy of replication in South Africa.

1.3 CLARIFICATION OF CONCEPTS

This section serves to define and provide meaning to some of the core concepts or phrases that are employed throughout this thesis.

1.3.1 - Feeder zones / feeder areas / catchment areas

The terms ‘feeder zones’, ‘feeder areas’ and ‘catchment areas’ are used interchangeably. These terms refer to the demarcated area from which a school draws its core learner intake.

²⁵⁹ Orfield G & Gándara P ‘Housing and School Segregation and Intergenerational Inequality in the U.S.’ (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 38.

²⁶⁰ Rossell CH ‘An analysis of the court decisions in Sheff v. O’Neill and possible remedies for racial isolation’ (1997) 29:3 *Connecticut Law Review* 1225. Rossell CH ‘The convergence of black and white attitudes on school desegregation issues during the four decade evolution of the plans’ (1995) 36:2 *William and Mary Law Review* 628.

²⁶¹ Rossell CH ‘An analysis of the court decisions in Sheff v. O’Neill and possible remedies for racial isolation’ (1997) 29:3 *Connecticut Law Review* 1225. Rossell CH ‘The convergence of black and white attitudes on school desegregation issues during the four decade evolution of the plans’ (1995) 36:2 *William and Mary Law Review* 628.

²⁶² Armor DJ & Rossell CH ‘Desegregation and Resegregation in the Public Schools’ in Thernstrom A & Thernstrom S (eds) *Beyond Victimization* (2002) 219 and 220.

²⁶³ Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s public schools’ (2018) 16 *Northwestern Journal of Human Rights* 110.

²⁶⁴ Van Riper D and Saporito ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 65 and 66. Richards MP ‘The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis’ (2014) 51:6 *American Educational Research Journal* 1122. Stroub KJ & Richards MP ‘An accident of geography? assessing the gerrymandering of school attendance zones’ (2015) 117(7) *Teachers College Record* 3.

1.3.2 School zoning

The term ‘school zoning’ refers to the process whereby schools establish their ‘feeder zones’/ ‘feeder areas’/ ‘catchment areas’.

1.3.3 Transformative feeder zones

The term ‘transformative feeder zones’ refers to ‘feeder zones’ designed to eradicate racially discriminatory school zoning practices and advance racially equitable access to public schooling in South Africa.

1.3.4 Transformative zoning

The term ‘transformative zoning’ refers to the process whereby schools establish ‘transformative feeder zones’.

1.3.5 Exclusionary zoning

The term ‘exclusionary zoning’ refers to the process whereby schools establish zones that exclude predominantly impoverished black children. ‘Exclusionary feeder zones’ have a comparable meaning.

1.3.5 Attendance zones / school boundaries

The terms ‘attendance zones’ and ‘school boundaries’ are the US equivalent of the terms ‘feeder zones’/ ‘feeder areas’/ ‘catchment areas’.

1.3.6 School community / school body

The term ‘school community’ or ‘school body’ refers to the current learner and parent body of a school. That is, the learners currently enrolled in a school and the parents/guardians of these learners.

1.4 RESEARCH QUESTION

The core research question of this thesis is: What is the effect of feeder zones on equitable access to schools in South Africa and, how can feeder zones be used to promote such access?

This thesis also aims to answer the following sub-questions:

- How has school zoning impacted upon the ability to achieve access to schooling in South Africa? (Chapter 2)
- What is the content and meaning of the right to basic education under section 29(1)(a) of the Constitution? (Chapter 3)
- What legal meaning is to be attached to the concept of equal access to basic education in South Africa? (Chapter 4)
- What are the relevant national laws and policies regarding school zoning and what are the deficits in this legislative and policy framework? (Chapter 5)
- What implications does the current case law on school governance have for school zoning as a component of the school admission process? In light of the jurisprudence, which role player is best placed to implement school zoning? (Chapter 6)
- To what extent have attempts made by the KwaZulu-Natal, Western Cape, and Gauteng Education Departments to address the issue of school zoning in their respective provinces been successful? (Chapter 7)
- Can SGBs from HWS that use feeder zones relying purely on proximity be said to be unfairly discriminating against black learners? Can feeder zones be leveraged as a section 9(2) remedial measure under South Africa's Constitution to advance racially equitable access to education in the country's public schools? (Chapter 8)
- What lessons can South Africa take from United States jurisprudence and experience in addressing geographical proximity as a barrier to racially equitable access to schooling? (Chapter 9)
- What legal and/or policy reforms can be undertaken to ensure one, that the use of feeder zones in the admission process does not result in unfair race based discrimination and, two, that school zoning promotes equal access to quality basic education in South Africa? (Chapter 10)

1.5 THE SIGNIFICANCE OF THE RESEARCH QUESTION

One cannot flee the reality that, in line with learner performance, the overwhelming majority of South Africa's learners (an astounding 75%) attend schools considered dysfunctional.²⁶⁵ There are simply too few functional schools within the public education system to

²⁶⁵ Spaul N 'Education in SA: A tale of two systems' *PoliticsWeb* 31 August 2012 available at <http://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 8 August 2018).

accommodate every child. The goal of realising equitable access to education can therefore never be accomplished simply by addressing the use of feeder zones and its racialised impact on schooling access. This thesis does not contend as much. To achieve equitable access to education will of necessity entail enhancing and supporting dysfunctional schools including hiring extra and better teachers, supplying appropriate educational resources, improving school leadership and management capacity, and facilitating parental involvement. It will also entail building new schools in areas of need. However, inequitable access to education is a problem that should be tackled on all fronts and feeder zones are one of those fronts. More importantly, transformative zoning is an approach that might, if implemented, advance racially equitable access to a basic education with immediate effect which is not the case with remedies such as building schools and improving teacher quality. This is crucial, since the Constitutional Court has described the right to basic education as an ‘immediately realisable’ right.²⁶⁶ This is because the right to basic education differs from other socio-economic rights in that it is not dependant on available resources nor subject to reasonable legislative measures and progressive realisation.²⁶⁷ Any limitation of the right must be justified in terms of section 36(1) of the Constitution.²⁶⁸

Moreover, the maladies of South Africa’s public education system do not absolve privileged schools from playing their role in realising the goal of equitable access to education for the country’s learners.²⁶⁹ This is particularly so given the cruel genesis of their privilege. Furthermore, the Schools Act requires that public schools must ‘admit learners and serve their educational requirements without unfairly discriminating in any way’. Should it be established that feeder zones operate to unfairly discriminate this would fall foul of the demands of the Schools Act and the Constitutional prohibition against unfair racial discrimination. The core role of transformative zoning would be to eliminate such racially discriminatory school zoning practices.

Addressing the racially exclusionary effect of feeder zones also holds deep symbolic importance in a country still ravaged by its racist colonial and apartheid history. However, the

²⁶⁶ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 37.

²⁶⁷ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 37.

²⁶⁸ McConnachie C & McConnachie C ‘Concretising the right to basic education’ (2012) 129:3 *South African Law Journal* 557 and 564.

²⁶⁹ See section 6.3 below.

issue of feeder zones and access to schooling goes beyond this broader symbolism. Barring black families from accessing good schools in areas which they have historically been forced out of and/or prevented from residing in simply because they do not live there re-inflicts apartheid wounds in an especially acidulous way.

Advancing racially equitable access to schooling and furthering spatial justice within the context of education would require that HWS no longer operate as de facto physically segregated spaces separating class and race. Feeder zones grounded purely on residential proximity to schools do more than preserve exclusionary spaces. Rather, this school admission standard, reinforces existing pockets of historical privilege within the education system. In so doing, it feeds racial inequalities both within South Africa's schooling system and society beyond. The manner in which feeder zones are created and implemented is therefore an issue that calls out for attention.

1.6 THESIS STRUCTURE AND CHAPTER OUTLINE

This thesis contains ten chapters divided as follows:

Chapter one introduces the research and serves as a statement of the problem and the research questions this thesis seeks to answer.

Chapter two circumscribes the zoning issues that the thesis aims to address. This is crucial for understanding the problem and devising solutions.

Chapter three provides a detailed explanation of the content and meaning of the right to basic education contained in section 29(1)(a) of the Constitution. This chapter illustrates why the right to basic education should be understood as a right to equal access to quality basic education. This chapter also shows why the ability to realise one's right to basic education should not be constrained by one's geographical location or race.

Chapter four is dedicated to determining how a state's compliance with the duty to provide equal access to a quality education is to be measured and to measure the South African state against this standard. This chapter illustrates how school zoning can be used to advance the goal of racially equitable access to a basic education.

Chapter five contains an analysis of the current national legislative and policy framework relating to feeder zones. An analysis of this framework is undertaken to facilitate an understanding of how law and policy relevant to school zoning has aided in the abusive and discriminatory school zoning practices implemented by some SGBs.

Chapter six contains an analysis of South African jurisprudence concerning the intersection between SGB policy making powers and HoDs roles and responsibilities within basic education. This is done in an endeavour to comprehend the way in which HoDs are required to engage with SGBs when addressing school admissions related issues inclusive of school zoning.

Chapter seven focuses on the way the KwaZulu-Natal, Western Cape, and Gauteng Education Departments have approached the question of school zoning. This chapter documents and critiques these differing approaches. This chapter is geared at exploring whether any of these provincial education department interventions can function as an effective template for tackling racial inequalities resulting from the use of feeder zones by HWS.

Chapter eight applies sections 9 of the Constitution to school zoning practices. It considers whether exclusionary zoning practices amount to indirect unfair discrimination under section 9(3) of the Constitution. Attention is drawn to these practices and their racially discriminatory impact in an attempt to establish the need for legislative and policy reform in the area of school zoning. In addition, this chapter considers whether a school zoning scheme designed to further racially equitable access to education (transformative zoning) could qualify as a remedial measure under section 9(2) of the Constitution. This question is important because a positive answer would mean that transformative zoning would be shielded from a potential unfair race based discrimination challenge by disgruntled parents and/or learners.

Chapter nine documents attempts made by the US to integrate schools following the US Supreme Court ordered desegregation of schools in *Brown v Board of Education*, and in the series of judgments that followed.²⁷⁰ Also considered is more recent attempts to use school zoning as a mechanism to further racial diversity within US schools. Drawing lessons from the US, this chapter enquires into alternative solutions to the use or exclusive use of feeder zones

²⁷⁰ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954). *Green v County School Board of New Kent County* 391 U.S. 430. *Milliken v. Bradley* 418 U.S. 717 (1974). *Monroe v Board of Commissioners of City of Jackson* 391 U.S. 450 (1968).

based on geographical proximity as criteria for determining admission to South African public schools.

Chapter ten concludes the study. Conclusions are drawn, and recommendations made for effective legal and policy reforms to address spatial injustices in the school admission process.

1.7 RESEARCH METHODOLOGY

This study takes the form of desktop research. Reliance is placed on library resources and internet databases. The relevant aspects of the legislative and policy scheme relating to basic education in South Africa is reviewed. Relevant South African case law is grappled with. Regional and international instruments are examined to aid the study's approach to the problems presented. This study makes use of academic journals as well as US jurisprudence. Governmental circulars, official government statements and parliamentary records are also employed. Relevant NGO and government reports are discussed. In addition, information sourced from an access to information request sent to the Western Cape Education Department (WCED) dated 16 June 2022 and relating to school admissions is analysed. The following information was requested from the WCED: 'Copies of all internal admission appeals lodged by learners or/and parents/guardians of learners . . . in relation to the academic years 2019-2022 ... and ... Copies of all the MEC's letters communicating the outcome of such appeals'. The information revealed 76 appeals over this period.

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CHAPTER 2

ZONING CHAOS

2.1 INTRODUCTION

The coal mining town of Lephalale rests at the spur of the majestic Waterberg Mountains in the north western part of the Limpopo province.²⁷¹ In 1981, Eskom (South Africa's state electricity supplier) began work on a coal fired power station, named Matimba, in the Lephalale area.²⁷² At that stage Hoërskool Ellisras, a secondary school servicing the town's conservative, white Afrikaans speaking community,²⁷³ had already been operating for roughly two decades.²⁷⁴ The presence of the Matimba plant led to the birth of the black township of Marapong to accommodate black labourers working in the nearby coal mines and at Matimba.²⁷⁵ In 2007, Eskom broke ground on a second power plant, Medupi, in the vicinity of Lephalale.²⁷⁶ When construction on Medupi began, the area swelled and the town expanded.²⁷⁷ By 2011, Lephalale had a 37% white population and Afrikaans was the mother tongue for 39% of the town.²⁷⁸ It was at this point that Hoërskool Ellisras formed the subject of an investigation by the Limpopo Department of Education. The department's enquiry was conducted after it had received a memorandum of demands from some concerned Lephalale parents.²⁷⁹ The memorandum included allegations that the school's admission policy was racially discriminatory against the black children of Lephalale. The department's enquiry revealed that Hoërskool Ellisras had manipulated its feeder zone to increase the number of white learners at the school through widening its catchment area to accommodate three primary schools (all about a 50 minute or more drive from the school) at the expense of black learners living in

²⁷¹ Limpopo Happenings 'Lephalale (Ellisras) History and Information' available at http://www.limpopohappenings.co.za/lephalale_homepage.html (accessed 3 December 2022).

²⁷² Public Affairs Research Institute *We are Building a City the struggle for self-sufficiency in Lephalale Local Municipality* (undated) PARI 2.

²⁷³ Limpopo Department of Education 'Report on Racism in Schools: The Case of Hoerskool Ellisras' (April 2011) 16.

²⁷⁴ Janse van Rensburg N *A memory exchange hub encapsulating memory through an architectural intervention* (unpublished Master's thesis, University of the Free State 2021).

²⁷⁵ ENCA 'Gallery: Township life next to an Eskom power station' *ENCA* 4 December 2022 available at <https://www.enca.com/gallery-township-life-next-eskom-power-station> (accessed 4 December 2022).

²⁷⁶ Lockett T 'Hope in the debris of capitalist dys/utopia? Historical progress and the intricacies of everyday life in Lephalale' (2019) 42:1 *Anthropology Southern Africa* 76.

²⁷⁷ Public Affairs Research Institute *We are Building a City the struggle for self-sufficiency in Lephalale Local Municipality* (undated) PARI vii.

²⁷⁸ Frith A 'Lephalale Main Place 978038 from Census 2011' available at <https://census2011.adrianfrith.com/place/978038> (accessed 29 November 2022).

²⁷⁹ Limpopo Department of Education 'Report on Racism in Schools: The Case of Hoërskool Ellisras' (April 2011) 10.

Lephalale. The deliberate extension of the school's feeder zone to ensure the enrolment of Afrikaans speaking white learners in conjunction with use of complicated combining of curriculum streams, allowed for black learners to be turned away under the pretext of insufficient English-speaking teachers to offer certain subjects, including mathematics.²⁸⁰ Hoërskool Ellisras is but one example of the racial inequities that manifest when SGBs are provided with the agency to determine their own feeder zones.

The purpose of this chapter is to provide factual background to the problem that the thesis aims to address. That is, what is the effect of feeder zones on equitable access to schools in South Africa and, how can feeder zones be used to promote such access. This factual background is necessary to understand the problem and devise solutions therefor. This chapter begins by examining some of the racially exclusionary practices arising from the misuse of school feeder zones. The first of such practices to be examined is the race-based gerrymandering of feeder zones by some schools. Another practice scrutinised, is the use of feeder zones in conjunction with school language policies to further racial inequity in the school admission process. The interplay between feeder zones and school fee exemptions and its racially disproportionate impact on schooling access is also considered. Thereafter, focus shifts to the arbitrary manner in which feeder zones have been implemented and the double standards applied by some schools when processing the admission applications of learners from outside of their feeder zone. This chapter also discusses the concept of feeder primary schools and the impact of the use of these feeder schools on racially equitable access to schooling.

2.2 FEEDER ZONES AND RACIALLY BASED LINE DRAWING

The South African Human Rights Commission (SAHRC) had, in as early as 1999, sounded a warning that:

‘[p]rovincial departments need to be wary because... a huge percentage of governing bodies remain white and some might want to exclude black learners by excluding black residential areas from the feeder zones.’²⁸¹

²⁸⁰ Limpopo Department of Education ‘Report on Racism in Schools: The Case of Hoërskool Ellisras’ (April 2011) 8, 26, 31 and 36-38.

²⁸¹ The South African Human Rights Commission, Racism ‘Racial Integration’ and Desegregation in South African Public Secondary Schools and the Conference on Racial Integration in Schools - Combined Report (1999) SAHRC at 46.

The surreptitious conduct warned of by the SAHRC over 20 years ago has borne out repeatedly,²⁸² including in a 2011 study concerning former Model C schools conducted in the affluent and apartheid-designated white suburb of Sandton, Gauteng. Here researchers found that despite how closely the black township of Alexandra is situated to the Sandton area, no portion of Alexandra had at that point formed part of the feeder zones for Sandton schools and not a single Alexandra primary school had been recognised as a feeder school to a Sandton secondary school.²⁸³

A 2013 NGO report to the Western Cape Education Department (WCED) titled ‘Western Cape School Admission Policies and Practices’ explained that a clear case of gerrymandering could be detected when one examined the zoning parameters set in the then admission policy of Fish Hoek High, a HWS.²⁸⁴ Fish Hoek High had deliberately designed its feeder zones to skirt the nearby large black informal settlement of Masiphumelele whilst including more affluent areas situated even further away.²⁸⁵ Kriger and Jansen also document the use of manipulative zoning techniques in some other Western Cape schools. These scholars undertook a study in Cape Town involving 30 highly desired previously white primary schools located in ‘the wealthy corridor’ stretching from the City Bowl across the southern suburbs downward to Fish Hoek.²⁸⁶ The primary tool of their multiple information gathering techniques entailed partially controlled and on-site interviews with well-seasoned school officials engaged in admission processes. Their research involved principals, administrators, SGB members and, what the authors term, ‘activist parents’.²⁸⁷ Kriger and Jansen explain how, from their many interviews, it clearly emerged that feeder zones serve as nothing more than a ‘handy tool’ with which these

²⁸² Ntshoe I ‘Resegregation and recreation of racism in education in a post-apartheid setting’ (2017) 23:1 *Southern African Review of Education with Production* 77 and 83. Ntshoe I ‘Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa’ (2009) 15:2 *Southern African Review of Education with Production* 94. Brown K ‘New educational injustices in the ‘new’ South Africa: A call for justice in the form of vertical equity’ (2006) 44:5 *Journal of Educational Administration* 516. Soudien C, Jacklin H & Hoadley U ‘Policy values: Problematising equity and redress in education’ in Sayed Y & Jansen J *Implementing Education Policies: The South African Experience* (2001) 83.

²⁸³ Bell J & Morton McKay T ‘The rise of ‘class apartheid’ in accessing secondary schools in Sandton, Gauteng’ (2011) 36. In relation to a study conducted in schools in the northeast of Johannesburg see Tikly L & Mabogoane T ‘Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa’ (1997) 43:2-3 *International Review of Education* 169. The three predominantly white schools studied relied on links with traditional feeder schools to recruit pupils.

²⁸⁴ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013).

²⁸⁵ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) 19.4 and 19.5. See section 1.1 above.

²⁸⁶ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 11.

²⁸⁷ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 15. Activist parents refer to parents strongly involved in the communities in which they are based.

Cape Town schools are able to regulate the racial and class makeup of their learner body.²⁸⁸ These scholars inform of how the break off point of these feeder zones frequently coincide with the location at which the ‘white area’ comes to a close and the ‘coloured area’ starts. The researchers refer to the southern suburbs of Cape Town as a case in point. In particular, they refer to schools in Rondebosch who frequently cite Milner Road as the end-point of their feeder zone. The image below provides a visual display of Milner Road. Milner road (whose name, the authors point out, ironically has its genesis in South Africa’s colonialist history) separates the largely white suburb of Rondebosch from Rondebosch East which is home to a more middle-class coloured community.²⁸⁹

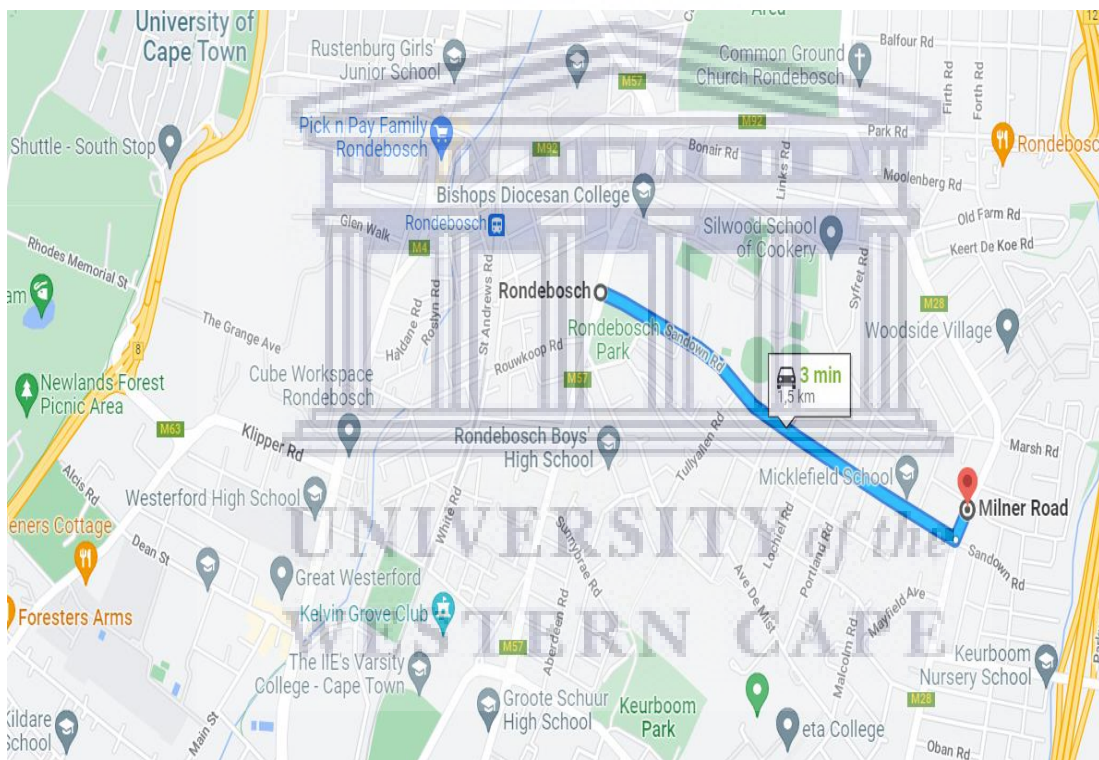


Figure 19

Hunter explains how the strategy of extending feeder zones and then implementing them selectively to deter desegregation has been applied with success by some historically, and still predominantly, elite white schools in Upper Berea (an overwhelmingly white and lavish part of east Durban) in KwaZulu-Natal (KZN).²⁹⁰ Jansen refers to similar nefarious school zoning

²⁸⁸ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 53.

²⁸⁹ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 32.

²⁹⁰ Increasing their catchment areas to increase ‘their crop of white applicants’ is, says Hunter, but one tactic employed by Upper Berea schools to guard against reaching their ‘tipping point and going black’. Hunter M ‘Schooling choice in South Africa: The limits of qualifications and the politics of race, class and symbolic power’ (2015) 43 *International Journal of Educational Development* 46-47.

practices occurring in south Durban in the wealthy suburb of Westville, and explains that this is part of a larger pattern across the country where ‘more privileged schools’ have actively sought to frustrate desegregation:

‘Throughout [South Africa], the more privileged schools make conscious decisions to deny entry to children who fall outside of their ‘zones’ - often marking these cut-off points arbitrarily but also consciously so that those from poor and black communities do not overwhelm the school. Some schools, such as Westville in KwaZulu Natal, have been able to remain virtually all-white, through their manipulation of these geographical cut-off points to access.’²⁹¹

Kruger and Jansen further record how a case of gerrymandering was unearthed from an interview conducted with the principal of an elite historically white school in the southern suburbs of Cape Town. This principal, when questioned on his school’s feeder zone, initially advised researchers that the school’s zone would encompass a geographical area of a ‘1.5 km, 1.6 km, 1.7 km’ quadrant and those children who are nearest to the school are then admitted.²⁹² When quizzed by one researcher whether the neighbouring African township, which was clearly visible from his office window, would fall within this geographical quadrant, the principal was quick to rectify himself. He clarified that the school would be the starting point (and not the centre) of the quadrant which would then exclusively encompass the largely white neighbourhood on the one side of the school.²⁹³ This design would therefore completely and conveniently exclude the nearby African township.

The manner in which SGBs have been allowed to operate in the absence of a proper regulatory framework which addresses feeder zones head on has invariably resulted in much arbitrary and racialised line drawing by some schools.²⁹⁴ The use of gerrymandering to deliberately exclude impoverished black children, highlight the innate dangers in leaving it to individual SGBs to determine their feeder zones in a constitutionally and statutorily compliant way. Maintaining this haphazard and individualistic approach to school zoning inevitably opens the door to deliberate discrimination against the substantial majority of black South African children. This in turn creates a vicious cycle in which apartheid injustices are recycled at school level and in society beyond.

²⁹¹ Jansen JD ‘Access and Values in Education’ (2001) A paper presented at the “Saamtrek” Conference on Values, Education, and Democracy in the 21st century Kirstenbosch, Cape Town 790.

²⁹² Jansen J & Kruger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 53.

²⁹³ Jansen J & Kruger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 53.

²⁹⁴ Equal Education Law Centre, Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices (2013) para 23.

2.3 LANGUAGE POLICIES AND CULTURE

Aside from a SGB's general power to determine admission policies,²⁹⁵ section 6(2) of the Schools Act explicitly empowers SGBs to determine a language policy for their school, subject only to the Constitution, the Schools Act itself and the laws operating in the province in which the school is based. Since language and race are inextricably intertwined, a school's language of instruction can effectively operate to bar black children admission to a school. Racially discriminatory admissions practices in the public education system are therefore not limited to the misuse of feeder zones. Addressing the issue of school zoning would admittedly not eliminate some of these other practices. However, given the scope of this thesis, this section is limited to considering how the use of school language policies in conjunction with feeder zones based on geographical proximity compounds racial inequities within public education. Ntshoe speaks of this as the 'lock in, lock out' effect where black learners residing in townships are 'locked-into' feeder zones that mirror apartheid residential geography and 'locked out' from accessing HWS due to language obstacles and the cost of school fees.²⁹⁶ The harsh consequences which result where language policies and boundary manipulation coalesce to deny black children access to a good education is particularly poignant given South Africa's history of mass black student uprisings against the apartheid government's decision to impose Afrikaans as a medium of instruction in all schools.

Where the dominant population group surrounding a former Model-C school is black, a school may be able to skirt its feeder zone policy through decreasing the value it attaches to zoning as an admission criterion and weighting exclusionary language policies heavier. Winterberg Agricultural High, a former Model C school in Fort Beaufort in the Eastern Cape provides example of this practice. Winterberg High's admission policy formed the subject of legal challenge for its alleged discriminatory impact.²⁹⁷ At the time of the litigation, Winterberg had a predominantly white learner body despite that only 2.6 percent of the Fort Beaufort

²⁹⁵ Section 5(1) of the Schools Act.

²⁹⁶ Ntshoe I 'Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa' (2009) 15:2 *Southern African Review of Education with Production* 87.

²⁹⁷ *Mthetheleli Mana v School Governing Body for Winterberg Agricultural High School and Others*, Notice of motion (Case No. 1642/2017) 2. *Mthetheleli Mana v School Governing Body for Winterberg Agricultural High School and Other*, Founding Affidavit of Mthetheleli Mana (Case No. 1642/2017) 44. The matter was brought by the Legal Resource Centre. Rooney J 'Confronting Ongoing Racial Discrimination in Schools Admissions Policies in South Africa' – Oxford Human Rights Hub Blog (20 February 2017) Accessible at <http://ohrh.law.ox.ac.uk/confronting-ongoing-racial-discrimination-in-schools-admissions-policies-in-south-africa/> (accessed 1 November 2018).

population was white at the time.²⁹⁸ Although the school's feeder zone policy had centred on geographical proximity, Winterberg had managed to maintain its white make-up through an admission policy that favoured English and Afrikaans mother tongue speakers (the school's languages of learning and teaching). Residents of Fort Beaufort primarily speak isi-Xhosa as a mother tongue and this language is entwined with the race and culture of the isi-Xhosa people. Under Winterberg's then admission policy, English and Afrikaans home language children were privileged over local black isi-Xhosa mother tongue children regardless of whether they lived in the feeder zone.²⁹⁹ The admission policy was therefore skewed in favour of white and coloured children and discriminated against isi-Xhosa mother tongue children on the basis of race, culture and language. During the course of the litigation Winterberg acknowledged that its admission policy was discriminatory and agreed to change it.³⁰⁰ The school's admission policy was therefore amended to remove the preference given to learners beyond the feeder zone whose mother tongue was English or Afrikaans.³⁰¹ The lack of central regulation around the delineation of feeder zones and its proper implementation has opened up the space for HWS like Winterberg to mask racism through the use of language policies that ironically allow these schools to avoid serving the children of black communities even where these communities are situated in their immediate local. It has also resulted in those aggrieved by feeder zones turning to the courts for assistance.³⁰²

Entangled with the interplay between language and school admissions is the issue of school culture. It has been argued that there is the possibility for SGBs—as is the case in the northern suburbs of Cape Town—to be more restrictive when delineating their feeder areas, in an attempt to preserve a school's institutional character and culture.³⁰³ Transformative zoning

²⁹⁸ Rooney J 'Confronting Ongoing Racial Discrimination in Schools Admissions Policies in South Africa' – Oxford Human Rights Hub Blog (20 February 2017) Accessible at <https://ohrh.law.ox.ac.uk/confronting-ongoing-racial-discrimination-in-schools-admissions-policies-in-south-africa/> (accessed 1 November 2018).

²⁹⁹ *Mthetheleli Mana v School Governing Body for Winterberg Agricultural High School and Other*, Founding Affidavit of Mthetheleli Mana (Case No. 1642/2017) paras 8 and 24-26. Rooney J 'Confronting Ongoing Racial Discrimination in Schools Admissions Policies in South Africa' – Oxford Human Rights Hub Blog (20 February 2017) accessible at <http://ohrh.law.ox.ac.uk/confronting-ongoing-racial-discrimination-in-schools-admissions-policies-in-south-africa/> (accessed 1 November 2018).

³⁰⁰ Confirmed by applicant's instructing attorney Cameron McConnachie of the Legal Resources Centre.

³⁰¹ *Mthetheleli Mana v School Governing Body for Winterberg Agricultural High School and Others*, Notice of motion (2017) 2. *Mthetheleli Mana v School Governing Body for Winterberg Agricultural High School and Other*, Responding Affidavit of principal of Winterberg Agricultural High School (Case No. 1642/2017).

³⁰² *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212. *Mthetheleli Mana v School Governing Body for Winterberg Agricultural High School and Other* (Case No. 1642/2017). Equal Education Law Centre *Annual Report* (2012-2013) 14. Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) 21.

³⁰³ Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 522.

established at the provincial level would prevent these schools from using feeder zones in furtherance of such narrow and racially exclusive agendas.

2.4 FEEDER ZONES AND FEE EXEMPTIONS

The South African Schools Act provides that a school may charge fees where a resolution to do so is tabled at a general meeting of parents and approved by a majority of those parents in attendance and voting.³⁰⁴ A resolution to this effect must make provision for the amount of fees to be charged.³⁰⁵ Schools are required to apply a detailed formula, set out in the regulations relating to fee exemptions, to determine whether a parent should be exempt from the payment of fees either wholly, conditionally or in part.³⁰⁶ This is essentially a means based test. The Minister of Basic Education must also, via annual notice in the government gazette, establish national quintiles for public schools which a Member of the Executive Council for Basic Education (MEC) must use to identify schools that may not charge fees.³⁰⁷ The Minister has, through the introduction of Norms and Standards for School Funding (NNSFF), provided for five different quintiles that rank schools from the most (quintile 1) to the least (quintile 5) poor. Quintiles one to three are no fee schools.³⁰⁸ Schools that do charge fees are prohibited from turning away learners simply because their parents cannot afford to enrol them.³⁰⁹ Instead parents are to be informed about their right to apply for a fee exemption and the manner in which to do so.³¹⁰ Since fee-paying schools receive less in non-personnel funding, provincial government may at times compensate those schools who do in fact grant fee exemptions.³¹¹ Schools are to apply to the HoD for partial reimbursement in this regard.³¹² Compensation is intended to alleviate the strain which fee exemptions place on school budgets. However, schools often receive very little compensation or nothing at all. Even those provinces that by

³⁰⁴ Section 39(1) of the Schools Act.

³⁰⁵ Sections 39(2)(a) and 39(2) (b) of the Schools Act.

³⁰⁶ Exemption of Parents from Payment of School Fees regulations in GN 1293 GG 19347 of 12 October 1998. Promulgated by the Minister of Basic Education, after consultation with the Council of Education Ministers and the Minister of Finance, in terms of section 39(4) of the Schools Act.

³⁰⁷ Section 39(7) of the Schools Act.

³⁰⁸ Rinquest A and Dass S 'School fees' in Veriava F and Fish Hodgson TF 'Basic education rights handbook: Education Rights in South Africa' (2017) 143.

³⁰⁹ Section 5(3)(a) of the Schools Act.

³¹⁰ Section 3(1)(a) of the Exemption of Parents from Payment of School Fees regulations in GN 1293 GG 19347 of 12 October 1998.

³¹¹ Rinquest A and Dass S 'School fees' in Veriava F and Fish Hodgson TF 'Basic education rights handbook: Education Rights in South Africa' (2017) 152.

³¹² Sayed Y and Motala S 'Getting in and staying there: Exclusion and inclusion in South African schools (2012) 18:2 *Southern African Review of Education* 108-109. The possibility of a partial reimbursement was introduced under a 2011 amendment to the NNSFF.

practice reimburse, only provide schools with a negligible refund.³¹³ Schools thus have a strong financial incentive to keep the number of fee exemptions to a minimum,³¹⁴ and they are inclined to do so.³¹⁵

Many poor children are thus purposefully excluded from schools through the use of school zoning criteria in school admission policies.³¹⁶ Hunter records an instance where a KZN principal even went so far as to visit local addresses to check their veracity (whether they fell within the feeder area) where it was suspected that parents would be unable to pay fees.³¹⁷ The principal concerned would even measure the distance between the residence in question and his school in comparison to other nearby schools to try and exclude poor learners.³¹⁸ Similar behaviour can be observed in the 2006 case of two Durban schools. These two schools engaged in an acrimonious struggle over who was responsible for accepting a child with a foster parent.³¹⁹ Under the fee exemption regulations, a foster parent qualifies for an automatic fee exemption.³²⁰ The dispute concerned whether the distance from the school to the foster child's house should be calculated based on vehicle or foot.³²¹

Many schools contemplate a family's likely ability to pay the amount of fees they charge when devising their admission policies.³²² Hoadley draws the connection between a more privileged school's ability to define its own feeder area and the fee generating ability of the community so defined. Fee generating public schools benefit from the ability to fix more expensive school fees. The cost of school fees is largely based on the capacity of the school community to afford

³¹³ Rinquest A and Dass S 'School fees' in Veriava F and Fish Hodgson TF 'Basic education rights handbook: Education Rights in South Africa' (2017) 152.

³¹⁴ Fleisch B & Woolman S 'South Africa's unintended experiment in school choice: how the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act create the enabling conditions for quasi-markets in schools' (2006) 18:1 *Education and the Law* 32. Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 526.

³¹⁵ Lemon A 'Redressing school inequalities in the Eastern Cape, South Africa' (2004) 30:2 *Journal of Southern African Studies* 272. Lemon A 'Shifting geographies of social inclusion and exclusion: Secondary education in Pietermaritzburg, South Africa' (2005) 104:414 *African Affairs* 75. Arendse L 'The school funding system and its discriminatory impact on marginalised learners' (2011) 15 *Law, Democracy & Development* 351.

³¹⁶ Mestry R 'A critical analysis of the learners' constitutional rights to basic education in South Africa (2017) 82:3 *KOERS Journal* 3.

³¹⁷ Hunter M 'Racial desegregation and schooling in South Africa: Contested geographies of class formation environment and planning' (2010) 11:42 *Environment and Planning A: Economy and Space* 2648.

³¹⁸ Hunter M 'The Remaking Of Social-Spatial Hierarchies: Educational Choice and A South African City' (2013) *Paper for Panel on Education and the City Conference*, 29-31 August 2013 Berlin 27.

³¹⁹ Hunter M *Race for Education: Gender, White Tone, and Schooling in South Africa* (2019) 140.

³²⁰ Section 1(a)(i) of the Exemption of Parents from Payment of School Fees regulations in GN 1293 GG 19347 of 12 October 1998.

³²¹ Hunter M *Race for Education: Gender, White Tone, and Schooling in South Africa* (2019) 140.

³²² Fiske EB & Ladd HF 'Balancing public and private resources for basic education: school fees in post-apartheid South Africa' in *Changing class: Education and social change in post-apartheid South Africa* (2004) 72.

these fees. However, the school is capable of arranging the makeup of its school community through the establishment of its feeder area, the creation of its admission policies and the setting of its fees.³²³ Given the link between a school's feeder area and the fee-paying potential of the community it serves, it is unsurprising that schools (Gauteng not included) could, as warned by Rinquet and Dass, use their unregulated zoning powers to configure (and reconfigure) their boundary lines in a way that best excludes communities with a majority demographic most in need of a fee exemption.³²⁴ Since socio economic circumstances in South Africa remain strongly fixed along colour lines, those most in need of financial assistance are those families who are mostly black and poor. Thus, where gerrymandering occurs in the manner warned of, it occurs to the detriment of these already deeply disadvantaged black families.

Lemon points out that fierce competition amongst those outside the feeder zones of HWS for 'left over space' leaves very little chance for successful entry for the children of those families who do not stay in the historically white areas within which these schools are based.³²⁵ Lemon explains that it is the parents of learners at a school who have say over whether to charge fees,³²⁶ and most HWS do. Those parents unable to afford fees are entitled to a fee exemption. Given how highly sought after the few empty spaces (where they exist) are for children staying outside the feeder area, schools are easily able to allocate these spaces to parents capable of paying the fees.³²⁷ Lemon's claim is supported by the fact that 'only about 0,3% of students in the country receive fee exemptions'.³²⁸

There are schools that have been deliberately designing their feeder areas in a manner that extends the pool of potential fee-paying applicants and keeps the number of exempted learners to a minimum.³²⁹ Chetty points out the absurd lengths to which schools are prepared to go to achieve this. She refers to an instance where a school replaced the school gate with a wall to further the distance between the school and the more impoverished areas within its range. This was done with the intention of preventing poorer children from these impoverished

³²³ Hoadley UK 'For better or worse: school choice in a South African working-class context' in Chisholm L (ed) *Critical perspectives in South African education: Reconstituting the educational realm* (1999) 29.

³²⁴ Rinquet A and Dass S 'School fees' in Veriava F and Fish Hodgson TF *Basic education rights handbook: Education Rights in South Africa* (2017) 152.

³²⁵ Lemon A & Stevens L 'Reshaping Education in the New South Africa' (1999) 84:3 *Geographical Association* 231.

³²⁶ Section 39(1) of the Schools Act.

³²⁷ Lemon A & Stevens L 'Reshaping education in the New South Africa' (1999) 231.

³²⁸ Spaul N 'Equity: A price too high to pay?' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 8.

³²⁹ Lemon A 'Redressing school inequalities in the Eastern Cape, South Africa' (2004) 30:2 *Journal of Southern African Studies* 272.

neighbourhoods, whose parents are unable to pay fees, from gaining admission to the school.³³⁰ Ndimande asserts that some former Model C schools have managed to exclude black children through the use of both nefarious zoning practices and a ‘tendency to deny information about eligibility for school fee waiver’.³³¹ Although illegal, some schools have even gone so far as to bar any parents from outside the catchment area from applying for a fee exemption. A report by the EELC regarding fee exemptions records how

‘schools seldom inform parents of the exemption policies, and if they do so, it [is] done in such a way that it has the effect of discouraging their use or shaming parents into not applying for exemptions. Schools frequently sift poor learners during the application process to ensure that only parents who can guarantee full payment of fees are admitted. Furthermore, in some application forms it states that only parents who reside in the feeder area of the school may apply for exemptions from school fees, and that at certain schools parents are advised that they may apply for fee exemptions, but do so in such a way that emphasises the additional financial burden that this will place on other parents’.³³²

As long as fee charging schools remain part of South Africa’s education landscape, the inherent threat that schools will use their powers to establish and implement their own feeder zones as a means to evade their fee exemptions responsibilities persist.

2.5 APPLICATION OF FEEDER ZONES

Much arbitrariness also stems from the way in which these self-created zones are applied by schools in practice. Since schools (those in Gauteng now excluded) have been left to their own devices in this regard, the manner in which they have applied their feeder zones have varied. In the section that follows I consider some of these variations in the processing of admission applications. I focus, first, on the implementation of feeder zones as it relates to place of residence. Then, on how some schools have either applied their feeder areas inconsistently or selectively enforced these zones. A failure by some schools to define or clearly define their feeder areas has facilitated the arbitrary and covert application of feeder zones. This issue is

³³⁰ Chetty C ‘*An Ethnographic Exploration of the Day to Day Texture of the School Life of Poor Children*’ (unpublished PhD, University of KwaZulu-Natal, 2013) 153.

³³¹ Ndimande BS ‘Parental “choice”: The liberty principle in education finance’ (2006) 24:2 *Perspectives in Education* 151. See also Tikly L & Mabogoane T ‘Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa’ (1997) 43:2-3 *International Review of Education* 169.

³³² *M S v Head of Department, Western Cape Education Department and Others* 2017 (4) SA 465 (WCC) 150. Here the judge provides a summary of the EELC report in case. Equal Education Law Centre, Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices (2013) 31.3. This judgment, however, did not turn on feeder zones but rather the nature of the liability imposed on divorced and separated parents to pay their child’s school fees.

also explored. Finally, I discuss how some schools apply different and more onerous criteria when administering applications from learners beyond their feeder area.

2.5.1 Residents only

Lemon & Battersby-Lennard have found that schools in the well-off and historically white designated neighbourhood of Pinelands in the Western Cape have not allowed parents who are employed within the feeder zone to claim preferential admission on this basis. The researchers explain how Pinelands schools insist that it is the home, and not the work address of parents that counts.³³³ The resultant effect is to deny access to the children of those black parents who, although unable to afford housing in Pinelands, nevertheless work there. Jansen and Kriger in their more recent research point out that at least one of the three historically white primary schools located in Pinelands has persisted in deeming parent's work address irrelevant when implementing their feeder zones.³³⁴ The scholars attribute the school in question's stance to the location of the Old Mutual Insurance company (a giant in the industry) in the suburb of Pinelands. Old Mutual hires hundreds of coloured people.³³⁵ Jansen and Kriger argue that given these large numbers of middle-income coloured families working at Old Mutual, a relaxation of the feeder zone policy to include parents' work address would quickly turn the Pineland's school in question 'non-white'. These scholars argue that this particular school's feeder zone has been constructed in a manner to guard against this 'threat'.³³⁶

Disregarding a parent's place of employment where a feeder zone encompasses areas of wealth and privilege further compounds the spatial injustices created by the group areas legacy. The disqualification of children of domestic workers employed in the more affluent areas in which these schools are based would be a prime example of this. EE and EELC have similarly pointed out how schools 'in the more well-off areas rely on strict application of self-determined geographical feeder zones to only admit learners who live within the radius of the school' thus rendering all other learners ineligible for admission.³³⁷ This type of strict application of feeder

³³³ Lemon A & Battersby-Lennard J 99:4 *Geographical Review* 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 534.

³³⁴ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 54.

³³⁵ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 54.

³³⁶ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 54. Joubert, in her 2009 research on the 2001 Gauteng admission regulations, uncovered evidence of a Gauteng school which limited its intake to learners residing within the school's catchment area. Joubert R 'Policy-making by public school governing bodies: law and practice in Gauteng' (2009) 41:2 *Acta Academica* 242.

³³⁷ Equal Education and Equal Education Law Centre *Joint submission on the Basic Education Laws Amendment Bill – 2017* (2018) 85.

zones eliminates any opportunity for children living beyond these more affluent neighbourhoods to attend these HWS. This takes the racially disproportionate impact of using geographical proximity in the school admission process to the extreme.

Many of Cape Town's finest southern suburbs schools have gone beyond requiring that applicant families live within the catchment area. Instead, these schools insist that parents provide proof of ownership of a property falling within the school's feeder zone.³³⁸ This means that even those parents who cannot afford to buy in these prestigious areas but who are by the means to pursue a rental option to increase their children's chance of admission are left without that possibility.³³⁹ All the above inconsistencies in the implementation of feeder zones underscores the need to ensure some form of racial equity in the manner in which families are allocated to a particular feeder area where school zoning occurs.

2.5.2 Inconsistent application or selective enforcement

Bergvliet High provides an example of the arbitrary implementation of a feeder area. Bergvliet relies on the 'nearest school criterion' when processing admissions applications. The school's admission policy defines its feeder area as follows:

'Applicants for whom this is the nearest ordinary high school to their actual place of residence. That means the shortest distance by public road from the applicant's home to the nearest entrance to the school grounds, and this distance should be shorter than the corresponding distance to any other ordinary high school.'³⁴⁰

Not only is Bergvliet High's feeder zone defined purely in relation to residence (and hence further adversely affecting impoverished black children), but the school also implements its own policy in a contradictory and selective manner. EELC in its report on school admissions related problems to the WCED, identifies Bergvliet High as frequently undertaking an arbitrary approach when it comes to assessing proximity with reference to other schools within its locality.³⁴¹

Beckmann and Karvelas, after investigating the manner in which two former Model C Gauteng schools implemented their admission policies, discovered the selective enforcement by one

³³⁸ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020).

³³⁹ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020).

³⁴⁰ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) at 19.2.

³⁴¹ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) at 19.2.

school of the GDoE's then nearest school policy. The school in question was prepared to overlook this policy when administering the admissions applications of white children whilst simultaneously applying this policy to ensure the exclusion of black children. At the same time, white learners living in outer lying areas were being bussed in to attend this school.³⁴² The phenomenon of bussing in white children is by no means unique to the school studied by Beckman and Karvelas. The Mpumalanga Department of Education uncovered evidence of some Mpumalanga schools actively recruiting children from beyond their feeder area to 'keep black learners out'.³⁴³

Ntshoe's research points to the inconsistent application of criteria by Gauteng schools when applying their feeder zone policies. Of the 28 informants (consisting of parents, principals, teachers, deputy principals and SGB members), in Ntshoe's education district-based study in Gauteng,³⁴⁴ all expressed disquiet regarding inconsistencies in the application of school feeder areas that conceal racism. Concern was also raised that seemingly neutral standards as regards zoning continued to be employed in a manner that entrenched racial inequality in education.³⁴⁵ It is to be noted, though, that Ntshoe's research occurred prior to the establishment of the 2012 Gauteng regulations on learner admissions which created default feeder zones,³⁴⁶ and the 2019 admission regulations which amended these zoning provisions.³⁴⁷

The manner in which these schools were able to selectively enforce their feeder zone policies and, at times, employ busing tactics to disadvantage black children is indicative of the arbitrariness and unaccountability that pervades the admission process including the use of feeder zones.

³⁴² Beckman J & Karvelas N 'Stifling transformation through the manipulation of enrolment: A case study of two public high schools in Gauteng Province: research article' (2006) 1:2 *Africa Education Review* 25.

³⁴³ The Department of Basic Education *Educating for Our Common Future: Building Schools for an Integrated Society: A Guide Book for Principals and Teachers* (2001) DBE 5. Mafumo T & Foncha J 'Managing racial integration in South African public schools: In defence of deliberative racial integration' (2016) 14:2 *Gender and Behaviour* 7497.

³⁴⁴ The 28 informants in Ntshoe's study consisted of parents, principals, teachers, deputy principals and governing body members. Ntshoe I 'Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa' (2009) 15:2 *Southern African Review of Education with Production* 94.

³⁴⁵ Ntshoe I 'Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa' (2009) 15:2 *Southern African Review of Education with Production* 94.

³⁴⁶ Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012

³⁴⁷ Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

2.5.3 A failure to define feeder areas and malleable feeder areas

A ‘considerable majority’ of Western Cape schools refer to ‘residential proximity’ as a relevant factor in their admissions policy but then fail to define their feeder area.³⁴⁸ A previous policy of Rondebosch Boys’ High bears example of this. Rondebosch Boys’ failure to specify the feeder area in their admissions policy resulted in children being randomly turned away from the school under the guise of falling outside the feeder zone.³⁴⁹ In a particular instance, a child was denied admission to Rondebosch Boys, after his father had also applied for a fee exemption when seeking to enrol him. The application was supposedly rejected on the grounds that the child lived outside the school’s catchment area, yet it was subsequently revealed that a neighbour’s child had been accepted for that same year.³⁵⁰ The matter eventually reached the Western Cape High Court. Amongst the relief sought was that the Western Cape MEC be compelled to ‘determine feeder zones that promote equality in terms of access to schooling’ in the province.³⁵¹ The case was withdrawn after Rondebosch Boys’ eventually agreed to accept the learner.³⁵² Attempts were made to obtain information from Rondebosch Boys’ as to the school’s current feeder area. This included a request for access to the school’s current admission policy which could not be located on its website. However, Rondebosch Boys’ was not forthcoming with this information. It seems that the school continues to operate in a clandestine way as regards its feeder zone. Even where catchment areas are specified by schools, these ‘are often poorly defined.’³⁵³ The failure of some schools to clearly define their feeder areas exemplifies the arbitrary and surreptitious manner in which feeder zones have at times been established and enforced.

Such failure is compounded by the unwillingness of some schools, such as Rondebosch Boys’, to make their policies publicly available. Parents, communities and researchers should not be required to embark on a fishing expedition to determine which areas constitute the catchment areas for which schools or whether zoning has even occurred. Fortunately, Gauteng’s feeder zones are now made publicly available through the Gauteng Department of Education’s

³⁴⁸ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) para 21.

³⁴⁹ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) para 21.

³⁵⁰ Equal Education Law Centre *Annual Report* (2012-2013) 14.

³⁵¹ Equal Education Law Centre *Annual Report* (2012-2013) 14.

³⁵² Equal Education Law Centre *Annual Report* (2012-2013) 15.

³⁵³ Wills G ‘Principal Leadership Changes in South Africa: Investigating their Consequences for School Performance’ (2016) A working paper 1/16 of the Department of Economics and the Bureau for Economic research at the University of Stellenbosch 12-13.

website. However, the same does not occur in the Western Cape or KZN. Even where schools have defined their feeder area, this has not necessarily translated into the consistent application thereof in their admissions process.³⁵⁴ Given the haphazard and hazy approach to school zoning thus far, it is unsurprising that the Minister of Basic Education, Angie Motshekga, has herself confessed to Parliament that although

‘schools are expected to provide reasons for declining any application. It is not possible for districts to conclusively determine that a learner was excluded from a school on the basis of residential area’.³⁵⁵

To the Minister’s credit, schools *can* easily obscure their reasons for refusing admission. This reality underscores the need for reform in the area of school admissions and more particularly feeder zones.

2.5.4 Double standards for out-of-zone learners

Lemon and Battersby-Lennard, after conducting a study of 14 Cape Town schools concluded that, despite variation in selection criteria, schools are ‘commonly much more selective’ when considering admissions applications stemming from outside their main feeder area.³⁵⁶ Academic criteria and sporting aptitude of these applicants are examples of the additional factors considered. Principals interviewed by these researchers employed euphemistic terms when describing this approach. Principals’ stances included that those learners who had been accepted from outside the catchment area are the ones that ‘would benefit from being here’, ‘fit in’ or have the potential to be nurtured.³⁵⁷ Bartlett’s study of a HWS shows this same admission double standard of requiring higher academic results from out-of-zone learners.³⁵⁸ Bartlett states that it appears that the reasoning behind this additional admission requirement by the school in case may have been the school’s view that black learners entering the school would struggle academically as they received inferior education provisioning in ‘black primary schools’.³⁵⁹ The irony is that learners applying from outside a school’s catchment area are

³⁵⁴ Equal Education Law Centre *Report to the Western Cape Education Department on Western Cape School Admission Policies and Practices* (2013) para 19.2.

³⁵⁵ Parliamentary Question 135 to the Minister of Basic Education ‘Internal Question Paper 02/2012’ (17 February 2012).

³⁵⁶ Lemon A & Battersby-Lennard J ‘Overcoming the apartheid legacy in Cape Town schools’ (2009) 99:4 *Geographical Review* 532.

³⁵⁷ Lemon A & Battersby-Lennard J ‘Overcoming the apartheid legacy in Cape Town schools’ (2009) 99:4 *Geographical Review* 532.

³⁵⁸ Bartlett H ‘*Exploring the ‘educational engagement’ processes at a Former Model C high school in Cape Town* (unpublished Master’s thesis, University of Stellenbosch, 2016) 58.

³⁵⁹ Bartlett H ‘*Exploring the ‘educational engagement’ processes at a Former Model C high school in Cape Town* (unpublished Master’s thesis, University of Stellenbosch, 2016) 54.

already unlikely to secure a place at their desired school. Placing the bar even higher for these learners does a double injustice to them. It is also just one of the many arbitrary practices that have arisen in the murky area that characterises the drawing up and implementation of feeder zones by individual schools.

2.6 FEEDER PRIMARY SCHOOLS: A PIPELINE FOR PRIVILEGE

Numerous South African secondary schools make use of ‘feeder primary schools’ when processing admission applications.³⁶⁰ This notwithstanding, there appears to be no reference to feeder primary schools in the entire national legislative and policy framework relating to school admissions. However, the concept of feeder primary schools does find reflection in the North West Regulations on Learner Admissions.³⁶¹ Under these regulations, an entry phase learner enjoys preferential admission by virtue of having attended the feeder primary school to the secondary school which learner has applied to attend.³⁶² It is the North West MEC who is empowered to designate a specific school or schools as feeder primary schools in relation to a learner applying for admission to a specific secondary school.³⁶³ No evidence could be sourced of the MEC having made such a designation. The use of feeder primary schools to confer preferential admission carry the inherent danger of advancing racially inequitable access to education twice over. This occurs where historically white primary schools use geographical proximity as a criterion for admission thus admitting more well-off and white learners at the expense of impoverished black ones. The disadvantage suffered by impoverished black learners that occurs at this point is automatically duplicated when this same learner cohort enjoy preferential admission to designated historically white secondary schools. In this way feeder primary schools serve as a pipeline for white and class privilege.

2.7 DESPERATE ATTEMPTS BY PARENTS TO CIRCUMVENT FEEDER ZONES

Parents are prepared to go to great lengths to ensure that feeder zones do not serve as a barrier to their children accessing a quality education. For instance, the news reports of a young couple living in Rondebosch who sold their three-bedroom house and purchased a flat a mere 1.5 km

³⁶⁰ McKay T ‘The geography of education: From race to class apartheid?’ in Knight J and Rogerson C (eds) *The geography of South Africa - 2019: Contemporary changes and new directions* (2019) 160.

³⁶¹ Regulations 1, 4(2) and 6(2)(a)(ii) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary, 125, GN 7094 of 14 March 2013 (North West).

³⁶² Regulations 1, 4(2) and 6(2)(a)(ii) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary, 125, GN 7094 of 14 March 2013 (North West).

³⁶³ Regulation 4(2) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary, 125, GN 7094 of 14 March 2013 (North West).

from their previous residence. The sole purpose of their shifting homes was to be situated nearer to the Little Bosch Grade R and Activity Centre. Little Bosch is a pre-primary school that serves as a feeder school to Rondebosch Boys' Preparatory School. The father explained that 'I didn't have to move but my son's place is not guaranteed unless I am in the catchment zone'.³⁶⁴ A principal of an eminent Rondebosch school explained how

'[on]e of our parents bought a flat here in Devonshire and it was a bona fide case. They bought the flat; they owned the property. They actually lived there, we even did check that. But the moment they're in the school, they move'.³⁶⁵

Another news article speaks of a teacher in Milnerton who took her nine-year-old niece from Khayelitsha to stay with her so that her niece could access a good school.³⁶⁶ Apparently, the case of the Milnerton teacher is not an isolated instance as there are parents who are sending their children to stay with other family members in the hopes that they stand a better chance of accessing a quality education by virtue of living there.³⁶⁷

Jansen and Kriger in their research discuss how some southern suburbs schools in Cape Town do accept families who rent within the feeder zone. This has led to parents of lesser means going so far as to rent properties in the southern suburbs even though they cannot afford the monthly rental. These parents then sublease the properties to someone who can pay and then use the lease agreement concluded with the owner as proof of address in their child's admission application. Jansen and Kriger refer to this set up as a 'a complex scheme, but one that demonstrates again the lengths to which desperate parents go to enable their child to attend a good school'.³⁶⁸

Some parents even falsify addresses in desperation to enrol their children in certain schools.³⁶⁹ Schools can be unrelenting in verifying and re-verifying an address specified in an admission

³⁶⁴ Govendor P 'Here's a crib sheet on the right suburb for the best school: Parents helped to find homes giving access to top state schools' *Sunday Times* 17 June 2018 available at <https://www.timeslive.co.za/sunday-times/news/2018-06-16-heres-a-crib-sheet-on-the-right-suburb-for-the-best-school/> (accessed 19 February 2022).

³⁶⁵ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 66.

³⁶⁶ Fredericks I & Tswana Y 'Fines, jail time for parents who lie?' *IOL* 14 October 2015 available at <https://www.iol.co.za/news/fines-jail-time-for-parents-who-lie-1929582> (accessed 24 December 2021).

³⁶⁷ Fredericks I & Tswana Y 'Fines, jail time for parents who lie?' *IOL* 14 October 2015 available at <https://www.iol.co.za/news/fines-jail-time-for-parents-who-lie-1929582> (accessed 24 December 2021).

³⁶⁸ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 65.

³⁶⁹ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 57. Jasen L 'Integration at Schools to be Forced' *The Mercury – IOL* 13 July 2021 available at <https://www.iol.co.za/news/politics/integration-at-schools-to-be-forced-1340633> (accessed 9 December 2021).

application. One prestigious girls' school in the Western Cape southern suburbs explained, during an interview with researchers, that the school 'interrogates' both parents and children regarding where they live. The easiest of these interrogation techniques involves simply questioning a child about where they stay and more particularly asking them to name their address.³⁷⁰ The school in question admits to expending many hours on this interrogation work. Hunter records how some Durban schools are even bold enough to make house visits to applicants to authenticate their address.³⁷¹ Proposed amendments to the Schools Act seek to address the falsification of addresses in the admission process. Should the suggested amendments be made law, any parent of a learner as well as any other individuals who consciously provide false or misleading information or who tender a forged document in relation to a prospective learner's admission application will be rendered guilty of a crime. If convicted, such a person could receive a fine or six months imprisonment.³⁷² Criminalising parents for the use of fake addresses is at odds with the apartheid spatial and educational legacy and the structural elements that induce black and poor parents to resort to such desperate actions.

2.8 CONCLUSION

This chapter has documented some of the abusive school zoning practices that the thesis aims to address. This provided a background for understanding the issue addressed in the thesis. The following chapter unpacks the right to basic education and the fact that it requires equal access to quality education. This is necessary to show that the state has a duty to intervene in current school zoning practices. It is also necessary to set the groundwork for arguing that the state should use transformative zoning to fulfil its constitutional duties in respect of basic education.

Fredericks I & Tswana Y 'Fines, jail time for parents who lie?' *IOL* 14 October 2015 available at <https://www.iol.co.za/news/fines-jail-time-for-parents-who-lie-1929582> (accessed 24 December 2021).

³⁷⁰ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 65.

³⁷¹ Hunter M *Race for Education: Gender, White Tone, and Schooling in South Africa* (2019) 140.

³⁷² Section 26(c) Draft Basic Education Law Amendment Bill GN 1101 GG 41178 of 13 October 2017.

CHAPTER 3

AN EDUCATION IN THE RIGHT TO BASIC EDUCATION:

SECTION 29(1)(a) OF THE CONSTITUTION

3.1 INTRODUCTION

The Freedom Charter famously proclaims that '[t]he doors of learning ...shall be opened!' and that '[e]ducation shall be . . . equal for all children.'³⁷³ Fast forward 68 years and South African realities reveal anything but. The doors of the more privileged public schools across the country remain sealed off from most black children of less fortunate means. Instead, thousands of these children must enter dilapidated schools through dilapidated school gates.³⁷⁴ Once inside, they are met with decrepit infrastructure, disgusting toilets and a lack of laboratories and libraries.³⁷⁵ The enduring ramifications of apartheid schooling can be witnessed not only in the systematic difficulties of poor infrastructure but also in the inferior level of basic education for the majority of South Africa's black children.³⁷⁶ The inequities that pervade South Africa's public education system are easy to identify.

The purpose of this chapter is to show that access to basic education in the manner described above does not meet the requirements set by the right to basic education in section 29(1)(a) of the Constitution. Instead, the right requires that the education accessed must be of an adequate *quality*. Moreover, everyone must have *equal* access to education. Together these elements of the right require the state to ensure *equal* access to *quality* education. The Constitutional Court has described the right to basic education as an 'immediately realisable' right.³⁷⁷ Thus the state has a duty to ensure that children enjoy immediate access to a quality education.

Based on the reality sketched out above, very few schools offer the quality education required in terms of this right. It is the state's duty to ensure that all schools offer quality education. Essentially, exclusionary zoning may have the effect that many impoverished black children are prevented from accessing quality education. On the flip side, transformative zoning could

³⁷³ The Freedom Charter, 25 and 26 June 1955.

³⁷⁴ Draga L 'Infrastructure and equipment' in Veriava F and Fish Hodgson *TF Basic Education Rights Handbook: Education Rights in South Africa* (2017) 238.

³⁷⁵ Draga L 'Infrastructure and equipment' in Veriava F and Fish Hodgson *TF Basic Education Rights Handbook: Education Rights in South Africa* (2017) 238.

³⁷⁶ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 42.

be used by the state as a tool to fulfil its immediate duty of ensuring equal access to quality education.

Section 39(1) of the Constitution requires courts to consider the values underlying the Constitution, as well as international law to interpret the rights in the Bill of Rights. In addition, the courts have considered the Interim Constitution in its interpretation of the final Constitution.³⁷⁸ Furthermore, the Constitutional Court has favoured a purposive approach to interpreting rights.³⁷⁹ It has also stressed the use of other constitutional rights, particularly other fundamental rights, in interpreting the rights in the Bill of Rights.³⁸⁰ This chapter uses these measures to illustrate that the right to basic education should be interpreted to require equal access to quality education.

3.2 THE RIGHT TO BASIC EDUCATION AND THE INTERIM CONSTITUTION

Section 32(a) of the Interim Constitution reads '[e]very person shall have the right to a basic education and to equal access to educational institutions'. Notably, unlike the provision on basic education in section 29(1)(a) of the present Constitution, section 32(a) contains an express right to equal access to educational institutions. However, one could potentially argue that in view of the presence of the equality clause in section 9 of the Constitution, the inclusion of such wording would have been superfluous. This is because section 9(1) provides that everyone has the right to equal benefit of the law and section 9(2) makes it clear that this includes 'the full enjoyments of all rights and freedoms' (including the right to basic education). The remainder of this chapter is dedicated to determining the meaning to be attached to the right to basic education under section 29(1)(a). This includes an investigation into whether section 29(1)(a) confers such a right of 'equal access to educational institutions' despite the discrepancies with the language of the basic education clause under the interim Constitution.

³⁷⁸ *AB and Another v Minister of Social Development* 2017 (3) BCLR 267 (CC) 55-62.

³⁷⁹ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) 9.

³⁸⁰ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) 10.

3.3 THE PURPOSES OF THE RIGHT TO EDUCATION

The purposes a fundamental right is designed to serve must also inform its meaning.³⁸¹ The purposes of the right to basic education reveal that section 29(1)(a) of the Constitution must be understood to entail the right to a basic education of a particular quality. The standard of education demanded by this section is the type of education capable of facilitating the fulfilment of the purposes of the right to basic education. It is for this reason that the purposes of the right are discussed below.

The right to basic education serves as an entrance right as it is vital to the fulfilment of other rights.³⁸² Although described as a socio-economic right and a cultural right it is, in several ways, also a civil and political right. This is because it is essential to the effective and complete realisation of these rights as well.³⁸³ The right to basic education can also be characterised as an ‘empowerment right’.³⁸⁴ It is primarily through education that those who live on the fringes of society can free themselves from the shackles of poverty.³⁸⁵ Particularly in the case of women and girls, education serves as ‘an agent of family health and nutrition.’³⁸⁶ Education also affirms and nurtures ‘a child’s personality, talents and mental and physical abilities to his or her fullest potential.’³⁸⁷ In so doing it gives effect to the constitutional right to human dignity.

³⁸¹ *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* (1) BCLR 14 (CC) 42.

³⁸² Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10 (ICESCR Committee General Comment 13). The Committee on ICESCR is tasked with ensuring that state parties to the International Convention on Economic Social and Cultural Rights uphold the right to education. In this regard it has issued General Comment 13 in which elaborates on the meaning of the right to education and emphasises its significance. Section 6 UNCRC Committee General Comment 1: The Aims of Education (art 29) UN Doc CRC/GC/2001/1. The Committee on the Rights of the Child is an international body of experts tasked with, amongst others, supporting the understanding of and familiarity with the contents of the Convention on the Rights of the Child. In this regard it has issued General Comment 1 which elaborates on the aims of education.

³⁸³ Section 2 of the ICESCR Committee General Comment 11: Plans of Action for Primary Education (art 14) UN E/C.12/1999/4.

³⁸⁴ Section 1 of the ICESCR Committee General Comment 13. The Constitutional Court has relied on General Comment 13 when discussing the right to education. See *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 41.

³⁸⁵ Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10. The Constitutional Court has described education as ‘the key to a better life’. See *AB and Another v Pridwin Preparatory School and Others* 2020 (9) BCLR 1029 (CC) 1.

³⁸⁶ United Nations Press Release ‘Secretary-General stresses need for political will and resources to meet challenge of fight against illiteracy’ 4 September 1997 available at <https://www.un.org/press/en/1997/19970904.SGSM6316.html> (accessed 11 April 2021).

³⁸⁷ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 4. In this regard, the Constitutional Court relies on the Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1990) (CRC). South Africa ratified the CRC in 1995. Article 11(2)(a) of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC). South Africa ratified the ACRWC in 2000. *AB and Another v Pridwin Preparatory School and Others* 2020 (9) BCLR 1029 (CC) 1. In addition, article 13(3)(a) of the African Youth Charter refers to a child’s emotional abilities. African Youth Charter (2006) 2009 (AYC). South Africa ratified the AYC in 2009.

It lays the groundwork for a child's lifelong learning and employment prospects,³⁸⁸ and enables them to enjoy their fundamental right to select 'their trade, occupation or profession freely.'³⁸⁹ Education also facilitates critical thinking and empowers individuals to engage in active citizenship and the democratic process.³⁹⁰ It therefore supports fundamental rights and democracy.³⁹¹ Education also contributes towards an enlightened mind and thus the ability to enjoy the pleasures of human life.³⁹²

It is predominantly through the medium of education that social ills can be eradicated. Education plays a crucial role in the battle against the sexual exploitation of children.³⁹³ It also protects children from forced and hazardous labour.³⁹⁴ In the African context, appropriately tailored education serves as a means to ready the African child to exist in a spirit of tolerance, shared respect, understanding and friendship amongst the diverse religious and ethnic groupings on the continent.³⁹⁵ Education is therefore vital to the eradication of the racial, ethnic and religious intolerance that has fuelled the conflicts which ravish Africa. Moreover, an educated population is core to the preservation of the environment.³⁹⁶

Education has been framed as the 'engine of equal opportunity.'³⁹⁷ This is as a result of its potential to propel South Africa towards a society in which all have an equal chance of success. Education is fundamental to achieving the transformation of South Africa's deeply unequal society inherited from colonialism and apartheid. In *Juma*, Nkabinde J explained that given the terrible educational legacy of apartheid the importance of particularly basic education to social advancement and personal growth cannot go unobserved.³⁹⁸ In *Section 27 and Others v*

³⁸⁸ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 43.

³⁸⁹ Section 22 Constitution.

³⁹⁰ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) 311.

³⁹¹ Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10.

Article 29(1)(b) of the CRC. Article 11(2)(b) of the ACRWC. Article 13(3)(b) AYC (2006) 2009.

³⁹² Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10.

³⁹³ Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10.

³⁹⁴ Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10.

³⁹⁵ Article 11(2)(d) of the ACRWC.

³⁹⁶ Section 1 of the ICESCR Committee General Comment 13: The Right to Education (art 13) UN Doc E/C.12/1999/10. Article 29(1)(e) of the Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1990). Article 11(2)(g) of the ACRWC. Article 13(3)(e) of the AYC.

³⁹⁷ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) 121.

³⁹⁸ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 42.

Minister of Education and Another the Gauteng North High Court elucidated on the link between education and the need to transform South African society:

‘[I]f regard be had to the history of an unequal and inappropriate educational system, foisted on millions of South Africans for so long, and the stark disparities that existed and continue to exist in so many areas and sectors of our society. Education takes on an even greater significance. It becomes at the makro[sic] level an indispensable tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a sine qua non to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society.’³⁹⁹

Interpreting section 29(1)(a) from a purposive angle indicates that the right to a basic education entails the right to a form of education capable of accomplishing the basic aims of individual and societal progress.⁴⁰⁰

Under a purposive interpretation, the right to basic education should be understood as a right to the type of education that can empower the individual to successfully contribute towards rendering South Africa a more egalitarian society. Instead of promoting social equality, however, South Africa’s basic education system continues to feed social inequality and perpetuates historical disadvantage.⁴⁰¹ In the South African setting, racially skewed educational access thus serves rather as a treacherous engine driving unequal opportunity. This engine operates to the detriment of the overwhelming majority of black children who are condemned to poorly resourced and dysfunctional schools. Tragically, the education system has failed to provide these children with the opportunity to enjoy their fundamental right to a basic education.

The purposive interpretation of the right to basic education indicates that the right requires equal access to quality education. It is only through this, that the purposes of the right can be achieved.

3.4 VALUES UNDERLYING THE BILL OF RIGHTS

The founding clause of the Constitution explains that South Africa is established on the values of ‘[h]uman dignity, the achievement of equality and the advancement of human rights and

³⁹⁹ *Section 27 and Others v Minister of Education and Another* 2013 (2) BCLR 237 (GNP) 5.

⁴⁰⁰ *McConnachie C & McConnachie C* ‘Concretising the right to basic education’ (2012) 129:3 *South African Law Journal* 566.

⁴⁰¹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 2. *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 2.

freedoms'.⁴⁰² Section 7(1) of the Constitution further provides that the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom'. The Bill of Rights is thus intended to uphold these values and should be interpreted with this purpose in mind. The necessity for such an interpretive approach is made clear by section 39(1)(a) of the Constitution. This section states that any court called to interpret a right in the Bill of Rights must do so in a manner that promotes 'the values that underlie an open and democratic society based on human dignity, equality and freedom'. A court when interpreting the fundamental right to a basic education must, therefore, in the process promote the values of equality and human dignity. Furthermore, section 39(2) provides that a court 'when interpreting any legislation' (including the Bill of Rights) must do so in a manner that promotes 'the spirit, purport and objects of the Bill of Rights.' Constitutional values therefore have a significant role to play in understanding the nature and content of the right to basic education.

Equality as a value derives support from the Constitution's preamble. The preamble requires equality between all races and sexes and envisions a country where everyone can have access to and enjoy their constitutional rights and freedoms.⁴⁰³ The value of equality demands that the law be employed in a fair and equitable manner.⁴⁰⁴ This would include the equitable application of the right to a basic education in section 29(1)(a). Equality articulated as a value encapsulates the promise of transforming South Africa's past and present to arrive at an improved future.⁴⁰⁵ The value of equality is key to notions of economic and social change.⁴⁰⁶ Achieving social change obliges the state to guarantee equal access to certain social goods such as education.⁴⁰⁷ Section 29(1)(a) should therefore be interpreted as conferring on everyone a right to equal access to a quality basic education.

The value of equality must be understood as "substantive equality" as expressed in the country's Constitution.⁴⁰⁸ Substantive equality recognises the continuous adverse effects of

⁴⁰² Section 1(a) of the Constitution.

⁴⁰³ Mashele R 'The right to equality under South Africa's transformative constitutionalism: a myth or reality' (2015) 2015:2015 *Acta Universitatis Danubius Juridica* 28-29.

⁴⁰⁴ Moosa F 'Understanding the "Spirit, purport and objects" of South Africa's Bill of Rights' (2018) 4:22 *Journal of Forensic, Legal & Investigative Sciences* 5 and 6.

⁴⁰⁵ Mashele R 'The right to equality under South Africa's transformative constitutionalism: a myth or reality' (2015) 2015:2015 *Acta Universitatis Danubius Juridica* 28-29.

⁴⁰⁶ Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23:2 *South African Journal on Human Rights* 254 and 255.

⁴⁰⁷ Mashele R 'The right to equality under South Africa's transformative constitutionalism: a myth or reality' (2015) 2015:2015 *Acta Universitatis Danubius Juridica* 28.

⁴⁰⁸ For a discussion of the meaning of substantive equality in the South African context see Albertyn C 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34:3 *South African Journal on Human Rights*.

historically rooted unfair discrimination and the need to remedy them to prevent these injustices from becoming further entrenched or even permanent.⁴⁰⁹ Substantive equality demands that positive steps be adopted to ‘actively redistribute resources and provide benefits’ to those historically disadvantaged by unfair discrimination.⁴¹⁰

The redress aspect of substantive equality is explained by Moseneke J in *Minister of Finance and other v Van Heerden*:

‘[W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.’⁴¹¹

Moreover, substantive equality suggests that access to basic education would not be equal if the quality of the education accessed is not equal. Substantive equality, therefore, illustrates how the ideas of equality and quality are intricately linked.

Similarly, the value of human dignity requires interpreting the right to basic education as that of equal access to quality education. For one, race-based discrimination affronts one’s dignity.⁴¹² Hence, implementation of the right in a way that unfairly discriminates on the grounds of race would not be in line with the value of dignity. Moreover, respect for dignity requires that people be enabled to reach their full potential. In *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others*, Justice Ackermann explains:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.⁴¹³

⁴⁰⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) 60.

⁴¹⁰ *King N.O. and Others v De Jager and Others* 2021 (5) BCLR 449 (CC) 229.

⁴¹¹ *Minister of Finance and other v Van Heerden* 2004 (11) BCLR 1125 (CC) 31.

⁴¹² *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) 47.

⁴¹³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) 49.

Dignity, as a value, thus supports the above purposive interpretation of the right to basic education, which requires the fulfilment of the right in a way that allows children to reach their full potential. This requires an interpretation of the right that entails equal access to quality education.

3.5 INTERNATIONAL LAW AND OTHER INTERNATIONAL INSTRUMENTS

The right to education was recognised at the international level as early as 1948 in the Universal Declaration of Human Rights (UDHR). The UDHR provides that ‘everyone has a right to education’.⁴¹⁴ This section explores how international law supports the interpretation of the right to basic education as a right of *equal* access to *quality* education. These instruments are relied upon because section 39(1)(b) of the Constitution requires a court to consider international law when interpreting rights in the Bill of Rights.⁴¹⁵ International law should therefore inform whether the right to basic education in section 29(1)(a) should be interpreted as requiring equitable access to a quality basic education. It should also inform whether the use of geographically based feeder zones by South Africa’s historically white schools (HWS) constitutes a violation of section 29(1)(a).

The following section illustrates how the right to basic education found in the ICESCR has been interpreted to require equal access to quality education. The focus is on the ICESCR since this is the primary international instrument entrenching the right to basic education. Thereafter, several international and regional instruments are discussed to support the finding that international law requires the right to basic education to be interpreted as equal access to quality education. Finally, the findings of the UN Special Rapporteur on the Right to Education are explained to show that these findings recommend reform measures which could potentially include transformative zoning.

Where the international instruments elaborate on the meaning of equal access to quality education, these are applied to the South African context to provide preliminary insight into whether South Africa is complying with its duty. This lays the groundwork for the discussion in Chapter 4, where this is considered in more detail.

⁴¹⁴ Article 26 of the Universal Declaration of Human Rights, 1948 UN General Assembly Resolution 217 A (III), A/RES/3/217 A, 10 December (1948).

⁴¹⁵ Section 39(1)(b) of the Constitution.

3.5.1 The ICESCR and the 4-A framework

Article 13 of the ICESCR entrenches the ‘right of everyone to education’.⁴¹⁶ Similar to the purposive interpretation of section 29(1)(a), it requires education that is ‘directed to the full development of the human personality and the sense of its dignity and enables ‘all persons to participate effectively in a free society’.⁴¹⁷ This shows an emphasis on the quality of education required. General Comment 11 on Plans of Action for Primary Education, adopted by the Committee on Economic, Social and Cultural Rights, emphasises that the reference to education under the ICESCR is, amongst others, a reference to an education which is ‘adequate in quality’.⁴¹⁸

General Comment 13 on the Right to Education of the Committee provides that all forms of education, regardless of what stage, should display the following four inter-connected and vital elements ‘availability’, ‘accessibility’, ‘acceptability’ and adaptability.⁴¹⁹ The following section adopts the 4-A framework under General Comment 13 to give meaning to the content of the right to basic education under section 29(1)(a) of the Constitution.

3.5.1.1 Availability

General Comment 13 explains that the element of ‘availability’ requires that educational institutions be both ample and functional.⁴²⁰ This element emphasises the requirement of *equal* access to an education of a certain quality. Not only should everyone be able to access education, the quality of the education accessed must be adequate.

In the South African setting, the South African Schools Act makes it the responsibility of the provincial education MECs to ensure that there are sufficient spaces available for every child within their province to attend school.⁴²¹ The Constitutional Court has explained that securing enough school spaces implies that ‘proactive and timely steps’ be taken well in advance of the commencement of a new academic year.⁴²² Despite this duty, news reports abound about the lack of a sufficient number of schools to accommodate all learners in urban provinces such as

⁴¹⁶ Article 13(1).

⁴¹⁷ Article 13(1).

⁴¹⁸ Section 6 of the ICESCR Committee General Comment 11: Plans of Action for Primary Education (art 14) UN *E/C.12/1999/4*.

⁴¹⁹ Section 6 of the ICESCR Committee General Comment 13.

⁴²⁰ Section 6(a) of the ICESCR Committee General Comment 13.

⁴²¹ Section 3(3) of the South African Schools Act 84 of 1996.

⁴²² *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 103.

the Western Cape and Gauteng.⁴²³ Intolerably overcrowded classrooms is also a common reality in rural areas such as the remote areas of the Eastern Cape.⁴²⁴ More recently, the Equal Education Law Centre (EELC) brought a successful challenge against the Western Cape Education Department (WCED) for its failure to secure spaces for unplaced learners in the province.⁴²⁵

The implementation of feeder zones based solely on geographical proximity in the face of such a chronic shortage of space within the education system is particularly problematic. This is because, through its exclusivity, these zones condemn disenfranchised black learners to already significantly overcrowded schools. Feeder zones, when used in this manner, potentially undermine the right to basic education for all those adversely affected in this way. This is not to say that historically privileged schools should be burdened in such a way that they are unable to provide an adequate education to the learners attending these schools. Addressing the racially skewed effect of feeder zones also does not absolve government from the legal duty to build sufficient schools and improve existing ones. However, it must be recognised that HWS have their role to play in ameliorating the load of a massively overloaded and highly racially inequitable education system.

As far as functionality goes, HWS still benefit from comparatively luxurious resources, infrastructure and other facilities whilst the overwhelming majority of black learners attend schools with overcrowded conditions and unsafe dilapidated infrastructure.⁴²⁶ The Minister of Basic Education (Minister) has introduced national regulations which set certain minimum infrastructural norms for all schools and deadlines within which they are to be achieved.⁴²⁷ These include sufficient and suitable water supply, adequate sanitation facilities, some type of power supply, perimeter fencing, recreational and sporting facilities, libraries, laboratories,

⁴²³ 'Not enough schools to place extra 19 000 learners, says WCED' *IOL* 18 March 2021 available at <https://www.iol.co.za/education/schools/not-enough-schools-to-place-extra-19-000-learners-says-wced-d5331e0a-b066-42ac-89d8-a43bbd50d5a9> (accessed 2 September 2022). Bendile D 'There simply aren't enough schools in Gauteng: Close to 20,000 pupils in Gauteng are yet to be placed after the 2016 academic year started last week' *EWN* 18 January 2016 available at <https://ewn.co.za/2016/01/18/Basic-Education-There-simply-arent-enough-schools-in-Gauteng> (accessed 2 September 2022).

⁴²⁴ De Waal M 'A school journey into Eastern Cape's darkest heart' *Daily Maverick* 30 April 2013 available at https://www.dailymaverick.co.za/article/2013-04-30-517f08545f703/#.UX_J3pXJDIJ (accessed 18 September 2022).

⁴²⁵ *Equal Education Law Centre and Others v HoD, Western Cape Education Department* Case No. 5186/2022 (3 June 2022).

⁴²⁶ McConnachie C & McConnachie C 'Concretising the right to basic education' (2012) 129:3 *South African Law Journal* 572.

⁴²⁷ Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure GN 920 GG 37081 of 29 November 2013.

electronic connectivity, and internet facilities.⁴²⁸ However, government has already failed to make good on the obligations arising from these regulations.⁴²⁹ Moreover, the positive gains that have been made by the minimum infrastructural norms and standards regulations have recently come under threat following the publication of the Minister's draft amendments to the regulations.⁴³⁰ Should these amendments take effect it would see the deletion of deadlines relating to, amongst others, the elimination of pit toilets and the delivery of elementary services such as electricity, water and classrooms to schools.⁴³¹ The removal of these deadlines would make it easier for government to escape accountability under the regulations for making good on its duty to deliver functional schools.

Fortunately, the state's duty to provide certain physical resources as an aspect of the right to basic education has also been recognised by South African courts.⁴³² Amongst others, the right to basic education has been held to oblige the state to ensure the delivery of safe and appropriate school toilets,⁴³³ textbooks,⁴³⁴ and age and grade suitable furniture.⁴³⁵ Courts have also recognised that state supplied scholastic stationery forms part of the right to basic education.⁴³⁶ More recently the distribution of basic nutrition has been found to be a component of the right.⁴³⁷ Aside from physical resources, the Eastern Cape High Court has stated that a failure to appoint teachers to empty posts in many public schools within the province resulted in an 'ongoing violation' of the right to basic education of children attending those schools.⁴³⁸

⁴²⁸ Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure GN 920 GG 37081 of 29 November 2013.

⁴²⁹ Damons M 'Learners march against proposal to end deadlines to fix schools' *Groundup* 30 June 2022 available at <https://www.groundup.org.za/article/learners-march-against-proposed-changes-to-school-norms-and-standards/> (accessed 10 July 2023).

⁴³⁰ Amendments to the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure in GN 2157 GG 46543 of 10 June 2022.

⁴³¹ Amendments to the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure in GN 2157 GG 46543 of 10 June 2022.

⁴³² *Equal Education and Another v Minister of Basic Education and Others* 2018 (9) BCLR 1130 (ECB).

⁴³³ *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18 (23 April 2018) 63.

⁴³⁴ *Section 27 and Others v Minister of Education and Another* 2013 (2) BCLR 237 (GNP) 25. All learners are entitled to the provision of a textbook for each subject taught by the time teaching in that subject commences *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) 50.

⁴³⁵ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

⁴³⁶ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD) unreported case no. 611/2022 (22 March 2022) 42. *Freedom Stationery (Pty) and Another v MEC for Education, Eastern Cape and Others* (2011) ZAECCELLC 1 (16 March 2011) 7-9.

⁴³⁷ *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306 (17 July 2020) 40-42.

⁴³⁸ *Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG) 2 and 26. In *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) the Eastern Cape High Court explains that the state's responsibility to deliver basic education requires, amongst others, teachers to teach.

These judgments and legislation around the state's obligation to ensure a sufficient number of functional schools makes for excellent reading on the law books. However, such a reading largely fails to reflect the reality on the school grounds of most historically underprivileged schools. Instead, for thousands of largely black South African children, decaying classrooms, atrocious bathrooms, broken fences and missing libraries and laboratories remain their everyday schooling experience.⁴³⁹ The law is clear, every day that these children attend a dysfunctional and poorly resourced school, is a day on which their right to basic education has been denied. Feeder zones shaped purely on geographical nearness operates in a manner that entrenches rather than dismantles the colonial and apartheid legacy of racially segregated schooling and highly uneven resource provisioning. It favours the historically privileged families who live within close proximity of historically privileged and well-resourced schools. At the same time, it slams the door in the face of most poor and historically excluded black families.

3.5.1.2 Acceptability

The element of 'acceptability' speaks to the mode and substance of education.⁴⁴⁰ This means both syllabus and teaching styles must be acceptable. For education to be acceptable it must be of good quality. It should also be, amongst others, culturally suitable and relevant.⁴⁴¹ Tragically, the overwhelming majority of teachers in South Africa (80%) do not have the content knowledge required to educate learners in the subjects which they presently teach.⁴⁴² Teachers working in poor schools perform weaker on content knowledge testing than those working in more affluent schools.⁴⁴³

The International Monetary Fund (IMF) explains that, despite an increase in government spending and access to primary schooling, 'the quality of South Africa's education substantially lags international standards.'⁴⁴⁴ On average, children in South Africa by age 18

⁴³⁹ Draga L 'Infrastructure and equipment' in Veriava F and Fish Hodgson *TF Basic Education Rights Handbook: Education Rights in South Africa* (2017) 238.

⁴⁴⁰ Section 6(c) of the ICESCR Committee General Comment 13. The Constitutional Court seems to appreciate that syllabus is integral to the right to basic education under section 29(1)(a) see *AB and Another v Pridwin Preparatory School and Others* 2020 (9) BCLR 1029 (CC) 178.

⁴⁴¹ Section 6(c) of the ICESCR Committee General Comment 13.

⁴⁴² Spaul N 'Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)' 19 January 2019 available at <https://nicspaull.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/> (accessed 3 September 2022).

⁴⁴³ Venkat H 'Teachers' mathematical knowledge, teaching and the problem of inequality' in Spaul N & Jansen J (eds) in *South African Schooling: The Enigma of Inequality* (2019) 189.

⁴⁴⁴ Mlachila M & Moeletsi T 'Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa's Education System' (2019) WP/19/47 The International Monetary Fund 12.

have concluded 9.3 years of studies within basic education. However, when adjusted to account for quality of education provisioning this figure is reduced to a mere 5.1 years.⁴⁴⁵ Writing in 2019, Spaul N explains that 45% of the country's primary schools can be characterised as 'cognitive wastelands' because one cannot find a single learner within these schools capable of reading and drawing deductions.⁴⁴⁶ Moreover, in 47% of secondary schools not one child could attain the 'intermediate international benchmark' set for mathematics.⁴⁴⁷ In sum, South Africa performs unacceptably in so far as the acceptability of basic education is concerned. South Africa's apartheid history of race based residential segregation has had an enduring effect on the 'inequality of opportunity to quality education.'⁴⁴⁸ Feeder zones that focus purely on geographical proximity continue to frustrate the ability of the majority of South Africa's black learners from accessing educational opportunities of an acceptable quality. As such, it is an issue that must be addressed in a manner that ensures more racially equitable access to quality schooling.

3.5.1.3 Accessibility

General Comment 13 states that educational institutions and educational programmes should be made 'accessible' to all and be devoid of discrimination.⁴⁴⁹ This points to the requirement that there must be *equal* access to basic education. The Constitutional Court has also recognised access as an integral ingredient of the right to basic education,⁴⁵⁰ and 'a necessary condition for the achievement of this right.'⁴⁵¹ General Comment 13 describes accessibility as encompassing, amongst others, the requirement of non-discrimination.⁴⁵² This element requires that education be accessible to everyone (particularly highly vulnerable groupings) without discrimination on certain grounds.⁴⁵³ South African courts have labelled unlawful/unacceptable discriminatory actions or policies that deny or frustrate learners' access to schools

⁴⁴⁵ The World Bank *Tertiary Education Enrollments Must Rise* (2019) The World Bank: Washington 6.

⁴⁴⁶ Spaul N 'Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)' available at <https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/> (accessed 3 September 2022).

⁴⁴⁷ Spaul N 'Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)' available at <https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/> (accessed 3 September 2022).

⁴⁴⁸ Spaul N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 438.

⁴⁴⁹ Section 6(b) of the ICESCR Committee General Comment 13.

⁴⁵⁰ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 43.

⁴⁵¹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) 43.

⁴⁵² Section 6(b) of the ICESCR Committee General Comment 13.

⁴⁵³ Section 6(b) of the ICESCR Committee General Comment 13.

in the context of, amongst others, religion,⁴⁵⁴ culture,⁴⁵⁵ pregnancy,⁴⁵⁶ disability,⁴⁵⁷ and immigration status.⁴⁵⁸ The same can be argued in the context of racial discrimination that may arise from the use of geographical proximity as a criterion in the school admission process. Accessibility also includes ‘economic accessibility’. This dimension requires that education be within financial reach of all.⁴⁵⁹ South Africa has a bifurcated system in which there are both fee charging and non-fee charging schools.⁴⁶⁰ Theoretically, at least, a lack of finance does not render education inaccessible since all families are free to enrol their children in non-fee charging schools. Moreover, schools who charge fees cannot turn away learners simply because of their parents’ inability to pay such fees. Rather parents must, by law, be advised of their right to apply for a fee waiver and must be informed of the process through which to do so.⁴⁶¹ However, most parents are unaware of their right to apply for a fee waiver and some HWS are inclined to withhold information from parents about the possibility of qualifying for one.⁴⁶² Virtually all schools that charge fees have been able to (and continue to) skirt their statutory fee exemption obligations.⁴⁶³ This can be seen on account that a mere 0.3% of learners within the country obtain fee exemptions.⁴⁶⁴ At first blush, education in South Africa appears to be economically accessible. However, the reality is that access to quality education still comes with an expensive price tag attached. Given this reality, any solution around transformative zoning should be cognisant of and make provision for this somber fact.

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⁴⁵⁴ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC). *Radebe and Others v Principal of Leseding Technical School and Others* (1821/2013) [2013] ZAFSHC 111 (30 May 2013) 3.

⁴⁵⁵ *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

⁴⁵⁶ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC). The majority did not rule on the constitutionality of the pregnancy policies. However, the court made it clear that the policies at face value breached the affected girls’ rights to equality, dignity, privacy and a basic education.

⁴⁵⁷ *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC). This matter focused on severe and profoundly disabled learners right to receive an education.

⁴⁵⁸ *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG). The matter concerned children who lacked documentation regulating their stay in South Africa (undocumented learners).

⁴⁵⁹ Section 6(b) of the ICESCR Committee General Comment 13.

⁴⁶⁰ Section 7.4 below.

⁴⁶¹ Section 3(1)(a) of the Exemption of Parents from Payment of School Fees regulations in GN 1293 GG 19347 of 12 October 1998.

⁴⁶² Ndimande BS ‘Parental “choice”: The liberty principle in ‘education finance’ (2006) 24:2 *Perspectives in Education* 151. See also Tikly L & Mabogoane T ‘Marketisation as a strategy for desegregation and redress: The case of historically white schools in South Africa’ (1997) 43:2-3 *International Review of Education* 169.

⁴⁶³ Spaul N ‘Equity: A price too high to pay?’ in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7 and 8.

⁴⁶⁴ Spaul N ‘Equity: A price too high to pay?’ in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7 and 8.

3.5.1.4 Adaptability

The final of the 4-A's requires that education be adaptable. General Comment 13 explains that adaptability connotes flexibility. This speaks to the *quality* of the basic education offered. Such flexibility is necessary to ensure that education is adaptive to the demands of ever-evolving societies and communities.⁴⁶⁵ Information Communication Technology has and continues to reshape our world at a rapid pace. The Qindao Declaration was issued in 2015 following the International Conference on Information Communication Technology and Post-2015 Education. The Declaration's preamble reads in part:

'Inspired by a humanistic vision of education based on human rights and social justice, we further affirm that the remarkable advances in ICT and the rapid expansion of internet connectivity have made today's world increasingly interconnected and rendered knowledge and familiarity with ICT essential for every girl and boy, woman and man.

To achieve the goal of inclusive and equitable quality education and lifelong learning by 2030, ICT – including mobile learning – must be harnessed to strengthen education systems, knowledge dissemination, information access, quality and effective learning, and more efficient service provision.'

The Qindao Declaration thus gives recognition to the impact of the digital revolution on social justice and education. Moloi and Mhlanga undertook a study to evaluate the extent to which South Africa's basic education system is equipped with the fundamental features required to fuel the fourth industrial revolution (4IR).⁴⁶⁶ These scholars concluded that South Africa's basic education system is not adapted for 4IR.⁴⁶⁷ Many schools lacked the technology required to facilitate such learning.⁴⁶⁸ In fact, statistics released by the Department of Basic Education in 2019 shows that about 64% of South African schools do not have a computer centre.⁴⁶⁹ It is thousands of impoverished black children in South Africa who endure the brunt of this lack of adaptability. Such disproportionate impact was clearly highlighted in the recent COVID schooling crisis. The use of feeder zones by HWS deprives impoverished black learners of the opportunity to access the type of schooling that will ensure that they are empowered with the necessary skills to successfully navigate an ever changing world of technology.

⁴⁶⁵ Section 6(d) of the ICESCR Committee General Comment 13.

⁴⁶⁶ Moloi T & Mhlanga D 'Key features of the fourth industrial revolution in South Africa's basic education system' (2021) 24:5 *Journal of Management Information and Decision Sciences*.

⁴⁶⁷ Moloi T & Mhlanga D 'Key features of the fourth industrial revolution in South Africa's basic education system' (2021) 24:5 *Journal of Management Information and Decision Sciences* 18 and 19.

⁴⁶⁸ Moloi T & Mhlanga D 'Key features of the fourth industrial revolution in South Africa's basic education system' (2021) 24:5 *Journal of Management Information and Decision Sciences* 18 and 19.

⁴⁶⁹ Department of Basic Education 'National Education Infrastructure Management System Standard Report August 2019' (2019) DBE.

The discussion above illustrates that the right to basic education in South Africa's Constitution should be understood as encompassing the 4-A elements of availability, accessibility, acceptability, and adaptability. Such an understanding aligns with the country's existing jurisprudence on the right. Realising the right to basic education therefore demands that all four of these elements are met. Where feeder zones shaped solely on geographical nearness are used by historically white and well-off schools, they operate to deny impoverished black children the possibility of gaining access to the sort of education required by the international 4-A framework.

The section that follows relies on regional and international instruments to reaffirm the conclusion that section 29(1)(a) must be understood as conferring a right to equitable access to a basic education and not merely a right to a basic education as the language of the section proclaims.

3.5.2 International law and policy on equal access to education

Prominent regional and international instruments recognise either directly or indirectly the right to equitable access to education. At a regional level, the African Charter on the Rights and Welfare of the Child (ACRWC), confers the right to education on every child.⁴⁷⁰ The ACRWC also requires state parties to adopt special steps relating to disadvantaged children to ensure that all segments of the community have equal access to education.⁴⁷¹ Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) places an obligation on state parties, where circumstances deem necessary, to adopt 'special and concrete measures' to guarantee the advancement and safeguarding of specific racial categories or individuals falling within those categories.⁴⁷² This would include the adoption of affirmative action measures, where the circumstances so warrant, to ensure equitable access to an education amongst different racial groups.

⁴⁷⁰ Article 3 of the ACRWC.

⁴⁷¹ Article 3(e) of the ACRWC. Although the ICESCR does not contain a similar directive to the ACRWC, General Comment 13 does elaborate on the ICESCR. General Comment 13 requires that education be 'accessible to all' especially the most marginalised groups and that access be devoid of any discrimination on certain grounds including race. Section 6(b) of the ICESCR Committee General Comment 13 read with article 2(2) of the ICESCR.

⁴⁷² Article 2(2) of ICERD states that '[s]tates parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

The World Conference on Education for All Framework (The Jomtien Framework),⁴⁷³ and the more recently adopted 2030 Agenda for Sustainable Development also include a focus on the most marginalised.⁴⁷⁴ The 2030 Agenda for Sustainable Development sets out certain sustainable development goals,⁴⁷⁵ including ensuring ‘equal access to all levels of education...for the vulnerable’.⁴⁷⁶ The Jomtien Framework proclaims an expanded vision for ensuring a basic education for all that involves promoting equity.⁴⁷⁷ The framework calls for the adoption of ‘consistent measures’ to ‘reduce disparities’ within education delivery,⁴⁷⁸ and an ‘active’ commitment to eradicating educational inequities.⁴⁷⁹ The framework provides that underserved, and vulnerable groups such as the rural, poor and refugees should not endure discrimination in accessing educational opportunities.⁴⁸⁰

A prohibition on discrimination within education can be found in the UNESCO Convention Against Discrimination in Education.⁴⁸¹ CADE was adopted by the United Nations in 1960 somewhat as a result of pressure exerted by social groupings for greater educational equity.⁴⁸² CADE defines ‘discrimination’ as including ‘any distinction, exclusion, limitation or preference’ based on race or colour which is designed or has the effect of ‘nullifying or impairing equality of treatment in education.’⁴⁸³ This is particularly where any individual or group are deprived of accessing any form of education,⁴⁸⁴ or are limited to an inferior standard

⁴⁷³ Article 3(4) of the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990).

⁴⁷⁴ Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015) 17.

⁴⁷⁵ Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015).

⁴⁷⁶ Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015) 17. This is referred to as Sustainable Development Goal 4.5.

⁴⁷⁷ World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990) 4.

⁴⁷⁸ Article 3(1) of the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990).

⁴⁷⁹ Article 3(4) of the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990).

⁴⁸⁰ Article 3(4) of the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990).

⁴⁸¹ The Convention Against Discrimination in Education, 1960 General Conference of the United Nations Educational, Scientific and Cultural Organization Resolution (1962) (CADE).

⁴⁸² Cavicchioni V & Motivans A ‘Monitoring educational disparities in less developed countries’ in Hutmatcher W, Cochrane D & Bottani N (eds) in *In Pursuit of Equity in Education: Using International Indicators to Compare Equity Policies* (2001) 217-240.

⁴⁸³ Article 1(b) of CADE.

⁴⁸⁴ Article 1(a) of CADE.

of education.⁴⁸⁵ To stamp out and inhibit such discrimination signatories agreed to repeal any statutes or administrative directives and cease any administrative practices associated with discrimination in education.⁴⁸⁶ Significantly, state parties to CADE also agree to ‘ensure by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions’.⁴⁸⁷ Moreover, CADE signatories undertake to create and implement national policy, suitably tailored to their particular nation’s context, which is inclined to encourage ‘equality of opportunity and of treatment in the matter of education’.⁴⁸⁸ This is especially to ensure first, equivalence of educational standards across public institutions catering to the same learning phase and, secondly that the circumstances concerning the quality of education provisioning are comparable. CADE therefore demands that signatories ensure that the notion of equal educational opportunities is in fact wholly and tangibly realised.⁴⁸⁹

The Convention on the Rights of the Child (CRC),⁴⁹⁰ the African Youth Charter (AYC),⁴⁹¹ and ICERD all prohibit racial discrimination.⁴⁹² The latter commits state parties to eradicating racial discrimination in all its shapes and sizes,⁴⁹³ including in education.⁴⁹⁴ The CRC incorporates an equality dimension in its formulation of the right to an education by requiring that the right be achieved ‘progressively and on the basis of equal opportunity.’⁴⁹⁵

As illustrated, there are an array of international and regional legal and policy instruments which South Africa has ratified,⁴⁹⁶ that requires South Africa to uphold the right to education

⁴⁸⁵ Article 1(b) of CADE.

⁴⁸⁶ Article 3(a) of CADE.

⁴⁸⁷ Article 3(a) of CADE.

⁴⁸⁸ Article 4 of CADE.

⁴⁸⁹ Report of the Special Rapporteur on the Right to Education on the Role of Equity and Inclusion in the right to education, UN General Assembly A/72/496 (2017) 5.

⁴⁹⁰ Article 28(1) of the CRC. Article 28(1) differentiates between primary, secondary and higher education. Under article 28(1)(a) primary education is to be made freely available and should be compulsory. Article 28(1)(b) requires that secondary education be made ‘available and accessible to every child’.

⁴⁹¹ Article 2(2) of the AYC (2006) 2009.

⁴⁹² Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 United Nations General Assembly Resolution 2106 (xx) (1969) (ICERD). South Africa ratified ICERD in 1998.

⁴⁹³ Article 5 of ICERD.

⁴⁹⁴ Article 5(e)(v) of ICERD. Article 7 of the ICERD requires state parties to ‘undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination’.

⁴⁹⁵ Article 28(1) of the CRC. Article 28(1) differentiates between primary, secondary and higher education. Under article 28(1)(a) primary education is to be made freely available and should be compulsory. Article 28(1)(b) requires that secondary education be made ‘available and accessible to every child’.

⁴⁹⁶ South Africa ratified the CRC on 16 June 1995, the ICERD on 10 December 1998 and the ICESCR on 12 January 2015 respectively see United Nations Human Rights Treaty Bodies ‘UN Treaty Body database’ available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=EN (accessed 4 September 2014). CADE was ratified on 9 March 2000 see WhatConvention.Org: International Legal Search Engine ‘Convention against Discrimination in Education, UNESCO, 1960’ available at https://www.whatconvention.org/en/ratifications/54?sort_by=comments&order=asc (accessed 4 September

and ensure equal access thereto. These instruments all support an interpretation of section 29(1)(a) that entails a right to equitable access to a basic education. However, equality of access is not the reality for South Africa's black and poor children who are consigned to the fringes of society. A number of regional and international instruments demand or recommend that South Africa adopt special steps to ensure that these marginalised children are able to enjoy equal educational opportunities. Schools' use of feeder zones based purely on geographic proximity results in the inverse as black and poor children's access to educational opportunities are further squeezed. This is due to South Africa's enduring legacy of spatial and educational injustice and how they interact to exclude these children from a chance to enrol in some of the country's few functional schools. Such school zoning practices may potentially be found to be racially discriminatory. Should this be the case, South Africa is obliged under international law to do away with current zoning practices which have allowed SGBs to select whether and how to create school feeder zones.

3.5.3 International law and policy on quality education

The previous section established that international law and other international instruments support an interpretation of section 29(1)(a) that entails a right of equal access to basic education. The section that follows relies on regional and international instruments to support the conclusion that section 29(1)(a) must be understood not only as a right of equal access to basic education but rather, as a right to equal access to a *quality* basic education. In the bulk of the instruments discussed, the concepts of equitable access and quality education are intimately intertwined. This seems a natural connection given that equal access to a basic education means little if the education being accessed is sub-par.

The AYC appears the boldest of all regional and international instruments as regards the issue of access to quality education.⁴⁹⁷ Whilst many of these instruments confer a right to education on every individual, the AYC goes a step further by explicitly framing the right to an education

2022). South Africa ratified the ACRWC on 7 January 2000 see ACRWC 'Ratifications Table' available at <https://www.acerwc.africa/ratifications-table/> (accessed 4 September 2022). The Banjul Charter was ratified on 9 July 1996 see African Commission on Human and People's Rights 'Concluding Observations and Recommendations – South Africa: First Periodic Report, 1999-2001' available at <https://www.achpr.org/sessions/concludingobservation?id=79> (accessed 4 September 2022) and the AYC on 28 May 2009 see South African Government 'South Africa ratifies the African Youth Charter' available at [https://www.gov.za/south-africa-ratifies-african-union-youth-charter#:~:text=South%20Africa%20has%20ratified%20the,AU\)%20on%208%20July%202009.](https://www.gov.za/south-africa-ratifies-african-union-youth-charter#:~:text=South%20Africa%20has%20ratified%20the,AU)%20on%208%20July%202009.) (accessed 4 September 2022).

⁴⁹⁷ Article 13(1) of the AYC.

as the right of young people to have an ‘education of good quality.’⁴⁹⁸ South Africa has ratified the AYC,⁴⁹⁹ and is therefore duty bound to ensure quality education provisioning for all young South Africans under the Charter. South Africa has performed abysmally in this regard. The overwhelming majority of the country’s learners come from impoverished circumstances and are enrolled in low quality schools at both the primary and secondary levels.⁵⁰⁰ These learners have very few opportunities of gaining access to institutions of higher learning as a result of the poor-quality education they have received.⁵⁰¹ South Africa is therefore in clear breach of its obligations under the AYC and the ICESCR to deliver quality education.

Article 28(1) of the CRC requires that ‘[s]tates [p]arties recognize the right of the child to education’. Article 29(1) in turn, lists some of the objectives that the right to education under article 28(1) is aimed at. The Committee on the Rights of the Child issued General Comment 1 which elaborates on the objectives of education as set out in article 29(1) of the CRC.⁵⁰² General Comment 1 explains that:

‘[e]very child has the right to receive an education of good quality which . . . requires a focus on the quality of the learning environment, of teaching and learning processes and materials, and of learning outputs.’⁵⁰³

General Comment 1 therefore associates ‘good quality’ education with tangibles inputs such as learning materials and the physical learning environment, intangible inputs such as the teaching and learning process itself as well as learning outputs which can be conceived of as, at a minimum, academic performance.

Article 1(2) of CADE specifically references the duty to guarantee quality in education as it reads ‘the term “education” refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given’. The Convention’s focus on quality education can be seen further in Article 2(a) which provides

⁴⁹⁸ Article 13(1) of the AYC.

⁴⁹⁹ South Africa ratified the AYC on 28 May 2009 see South African Government ‘South Africa ratifies the African Youth Charter’ available at [https://www.gov.za/south-africa-ratifies-african-union-youth-charter#:~:text=South%20Africa%20has%20ratified%20the,AU\)%20on%208%20July%202009](https://www.gov.za/south-africa-ratifies-african-union-youth-charter#:~:text=South%20Africa%20has%20ratified%20the,AU)%20on%208%20July%202009). (accessed 4 September 2022).

⁵⁰⁰ Spaul N ‘Education in SA: A tale of two systems’ *PoliticsWeb* 31 August 2012 available at <http://www.politicweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 8 August 2018).

⁵⁰¹ Spaul N ‘Education in SA: A tale of two systems’ *PoliticsWeb* 31 August 2012 available at <http://www.politicweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 8 August 2018).

⁵⁰² UNCRC Committee General Comment 1: The Aims of Education (art 29) UN Doc CRC/GC/2001/1.

⁵⁰³ UNCRC Committee General Comment 1: The Aims of Education (art 29) UN Doc CRC/GC/2001/1 para 22.

that the existence of separate educational institutions ‘for pupils of the two sexes’ shall not be considered discriminatory ‘if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study’. The former United Nations Special Rapporteur on the Right to Education, Kishore Singh, has described CADE as laying the ‘basis for combating disparities in education and ensuring equal opportunities which involve ensuring quality for all.’⁵⁰⁴

An international call for the expansion of ‘basic education services of quality’, was made in the Jomtien Framework.⁵⁰⁵ The Framework stemmed from pervasive concerns about the decaying state of education systems throughout the 1980’s and the persistent and massive number of functionally illiterate individuals ill equipped for ordinary life.⁵⁰⁶ Adopted in 1990, the Jomtien Framework defines an equitable basic education as one where all ‘must be given the opportunity to achieve and maintain an acceptable level of learning.’⁵⁰⁷ A decade post Jomtien, education stakeholders maintained that there had been unsatisfactory progress towards achieving education for all.⁵⁰⁸ The Dakar Framework for Action – Education for All: Meeting our Collective Commitments (The Dakar Framework) was a product of this criticism.⁵⁰⁹ The participants of the Dakar Framework reasserted the vision of the Jomtien Framework.⁵¹⁰ The Dakar Framework demands learning institutions of a good quality,⁵¹¹ and has a strong focus on equitable access to quality education.⁵¹² Almost a decade post Dakar, Ministers of education within the Commonwealth gathered in Kuala Lumpur for the 17th

⁵⁰⁴ Report of the Special Rapporteur on the right to education: Normative action for quality education UN General Assembly A/HRC/20/21 (2012) IV(A) 25.

⁵⁰⁵ Article 3(1) of the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990).

⁵⁰⁶ United Nations Educational, Scientific and Cultural Organization *Education for All: Status and Trends* (1993) 8.

⁵⁰⁷ Article 3(2) of the World Conference on Education for All Meeting Basic Learning Needs Jomtien, Thailand *The World Conference on Education for All (Jomtien) and Framework for Action to Meet Basic Learning Needs* (1990).

⁵⁰⁸ UNESCO *Education for All: Global Monitoring Report* (2008) – *Education for All by 2015 Will We Make It?* (2007) 12.

⁵⁰⁹ UNESCO *Education for All: Global Monitoring Report* (2008) – *Education for All by 2015 Will We Make It?* (2007) 12.

⁵¹⁰ World Education Forum Dakar, Senegal *The Dakar Framework for Action – Education for All: Meeting our Collective Commitments* (2000) 3.

⁵¹¹ World Education Forum Dakar, Senegal *The Dakar Framework for Action – Education for All: Meeting our Collective Commitments* (2000) 20. The basic inputs listed are motivated and competent teachers, appropriate facilities, context specific learning materials and technology accessible to all learners.

⁵¹² World Education Forum Dakar, Senegal *The Dakar Framework for Action – Education for All: Meeting our Collective Commitments* (2000) 8; 12; 14 and 16.

Conference of Commonwealth Education Ministers. The product of this gathering was the Kuala Lumpur Communiqué of 2009.⁵¹³ In this non-binding communiqué, Ministers emphasised the necessity of achieving equitable access to quality education despite, amongst others, geographical location. The Ministers committed to accomplishing this goal as a priority.⁵¹⁴

Former UN Special Rapporteur Singh has also fashioned ‘a holistic conceptual framework for quality education’ which lays out certain criteria for establishing whether quality education exists’.⁵¹⁵ This framework encompasses:

- (i) a minimum level of student acquisition of knowledge, values, skills and competencies;
- (ii) adequate school infrastructure, facilities and environment;
- (iii) a well-qualified teaching force;
- (iv) a school that is open to the participation of all, particularly students, their parents and the community.⁵¹⁶

The framework explains that quality schooling cannot be attained without the delivery of adequate resources that align with ‘quality imperatives’.⁵¹⁷

International and regional frameworks concerning education also provide somewhat of a guide as to how quality education should be assessed. For instance, improving the quality of education is one of the underlying impetuses of the African Union’s Second Decade of Education for Africa (2006-2015) (SDEA).⁵¹⁸ The SDEA construes quality education as being dependent on, amongst others, appropriately qualified, skilled and inspired teachers.⁵¹⁹ The Continental Education Strategy for Africa 2016-2025 (CESA 16-25),⁵²⁰ is closely aligned to

⁵¹³ Seventeenth Conference of Commonwealth Education Ministers, Kuala Lumpur Communiqué (2009)

2. South Africa formed part of this process.

⁵¹⁴ Seventeenth Conference of Commonwealth Education Ministers, Kuala Lumpur Communiqué (2009)

2. South Africa formed part of this process.

⁵¹⁵ Report of the Special Rapporteur on the right to education: Normative action for quality education UN General Assembly A/HRC/20/21 (2012) III.

⁵¹⁶ Report of the Special Rapporteur on the right to education: Normative action for quality education UN General Assembly A/HRC/20/21 (2012) III (21).

⁵¹⁷ Report of the Special Rapporteur on the right to education: Normative action for quality education UN General Assembly A/HRC/20/21 (2012) III (21).

⁵¹⁸ Report of the Special Rapporteur on the right to education: Normative action for quality education UN General Assembly A/HRC/20/21 (2012) 5.

⁵¹⁹ Second Decade of Education for Africa (2006–2015) 12.

⁵²⁰ The Continental Education Strategy for Africa 2016-2025 (CESA 16-25).

the SDEA.⁵²¹ It too contains a strong focus on quality education. Amongst the CESA strategic objectives are regenerating the teaching vocation to ensure education quality.⁵²² Both the SDEA and CESA therefore recognise that quality education necessitates quality educators. However, the significant majority of South African teachers are not up to grade.⁵²³ South African teachers have lower content knowledge of the subjects they teach than their counterparts in Sub-Saharan African countries.⁵²⁴ In fact, some South African teachers are even occasionally outclassed by the very children attending their class.⁵²⁵ An astonishing 79% of teachers in South Africa responsible for teaching grade 6 mathematics are unable to reach 60% on mathematics tests designed for grades 6 and 7 learners.⁵²⁶ Teachers employed in school's with a lower socio-economic profile perform weaker on content knowledge assessments than their peers working in schools characterised by a higher socio economic status.⁵²⁷ When the quality of education provisioning is gauged according to the competency of educators, South Africa comes up sorely short.

The SDEA also views quality education as being dependent on physical resourcing,⁵²⁸ and CESA draws a link between quality schooling and physical infrastructure.⁵²⁹ Viewed in this way, the quality of South Africa's education provisioning does not fare much better. According to the Department of Basic Education's own data, as of 2019 about 64% of South African schools lack a computer centre, 80% sit without a laboratory and 74% do not have a library.⁵³⁰ The majority of South African schools therefore lack the physical resources and infrastructure required to provide a quality education to their learners. Interestingly, the SDEA further recognises that the provisioning of quality education is dependent on good governance. Many

⁵²¹ The Continental Education Strategy for Africa 2016-2025.

⁵²² Strategic objective 1 CESA (16-25) 22.

⁵²³ Spaul N 'Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)' available at <https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/> (accessed 3 September 2022).

⁵²⁴ Mlachila M & Moeletsi T 'Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa's Education System' (2019) WP/19/47 The International Monetary Fund 31.

⁵²⁵ Mlachila M & Moeletsi T 'Struggling to Make the Grade: A Review of the Causes and Consequences of the Weak Outcomes of South Africa's Education System' (2019) WP/19/47 The International Monetary Fund 31

⁵²⁶ Spaul N 'Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)' available at <https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/> (accessed 3 September 2022).

⁵²⁷ Venkat H 'Teachers' Mathematical Knowledge, Teaching and the Problem of Inequality' in Spaul N & Jansen J (eds) in *South African Schooling: The Enigma of Inequality* (2019) 189.

⁵²⁸ Second Decade of Education for Africa (2006-2015) 12.

⁵²⁹ Strategic objective 2 CESA (16-25), 22 and 23.

⁵³⁰ Department of Basic Education 'National Education Infrastructure Management System Standard Report August 2019' (2019) DBE.

of South Africa's historically black schools can be classified as dysfunctional and the ills they suffer are, at least in part, a result of intangible elements such as inefficient management.⁵³¹

More recent prominent international instruments focusing on quality education are the Sustainable Development Agenda,⁵³² and the Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4 (the Incheon Framework).⁵³³ The Sustainable Development Agenda, set in 2015, is a compilation of 17 interconnected goals,⁵³⁴ designed to attain an improved and 'more sustainable future for all.'⁵³⁵ Sustainable Development Goal 4 focuses on education.⁵³⁶ It provides that by 2030 'all girls and boys complete free, equitable and quality primary and secondary education.'⁵³⁷ The Incheon Framework stresses the pitfalls of concentrating on access to education at the expense of education quality.⁵³⁸ It also suggests that countries initiate legislation and policies to guarantee, amongst others, equitable, inclusive and quality education at both primary and secondary level.⁵³⁹ The Incheon Framework asserts that a core aspect of the right to education is ensuring that the education delivered is of a 'sufficient quality to lead to relevant, equitable and effective learning outcomes' regardless of education levels or the particular context.⁵⁴⁰ The Framework states that at a minimum, quality requires that learners acquire basic mathematical and literacy

⁵³¹ Spaul N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 437.

⁵³² Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015).

⁵³³ World Education Forum Incheon, Republic of Korea Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All (2015).

⁵³⁴ Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015) at para 18.

⁵³⁵ UN Environment Management Group 'The UN Sustainable Development Goals' available at <https://unemg.org/our-work/supporting-the-sdgs/the-un-sustainable-development-goals/> (accessed 12 March 2021).

⁵³⁶ Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015) at para 19.

⁵³⁷ Transforming Our World: The 2030 Agenda for Sustainable Development, 2015 UN General Assembly A/RES/70/1 (2015) Goal 4.1.

⁵³⁸ World Education Forum Incheon, Republic of Korea Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All (2015) 5.

⁵³⁹ World Education Forum Incheon, Republic of Korea Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All (2015) Incheon 37.

⁵⁴⁰ World Education Forum Incheon, Republic of Korea Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All (2015) 30.

abilities to facilitate further learning and skills building.⁵⁴¹ The Framework seems to suggest that the quality of education provisioning must be assessed in terms of learning outcomes. Even by this standard, South Africa performs dismally. By example, results of the Progress in International Reading Literacy Study (PIRLS) 2016 survey revealed that 78% of grade four learners in South Africa were incapable of reading for meaning. PIRLS has since released its 2021 survey which has seen this figure jump to 81%. Consequently, a mere 19% of South African learners possessed the ability to read for meaning in any language in 2021.⁵⁴² The remaining learners, therefore, do not possess the literacy skills required to build on existing learning.

International law provides ample support that the right to basic education under section 29(1)(a) of South Africa's Constitution should be interpreted as a right of everyone to an equitable and quality basic education. Notwithstanding its international obligations to ensure equitable access to quality education, the South African education system is deeply divided. This is so much so that South Africa is depicted as having two distinct education systems.⁵⁴³ The first, serves as a well-oiled engine for equal opportunity. Under this system one finds all former Model C schools, some schools historically designated as Indian as well as well-off independent schools.⁵⁴⁴ These schools are functional, affluent, well resourced,⁵⁴⁵ and are capable of delivering a quality education to the learners enrolled there.⁵⁴⁶ The schools under the second education system are defined by poverty and dysfunctionality and are incapable of doing the same. These schools are unable to instil in learners the required numeracy and literacy abilities that they ought to be attaining in primary schools.⁵⁴⁷ Despite varying numbers across and within the different provinces, on all there remain a 'very small' number of African children in HWS.⁵⁴⁸ This can be attributed, in part, to the fact that these schools tend to be situated in more

⁵⁴¹ World Education Forum Incheon, Republic of Korea Education 2030: Incheon Declaration and Framework for Action for the implementation of Sustainable Development Goal 4: Ensure Inclusive and Equitable Quality Education and Promote Lifelong Learning Opportunities for All (2015) 30.

⁵⁴² Spaull N 'PIRLS 2021- Civil Society Briefing' 15 May 2023 available at <https://nascee.org.za/resources/pirls-2021-sa-briefing-15-may-2023.pdf> (accessed 10 July 2023).

⁵⁴³ Veriava F 'Basic education provisioning' in Veriava F and Fish Hodgson TF (eds) *Basic education rights handbook: Education Rights in South Africa* (2017) 223.

⁵⁴⁴ Veriava F 'Basic education provisioning' in Veriava F and Fish Hodgson TF (eds) *Basic education rights handbook: Education Rights in South Africa* (2017) 223.

⁵⁴⁵ Veriava F 'Basic education provisioning' in Veriava F and Fish Hodgson TF (eds) *Basic education rights handbook: Education Rights in South Africa* (2017) 223.

⁵⁴⁶ Spaull N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 444.

⁵⁴⁷ Spaull N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 444.

⁵⁴⁸ Chisholm L & Sujee M 'Tracking racial desegregation in South African schools' (2006) 40 *Journal of Education* 147.

affluent, wealthy and historically white areas,⁵⁴⁹ and some make use of geographical proximity as part of their admission criteria.⁵⁵⁰ Denying black and poor learners the opportunity to access good schools as a result of feeder zones grounded purely in proximity frustrates their rights to an equitable and quality education under international law. For as long as the South African government remains unwilling to intervene in the school zoning process it will continue to fall short of its international obligations to achieve equitable and quality basic education for all.

3.5.4 The UN Special Rapporteur on the Right to Education on educational redress

The UN Special Rapporteur on the Right to Education has pushed for the adoption of positive measures to redress imbalances in access to a quality education. In 2012 the Special Rapporteur issued a report titled ‘Normative Action for Quality Education’. In this report the Special Rapporteur recommended that positive actions be increased to ensure that those suffering poverty and social exclusion can obtain a quality education.⁵⁵¹ In a report released the following year, the Special Rapporteur again emphasised the need for positive steps to guarantee vulnerable and marginalised groups equitable access to education.⁵⁵² The Special Rapporteur cites the example of affirmative action schemes to illustrate potential measures that can be adopted in this regard.⁵⁵³ By adopting such measures, the Special Rapporteur explains, states will execute the norm that ‘everyone has the equal right to high-quality education.’⁵⁵⁴

In a more recent, 2017 report on ‘the Role of Equity and Inclusion in the Right to Education’, the Special Rapporteur asserts that states must visibly contest historical injustices that

⁵⁴⁹ Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 53. Lemon A & Stevens L ‘Reshaping education in the new South Africa’ (1999) 84:3 *Geographical Association* 231.

⁵⁵⁰ Ntshoe I ‘Resegregation and recreation of racism in education in a post-apartheid setting’ (2017) 23:1 *Southern African Review of Education with Production* 77 and 83. Ntshoe I ‘Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa’ (2009) 15:2 *Southern African Review of Education with Production* 94. Brown K ‘“New” educational injustices in the “new” South Africa: A call for justice in the form of vertical equity’ (2006) 44:5 *Journal of Educational Administration* 516. Soudien C, Jacklin H & Hoadley U ‘Policy values: Problematising equity and redress in education’ in Sayed Y & Jansen J *Implementing Education Policies: The South African Experience* (2001) 83.

⁵⁵¹ Report of the Special Rapporteur on the right to education: Normative action for quality education UN General Assembly A/HRC/20/21 (2012) 21.

⁵⁵² Report of the Special Rapporteur on the Right to Education: Recent developments with respect to the post-2015 development agenda focusing on a rights-based approach to education, UN General Assembly A/68/294 (2013) 11.

⁵⁵³ Report of the Special Rapporteur on the Right to Education: Recent developments with respect to the post-2015 development agenda focusing on a rights-based approach to education, UN General Assembly A/68/294 (2013) 11 and 22.

⁵⁵⁴ Report of the Special Rapporteur on the Right to Education: Recent developments with respect to the post-2015 development agenda focusing on a rights-based approach to education, UN General Assembly A/68/294 (2013) 22.

undermine the type of education received by the poor.⁵⁵⁵ The Special Rapporteur recommends that states implement laws and policies clearly targeted at annihilating discrimination and that they institute measures to address the disadvantage and obstacles experienced by some learners within the education system.⁵⁵⁶ One possibility for furthering educational redress in the South African context would be ensuring that feeder zones are designed in manner that favours those that suffer educational disadvantages by virtue of their race. Such transformative zoning could make a modest yet significant contribution to ensuring racially equitable access to South Africa's public schools. The possibility of the use of feeder zones as a remedial measure under the South African Constitution is discussed in more detail in Chapter 8.

3.6 THE RIGHT TO EQUALITY AND THE REALISATION OF THE RIGHT TO BASIC EDUCATION

It is perspicuous from international law that the right to education includes the right to equal access to quality education. This means that the right to equality plays a role in framing the right to basic education. In addition, the Constitutional Court has found that rights in the Bill of Rights are to be understood in conjunction with each other.⁵⁵⁷ The meaning to be attached to the right to basic education under section 29(1)(a) must therefore synchronise with the interpretation to be placed on the right to equality under section 9 of the Constitution. Making sense of the right to equality is pertinent to understanding the extent of the state's obligation under section 29(1)(a). This is because the state's obligation to deliver equal access to education is embedded in both rights. Section 9 of the Constitution provides that:

- '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) 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.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁵⁵⁵ Report of the Special Rapporteur on the Right to Education on the Role of Equity and Inclusion in the right to education, UN General Assembly A/72/496 (2017) 23.

⁵⁵⁶ Report of the Special Rapporteur on the Right to Education on the Role of Equity and Inclusion in the right to education, UN General Assembly A/72/496 (2017) 21.

⁵⁵⁷ *Omar v Government of the Republic of South Africa and Others* 2006 (2) BCLR 253 (CC) 17.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

Section 9(1) of the Constitution makes clear that the state, when granting benefits on individuals must do so in a manner that manifests in the equal treatment of all individuals.⁵⁵⁸ This same requirement is imposed on the state when exacting restrictions on state and other action.⁵⁵⁹ Section 9(2) empowers the state to adopt remedial action to safeguard and advance individuals or groups of individuals who have been disadvantaged by unfair discrimination. The state is prohibited, under section 9(3) from unfairly discriminating against individuals on the grounds listed under section 9(3) or similar grounds.

The Constitutional Court has stated that sections 9(1), (2) and (3) and the right to basic education under section 29(1)(a) form part of a ‘cluster of (constitutional) warranties’ designed to ensure that the social unevenness created by apartheid schooling be ‘addressed by a radical transformation of society as a whole and of public education in particular.’⁵⁶⁰ Section 9(1) provides that ‘[e]veryone is equal before the law and has the right to equal protection and benefit of the law.’ Section 29(1)(a) constitutes law as envisaged by section 9(1). Section 29(1)(a) does not differentiate between categories of persons. Rather it confers the right of basic education on everyone. These rights viewed together indicate that everyone has the right not only to a basic education, but also to equal access to such education. Consequently, the state is constitutionally obliged to realise not simply the right to a basic education but, rather the right of equal access to a quality basic education. Further support for this position can be found in section 9(2). This section provides that ‘[e]quality includes the full and equal enjoyment of all rights and freedoms.’ Consequently, impoverished black children have not only the moral entitlement, but also the legal right to enjoy a quality education as much as other children do. Moreover, such quality education must be on par with that received by their peers enrolled in South Africa’s HWS. This much is clear when sections 9(1) and (2) of the equality clause are read together with the right to basic education in section 29(1)(a) of the Constitution.

⁵⁵⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) 59.

⁵⁵⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) 59.

⁵⁶⁰ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 47 and 46.

Finally, school zoning that has the effect of excluding persons of a certain race or socio-economic background may be prohibited by section 9(3) of the Constitution based on it amounting to unfair discrimination.

The value of employing the right to equality in interpreting section 29(1)(a) is that the Constitutional Court has laid down specific tests to determine whether this right has been complied with. Consequently, there is a clear test to determine whether measures would amount to remedial measures as envisioned under section 9(2). This can be applied to determine whether a measure, such as transformative zoning, would be constitutionally compliant. In addition, the Constitutional Court has laid down a test to determine whether a measure amounts to unfair discrimination, prohibited by section 9(3) of the Constitution. Should this test show that the current zoning practices amount to unfair discrimination, the state is under a duty to rectify this. These tests are discussed in more detail and applied in Chapter 8.

3.7 CONCLUSION

Section 29(1)(a) of the Constitution confers the right to basic education on everyone. This chapter illustrated that this right should be interpreted to require the state to ensure equal access to quality education. Furthermore, the chapter suggested that based on international law requirements the majority of schools in South Africa do not offer quality education. This suggests that the state is failing to fulfil the right to basic education of the children attending these inadequate schools. School zoning excluding impoverished black children from the few schools that offer constitutionally compliant education may amount to unfair discrimination. Furthermore, zoning promoting access to these schools for previously disadvantaged learners may help in fulfilling the state's duty under section 29(1)(a) and may potentially constitute an affirmative action measure under the right to equality. The following chapter discusses in more detail what is required of the state to comply with its duty to offer equal access to quality education. This is applied to the South African context to show that the majority of schools do not comply with this standard. This determination is crucial, since school zoning would not be an issue if all schools complied with the quality standard required by the Constitution.

CHAPTER 4

WHAT PLUS WHAT EQUALS TO AN EQUAL EDUCATION

4.1 INTRODUCTION

Demands for equality are bellowed by human rights groups and ordinary people fighting injustice world over. It sounds through the voices of those who rise up against enduring social injustice in the streets. It reverberates through the texting and hashtags condemning oppression via social media platforms. Battles have been fought in its name, people have been shackled in its name and blood, has far too frequently been shed in its name. In South Africa, cries for equality in the context of education delivery has inspired a well renowned learner movement aptly branded 'Equal Education'.⁵⁶¹ The rallying cry 'equal education' draws much of its strength from its simplicity. It strikes sharply and incisively at the heart of basic human emotions of fairness and justice and the desire to equip our young with an equal chance of success. Yet, the concept of equal education is far from a simple one. Ascribing a meaning to the concept of equal education is a challenging exercise. Moreover, a cry for equal education means very little if there is no barometer by which to measure the extent to which this demand has been realised. This chapter grapples with questions concerning what amounts to equal access to quality education and when can it be said that the necessary conditions for ensuring as much have been met.

The previous chapter focused on the meaning to be attached to the right to basic education under section 29(1)(a) of the Constitution. It established that the right to basic education entails equal access to quality education. Having now established as much, this chapter is dedicated to ascertaining how a state's compliance with this duty is to be measured and to measure such. This is crucial, since school zoning would not be an issue if all schools complied with the quality standard required by the Constitution. While some standards were identified under international law, this chapter undertakes a more thorough investigation into the state's compliance with this duty.

In the literature the term equity is used to refer to equal access to quality education.⁵⁶² The rich literature on gauging equity in education is therefore valuable to the measuring of the state's

⁵⁶¹ Fleisch B & Robins SL 'Working-class high school learners' challenge to change: Insights from the Equal Education Movement in South Africa' (2016) 20:2 *Education As Change* 151-154.

⁵⁶² de los Santos PJ, Moreno-Guerrero A, Marín-Marín J, et al 'The term equity in education: A literature review with Scientific Mapping in Web of Science' (2020) 17:10 *International Journal of Environmental Research and Public Health* 3526.

compliance with its duties under section 29(1)(a). This chapter explains the different means of measuring equity in education systems and applies that to the South African context to show that the majority of South African schools do not comply with the duty under this concept.

This chapter leans on United States' jurisprudence. Such jurisprudence adds much value in light of section 39(1)(c) of the Constitution. This section provides that a court when interpreting the Bill of Rights 'may consider foreign law.' South African courts may therefore turn to US laws, in an attempt to ascertain the extent of the state's duty under section 29(1)(a). Foreign law, the Constitutional Court states, serves as a valuable reference point for courts when confronting constitutional dilemmas.⁵⁶³ It is therefore a valuable reference point for researchers grappling with understanding the nature of the obligation which a particular fundamental right imposes on the state, including the right to basic education.

4.2 THE PRINCIPLE OF EQUAL EDUCATIONAL OPPORTUNITY

Equal educational opportunity (EEO) serves as a standard by which one can measure equity, including racial equity, within schooling.⁵⁶⁴ In this section, the concept of EEO and the manner in which it is measured is discussed. The notion of equal opportunity is perhaps the most widely accepted construct of justice in progressive societies.⁵⁶⁵ The concept of EEO has evolved over many years. The earliest construct focused on school accessibility. Under this notion, equal access to education was a necessity and the state was duty bound to offer educational opportunities to learners.⁵⁶⁶ EEO was measured according to the extent to which individuals could access schooling of any quality.⁵⁶⁷ On this construct, South Africa has made major strides in access to schooling. At the primary school stage access to schooling is now near universal.⁵⁶⁸ The numbers of children in South Africa enrolling at the secondary stage have also grown.⁵⁶⁹ However, the concept of EEO has evolved to become more than a mere numbers exercise. A simple growth in the number of children enrolling in primary and secondary schooling does

⁵⁶³ See *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) BCLR 118 (CC) 106. *H v Fetal Assessment Centre* 2015 (2) BCLR 127 (CC) 31. *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC).

⁵⁶⁴ Fiske EB & Ladd HF *Elusive Equity: Education Reform in Post-Apartheid South Africa* (2004) 5.

⁵⁶⁵ Roemer JE 'Equality of opportunity: A progress report' (2002) *Social Choice and Welfare* 455.

⁵⁶⁶ Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 7.

⁵⁶⁷ Ansalone G 'Tracking, schooling and the equality of educational opportunity' (2009) 16:3/4 *Race, Gender & Class* 175.

⁵⁶⁸ International Monetary Fund 'Finance and Development: Back to Basics – Economic Concepts Explained' (2017) IMF 5.

⁵⁶⁹ International Monetary Fund 'Finance and Development: Back to Basics – Economic Concepts Explained' (2017) IMF 5.

not provide a sufficient standard for measuring the extent to which an education system can be said to be equitable, whether racially and or otherwise. EEO now means ensuring that students are empowered so that they are equally placed to succeed. Frequent metaphors attached to this idea are ‘levelling the playing field,’⁵⁷⁰ and ‘starting-gate equality.’⁵⁷¹

According to the current conception of EEO, all children, outside of factors such as effort and enthusiasm, should hold an equal chance of a prosperous educational career.⁵⁷² EEO has been described as a ‘negative principle’. This is because it is framed in the negative. It requires no discrepancies between individuals on the basis of ‘illegitimate’ characteristics.⁵⁷³ A student’s success must not hinge on circumstances beyond their control such as their race, socio-economic position or their place of residence.⁵⁷⁴ In South Africa, however, a child’s educational experience is still largely contingent upon their place of birth, race and how financially well-off they are.⁵⁷⁵ As a consequence of the apartheid legacy, there exists a ‘strong correlation’ between the area in which a school is located and the average academic results it achieves.⁵⁷⁶ South Africa’s black children who reside in poorer neighbourhoods are therefore more likely to enrol in dysfunctional schools which fail to provide them with an adequate education.⁵⁷⁷ In addition, feeder zones based only on geographical proximity further frustrates their ability to gain access to good schools due to how far away they stay from these schools. Shamefully, in South Africa a child’s ability to flourish is still very much dependent on whether they are white or black, rich or poor and, on where they are lucky or unlucky enough to reside.

⁵⁷⁰ Satz D ‘Equality, Adequacy, and Education for Citizenship’ (2007) 117:4 Symposium on Education and Equality 629. Roemer JE & Trannoy A ‘Equality of opportunity: Theory and measurement’ (2016) 54:4 *Journal of Economic Literature* 1289.

⁵⁷¹ Roemer JE & Trannoy A ‘Equality of opportunity: Theory and measurement’ (2016) 54:4 *Journal of Economic Literature* 1289.

⁵⁷² UNESCO Institute of Statistics *Handbook on Measuring Equity in Education* (2018)17.

⁵⁷³ Berne R and Stiefel L ‘Measuring the equity of school finance policies: A conceptual and empirical analysis (1981) 7:1 *Policy Analysis* 51.

⁵⁷⁴ UNESCO Institute for Statistics *Educational Equity and Public Policy: Comparing Results from 16 Countries – (2007) 25*. Berne R & Stiefel L ‘Concepts of School Finance Equity: 1970 to the Present’ in Helen Ladd, Chalk R & Hansen JS (ed) *Equity and Adequacy in Education Finance: Issues and Perspectives* (1999) 13. Report of the Special Rapporteur on the Right to Education on the Role of Equity and Inclusion in the right to education, UN General Assembly A/72/496 (2017) 6. Organisation for Economic Co-operation and Development *Ten Steps to Equity in Education* (2008).

⁵⁷⁵ Amnesty International *Failing to Learn The Lessons?: The Impact of COVID-19 on a Broken and Unequal Education System* (2021) Amnesty International 15.

⁵⁷⁶ Zoch A ‘The Effect of Neighbourhoods and School Quality on Education and Labour Market Outcomes in South Africa’ (2017) A working paper of the department of economics and the bureau for economic research at the University of Stellenbosch 8-9. Section 1.2.5 above.

⁵⁷⁷ International Monetary Fund ‘Finance and Development: Back to Basics – Economic Concepts Explained’ (2017) IMF 38.

Roemer offers a cogent formula for measuring equality of educational opportunity. Roemer suggests that a lack of equal educational opportunities can be inferred where inequalities in educational access can be sourced back to certain disparities such as parental wealth.⁵⁷⁸ Frankel states that the vision of perfect EEO should be interpreted as a mere ‘direction of effort, not a goal to be fully achieved’.⁵⁷⁹ The concept of EEO must be seen as simply a ‘guiding ideal’.⁵⁸⁰ The moral imperative of EEO lies not in whether we ultimately achieve this ideal but rather whether we come ‘sufficiently close’.⁵⁸¹ In South Africa, however, the achievement of substantive equality far from being a guiding ideal is, in fact, a constitutional imperative.⁵⁸² EEO, in the South African context, would demand as a basic that policies regarding education are fashioned conscious of the degree to which these policies reduce inherited racial inequalities.⁵⁸³ The same would hold true in the case of legislation. EEO would therefore require that any policies and laws regarding schooling access be designed or amended to diminish racial inequalities in South Africa’s school admission process. This would be inclusive of laws and policies regarding feeder zones. The section that follows considers some of the various ways in which EEO can be measured. The section considers how South Africa’s basic education system fairs when viewed against these different measures in light of the principle of EEO.

4.3 THE OBJECTS OF EQUITY

The following section attempts to determine what constitutes an equitable education system. An answer to this question will assist in determining whether transformative zoning can make a positive contribution to rendering South Africa’s public education system more racially equitable. The subject of inequities within education delivery has been studied and measured from various viewpoints. Some of the more popular approaches to measuring equity can be extracted from foreign literature and reports of renowned international bodies such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Organisation for Economic Co-operation and Development (OECD). These measures include schooling inputs, schooling outcomes and minimum threshold. Each of these will be discussed

⁵⁷⁸ UNESCO Institute of Statistics *Handbook on Measuring Equity in Education* (2018)18.

⁵⁷⁹ Frankel C ‘Equality of opportunity’ (1971) 81:3 *Ethics* 209.

⁵⁸⁰ Frankel C ‘Equality of opportunity’ (1971) 81:3 *Ethics* 209.

⁵⁸¹ Fritzberg GJ (2001) 36:1 ‘Opportunities of substance: Reconceptualizing equality of educational opportunity’ (2001) *Journal of Thought* 45.

⁵⁸² *King N.O. and Others v De Jager and Others* 2021 (5) BCLR 449 (CC) 166 and 244; *Sithole and Another v Sithole and Another* 2021 (6) BCLR 597 (CC) 2.

⁵⁸³ Fiske E & Ladd H ‘Racial equity in education: How far has South Africa come?’ (2006) 24:2 *Perspectives in Education* 100.

in turn below. South Africa's education system is considered in light of these different equity indicators.

4.3.1 Equality of inputs

Conventional attempts to advance educational equity have centered on the more even distribution of resources expended on schooling.⁵⁸⁴ Policy makers were satisfied to characterise equity almost purely on the basis of inputs.⁵⁸⁵ Inputs refers to those resources needed by a school to function such as computers,⁵⁸⁶ classrooms, revenue expended per learner and other supplies.⁵⁸⁷ These basic schooling inputs are considered core factors for improved schooling outcomes.⁵⁸⁸ Gauging EEO from an input's perspective requires an investigation into the potential relationship if any between the amount of resources allocated to students and immaterial factors.⁵⁸⁹ There should be no differences in the allocation of these resources based on, amongst others, race, socio-economic circumstances and geographic location.⁵⁹⁰ Ensuring sufficiency of inputs assumes that there exists a connection between inputs and outcomes.⁵⁹¹ The theory goes that EEO exists where all students commence the educational race with the same access to resources.⁵⁹² The ultimate result of the race is then thought to be based purely on individual determination. Differing outcomes are viewed as acceptable as any discrepancies in results are considered purely the result of differing efforts.⁵⁹³

One of the enduring wounds of apartheid is the immense disparities in access to resources in South Africa, including in the educational domain.⁵⁹⁴ Spaul explains '[w]hile all countries face educational inequalities, particularly that of low and middle-income countries,

⁵⁸⁴ Hess FM 'Courting backlash: The risks of emphasizing input equity over school performance' (1998) 6:1 *Virginia Journal of Social Policy & the Law* 12.

⁵⁸⁵ Murphy J 'Equity as student opportunity to learn' (1988) 27:2 *Research, Policy, Practice: Where Are We Headed?* 145.

⁵⁸⁶ Koski WS 'Equity in public education: School-finance reform in Michigan' (1992) 26:1 *University of Michigan Journal of Law Reform* 201.

⁵⁸⁷ Berne R and Stiefel L 'Measuring the equity of school finance policies: A conceptual and empirical analysis' (1981) 7:1 *Policy Analysis* 49 and 51.

⁵⁸⁸ Rakabe E 'Equitable Resourcing of Schools for Better Outcomes' Technical Report: Submission for the Division of Revenue 2015 (2014) 108.

⁵⁸⁹ Metzler J 'Inequitable equilibrium: School finance in the United States' (2003) 36:3 *Indiana Law Review* 565.

⁵⁹⁰ Koski WS 'Equity in public education: School-finance reform in Michigan' (1992) 26:1 *University of Michigan Journal of Law Reform* 203 and 204.

⁵⁹¹ Alexander N A 'Educational Equity' in Brewer DJ & Picus LO 'Encyclopedia of Education Economics and Finance' (2014) 287.

⁵⁹² UNESCO Institute for Statistics Educational Equity and Public Policy: Comparing Results from 16 Countries – (2007) 25.

⁵⁹³ Roemer JE 'Equality of opportunity: A progress report' (2002) *Social Choice and Welfare* 455.

⁵⁹⁴ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 45.

the levels and patterns of inequality in South Africa are extreme and still map onto the axes of apartheid oppression with uncanny regularity.⁵⁹⁵ The Constitutional Court in *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* documents these inequalities:

‘Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.

It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education’.⁵⁹⁶

The vast majority of South Africa’s black learners either lack essential schooling inputs or suffer short supply. For these learners, a shortage of textbooks,⁵⁹⁷ ‘crumbling classrooms, horrendous bathrooms, cracked fences, and non-existent libraries and laboratories’ are very much the order of the school day.⁵⁹⁸ South Africa’s historically white schools (HWS) reap the benefits of ‘decades of capital investment’ and are well-equipped to support the learning process.⁵⁹⁹ However, only a privileged few learners have the advantage of learning in these comfortable, resource rich and secure educational settings.⁶⁰⁰ It is unfailingly the country’s impoverished black learners who are the most robbed of an adequate schooling environment with all the vital inputs it entails.⁶⁰¹

⁵⁹⁵Spaull N ‘Equity: A price too high to pay?’ in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 4.

⁵⁹⁶ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 45 and 46.

⁵⁹⁷ Veriava F ‘Basic education provisioning’ in Veriava F and Fish Hodgson TF (eds) *Basic education rights handbook: Education Rights in South Africa* (2017) 222.

⁵⁹⁸ Draga L ‘Infrastructure and equipment’ in Veriava F and Fish Hodgson TF *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 238.

⁵⁹⁹ Veriava F ‘Basic education provisioning’ in Veriava F and Fish Hodgson TF (eds) *Basic education rights handbook: Education Rights in South Africa* (2017) 222.

⁶⁰⁰ Draga L ‘Infrastructure and equipment’ in Veriava F and Fish Hodgson TF *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 238.

⁶⁰¹ Draga L ‘Infrastructure and equipment’ in Veriava F and Fish Hodgson TF *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 238.

Section 34(1) of the Schools Act aims to rectify these inequities. It places an obligation on government to ensure the equitable financing of schools from public monies.⁶⁰² This section explains that the objectives of equitable financing are twofold. First, to ensure that all learners can thoroughly enjoy their right to an education. Second, to serve a remedial purpose in respect of addressing historical inequities. The Act also requires that the Minister of Basic Education establish norms and basic standards for the financing of public schools.⁶⁰³ The Minister has established the National Norms and Standards for School Funding (NNSSF).⁶⁰⁴ These norms regulate the amount of funding to be allocated to each school in respect of non-personnel costs such as school infrastructure, textbooks and maintenance.⁶⁰⁵ Under the NNSSF, provincial departments of education are required to use financing formulas that benefit those schools serving poorer communities.⁶⁰⁶ The NNSSF serves as the principal mechanism for diverting resources towards destitute learners in disadvantaged schools.⁶⁰⁷ However, the NNSSF impacts less than 20% of overall school funding.⁶⁰⁸ Moreover, public monies spent per learner in South Africa on basic education has, in real figures, been on the decline for a number of years.⁶⁰⁹ This is likely to worsen resource inequalities between fee and no-fee charging schools.

Increasing expenditure on teacher salaries has meant that in many provinces monies for non-personnel expenditure are exceedingly limited.⁶¹⁰ In addition, wealthier SGBs are allowed to charge school fees which can be used as income to supplement school resources.⁶¹¹ No fees schools, where 98% of learners are either coloured or African, do not enjoy this luxury.⁶¹² The supplementation of resources by wealthier schools further exacerbates inequities in physical

⁶⁰² Section 34(1) of the Schools Act states that ‘the State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.’

⁶⁰³ ‘Section 35 of the Schools Act states that ‘subject to the Constitution and this Act, the Minister must determine norms and minimum standards for the funding of public schools after consultation with the Council of Education Ministers, the Financial and Fiscal Commission and the Minister of Finance.’

⁶⁰⁴ National Norms and Standards for School Funding GN 869 GG 29179 of 31 August 2006.

⁶⁰⁵ Studies in Poverty and Inequality Institute & Equal Education Law Centre ‘How are Public Schools Funded?’.

⁶⁰⁶ McLaren D ‘Funding basic education’ in Veriava F and Fish Hodgson TF *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 65.

⁶⁰⁷ Rakabe E ‘Equitable Resourcing of Schools for Better Outcomes’ Technical Report: Submission for the Division of Revenue 2015 (2014) 105.

⁶⁰⁸ McLaren D ‘Funding basic education’ in Veriava F and Fish Hodgson TF *Basic Education Rights Handbook: Education Rights in South Africa* (2017) 51.

⁶⁰⁹ Spaull N ‘Equity: A price too high to pay?’ in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 17.

⁶¹⁰ Fiske E & Ladd H ‘Racial equity in education: How far has South Africa come?’ (2006) 24:2 *Perspectives in Education* 102.

⁶¹¹ Mestry R and Ndhlovu R ‘The implications of the National Norms and Standards for School Funding policy on equity in South African public schools’ (2014) 34:3 *South African Journal of Education*.

⁶¹² Spaull N ‘Equity: A price too high to pay?’ in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 14.

resourcing across the system. Although, this type of shoring up of government monies has contributed towards ensuring that at least a small portion of South Africa's public education system remains functional. There is, however, no denying that this bifurcated education model that differentiates between fee and non-fee charging schools is an inherently unequal structure. That is not to say that it is impossible to push for more racially equitable access within South Africa's existing split schooling framework.

Schooling inputs are not limited to physical resources but also extend to teachers.⁶¹³ This much has been recognised by the Eastern Cape High Court in *Linkside and Others v Minister of Basic Education and Others*.⁶¹⁴ Here the court stated that a failure to fill empty teacher posts in several public schools within the province led to an 'ongoing violation' of the right to basic education of children enrolled at the affected schools.⁶¹⁵ The distribution of teachers across South Africa's public education system remains grossly unequal.⁶¹⁶ SGBs of more well-off schools are also able to employ additional teachers and support staff through monies generated by school fees.⁶¹⁷

About 80% of South Africa's budget for public education is allocated to personnel spending.⁶¹⁸ It is the more affluent schools that unwaveringly entice more highly qualified teachers and other staff. Across all South Africa's provinces, schools based in the most affluent neighbourhoods boast more highly qualified teachers than schools located in impoverished areas.⁶¹⁹ Since salaries are partially fixed to qualification standard, personnel expenditure in these schools is substantially larger than in impoverished ones.⁶²⁰ According to Motala and Carel, in almost all provinces personnel distribution and spending on schooling continues to be

⁶¹³ Koski WS 'Equity in public education: School-finance reform in Michigan' (1992) 26:1 *University of Michigan Journal of Law Reform* 201. *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) 20. *Linkside and Others v Minister of Basic Education and Others* [2015] ZAECGHC 36 (26 January 2015) 2 and 26.

⁶¹⁴ *Linkside and Others v Minister of Basic Education and Others* [2015] ZAECGHC 36 (26 January 2015) 2 and 26.

⁶¹⁵ *Linkside and Others v Minister of Basic Education and Others* [2015] ZAECGHC 36 (26 January 2015) 2 and 26.

⁶¹⁶ Spaul N 'Equity: A price too high to pay?' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 16.

⁶¹⁷ Motala S & Carel D 'Educational funding and equity in South African schools' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 73.

⁶¹⁸ Spaul N 'Equity: A price too high to pay?' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 15.

⁶¹⁹ Motala S & Carel D 'Educational funding and equity in South African schools' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 73.

⁶²⁰ Motala S & Carel D 'Educational funding and equity in South African schools' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 73.

pro-rich.⁶²¹ Spauld claims that after accounting for pro-poor non personnel spending and features like school nutrition, public spending on basic education as a whole is only faintly pro-poor. Spauld argues that when consideration is given to private contributions within the system spending becomes extremely pro-rich.⁶²²

When measured in accordance with the equality of inputs indicator, South Africa's public education system is inherently and deeply unequal along racial lines. South Africa's government has, in real terms, only slightly increased government expenditure to achieve equality of inputs. However, one should be wary of treating equality of inputs as the gold standard for measuring equity within public schooling. Mbiti's research shows that a significant number of input-positioned policies, across different contexts, have in and of themselves done little to increase performance results within schooling systems.⁶²³ However, equality of inputs definitely has an important role to play in rendering South Africa's public education system more equal. This much can be gathered from the significantly skewed physical resourcing that continues to characterise the system and the fact that many South African schools lack even the most basic resources required for teaching and learning.

4.3.2 Equality of outcomes

In recent years debates on education policy have shifted in emphasis towards the impact of schooling on individuals.⁶²⁴ Many scholars term this as schooling outcomes.⁶²⁵ Scholars, policy shapers and courts alike consider outcomes as significant indicators of equity in education.⁶²⁶ EEO gauged through schooling outcomes is measured by, amongst others, student test

⁶²¹ Motala S & Carel D 'Educational funding and equity in South African schools' in Spauld N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 72. With Limpopo and Mpumalanga being the exceptions. See Spauld N 'Equity: A price too high to pay?' in Spauld N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 15.

⁶²² Spauld N 'Equity: A price too high to pay?' in Spauld N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 15.

⁶²³ Mbiti IM 'The need for accountability in education in developing countries' (2016) 30:3 *Journal of Economic Perspectives* 109-132.

⁶²⁴ Bulkley KE 'Conceptions of equity: ow influential actors view a contested concept' (2013) 88:1 *Peabody Journal of Education* 18. Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 8.

⁶²⁵ Bulkley KE 'Conceptions of Equity: How Influential Actors View a Contested Concept' (2013) 88:1 *Peabody Journal of Education* 18, Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 8 and Fiske E & Ladd H 'Racial equity in education: How far has South Africa come?' (2006) 24:2 *Perspectives in Education* 100.

⁶²⁶ Koski WS 'Equity in public education: School-finance reform in Michigan' (1992) 26:1 *University of Michigan Journal of Law Reform* 201.

scores,⁶²⁷ including reading achievement,⁶²⁸ competency levels and graduation rates.⁶²⁹ An outcomes based approach to equity focuses particularly on reducing the gaps in outcomes between top performing learners and those falling at the bottom.⁶³⁰ The focus is on whether learner achievement is inequitable regardless of whatever formal educational opportunities there may be.⁶³¹

A look at South Africa's international score card on learner outcomes paints a bleak picture of a highly inequitable education system skewed by wealth. The Progress in International Reading Literacy Study (PIRLS) is a good example of these inequities. PIRLS is now firmly recognised as the 'defacto' international benchmark for observing the attainment of reading comprehension.⁶³² According to the PIRLS 2016 survey, learners enrolled in the 10% of the most financially well-off schools in South Africa have a five times higher probability of attaining basic reading skills by the fourth grade compared to learners enrolled in the 50% of the most financially deprived schools.⁶³³ PIRLS 2016 also shows that on average, children enrolled in the most impoverished schools in South Africa are five times more likely to fail to attain reading skills than to acquire them.⁶³⁴ The Trends in International Mathematics and Science Study (TIMSS) serves as a further example of the inequities within South African education. TIMSS is an evaluation of the science and mathematics comprehension of eighth and fourth grade children worldwide.⁶³⁵ According to TIMSS 2015 data, 67% of children enrolled in fee charging public schools in South Africa can perform basic mathematics. However, this figure drops to 25% for no fee charging schools.⁶³⁶

⁶²⁷ Metzler J 'Inequitable equilibrium: school finance in the United States' (2003) 36:3 *Indiana Law Review* 565. Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 7.

⁶²⁸ Metzler J 'Inequitable equilibrium: School finance in The United States' (2003) 36:3 *Indiana Law Review* 565.

⁶²⁹ Metzler J 'Inequitable equilibrium: School finance in the United States' (2003) 36:3 *Indiana Law Review* 565. Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 7.

⁶³⁰ Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 5.

⁶³¹ Levin B 'Approaches to Equity in Policy for Lifelong Learning' (2003) A paper commissioned by the Education and Training Policy Division, OECD, for the Equity in Education Thematic Review 8.

⁶³² TIMSS & PIRLS International Study Center 'About PIRLS' available at <https://timssandpirls.bc.edu/pirls2021/> (accessed 31 March 2021).

⁶³³ Pretorius E & Spaull N 'Still Falling at the First Hurdle: Examining Early grade Reading in South Africa' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 9.

⁶³⁴ Pretorius E & Spaull N 'Still Falling at the First Hurdle: Examining Early grade Reading in South Africa' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 11.

⁶³⁵ Human Sciences Research Council *TIMSS 2015 Highlights of Mathematics Achievement amongst Grade 5 South African Learners* (2017) 1.

⁶³⁶ Human Sciences Research Council *TIMSS 2015 Highlights of Mathematics Achievement amongst Grade 5 South African Learners* (2017) 16 and 17.

At the national level, the matric exam (the South African school exit examination) is commonly looked at to dissect trends in South Africa's progress towards achieving a more equitable education system.⁶³⁷ The matric results show a huge schism for excellence in mathematics. Spaully explains that only three percent of the country's secondary schools (the top 200) generate more distinctions (a result of 80% and above) in mathematics in the matric exams than the other 97% collectively. Of the top 200 schools (the flourishing three percent) 185 are HWS.⁶³⁸ The official matric graduation rates for the years 2015 to 2019 have increased incrementally from 71% to 81%.⁶³⁹ These graduation rates seem to suggest that the overwhelming majority of South Africa's learners are, at the very least, successfully completing their secondary education. The matric pass rate has, however, been criticised as no more than a deceptive parade and a weak reflection of the overall well-being of the schooling system.⁶⁴⁰ This is partly because the matric pass rate does not account for elevated learner drop-outs rates.⁶⁴¹ Research suggests that once these rates are taken into account the actual pass rates for the academic years 2015 to 2019 may hover at about 40%.⁶⁴² There are massive racial inequalities regarding who goes on to complete secondary schooling in South Africa. It is African and coloured youth who disproportionately lack a matric certificate.⁶⁴³ The deep schisms in learner performance within South Africa's education system undeniably align with race.

The grim figures highlighted here unequivocally indicate that, from an equality of schooling outcome's standpoint, opportunities for schooling in South Africa is anything but equal. In fact, by this measurement South Africa is the poster child for unequal education. Although formal

⁶³⁷ Fiske E & Ladd H 'Racial equity in education: How far has South Africa come?' (2006) 24:2 *Perspectives in Education* 104.

⁶³⁸ Spaully N 'Equity: A price too high to pay?' in Spaully N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 1 and 2.

⁶³⁹ Head T 'Matric pass rate 'drops by 5.1%' – Here's how it compares to the last 10 years' *The South African* 22 February 2021 available at <https://www.thesouthafrican.com/news/what-is-matric-pass-rate-2020-comparison-last-year-decade/> (accessed 2 April 2021).

⁶⁴⁰ Equal Education Media Statement 'Arrested development: Matric exams are one step in an uphill education path for SA learners' 3 January 2019 available at <https://equaleducation.org.za/wp-content/uploads/2019/01/Equal-Education-matric-2019-media-statement-1.pdf> (accessed 4 January 2021.)

⁶⁴¹ Equal Education Media Statement 'Arrested development: Matric exams are one step in an uphill education path for SA learners' 3 January 2019 available at <https://equaleducation.org.za/wp-content/uploads/2019/01/Equal-Education-matric-2019-media-statement-1.pdf> (accessed 4 January 2021.)

⁶⁴² Equal Education Media Statement: 'One Step Forward, One Step Back: Covid-19 Threatens An Already Fragile Education System' 22 February 2021 available at <https://equaleducation.org.za/wp-content/uploads/2021/02/210221-EE-pre-matric-results-statement-2021.pdf> (accessed 4 April 2019).

⁶⁴³ Spaully N 'Education in SA – Still separate and unequal (Extended version of CityPress article)' 12 January 2014 available at <https://nicspaully.com/2014/01/12/education-in-sa-still-separate-and-unequal-extended-version-of-citypress-article/> (accessed 2 April 2020).

assessments as a marker of equity have many failings, they form a necessary and objective standard for assessing the health of a public education system and the degree of divisions therein. Equality of outcomes as a measure therefore has a constructive role to play in determining how equitable a schooling system can claim to be. These somber statistics suggest that impoverished black children who enroll in HWS stand a much better chance to acquire basic skills such as reading and mathematics and to go on to flourish than their counterparts who remain trapped in the much larger dysfunctional portion of the public education system. This position is supported by the research of Spaull, Van der berg, Burger and other scholars from the Department of Economics and the Bureau for Economic Research at the University of Stellenbosch,⁶⁴⁴ as well as Fintel and other researchers.⁶⁴⁵ In fact, Spaull claims that ‘placing a poor child in a wealthy school is likely to more than compensate for any negative effects of a poor home background’.⁶⁴⁶

Where HWS use feeder zones based on proximity as an admission criterion, they invariably bar poor black children from accessing these schools and thus from a much stronger chance of entering the formal job market and ultimately succeeding in life. Transformative zoning will allow some impoverished black children access to HWS and the immense opportunities that accompany such access. Such an intervention can therefore make a meaningful contribution in advancing more racially equitable access to schooling in South Africa. It provides a useful, albeit modest, mechanism that can be used to further the constitutional goal of transforming South African society into a more egalitarian one.

4.3.3 Minimum standards

The minimum standards concept entails viewing education through a binary measure. A binary measure means that the basic standard has either been achieved or not. Equity is measured by viewing the amount of people who have mastered the minimum standard. The greater number of people who comply, the closer the system moves towards being a perfectly equitable one.⁶⁴⁷ What constitutes the educational threshold for compliance may differ.⁶⁴⁸ Field, Kuczera and Pont, for instance cite the examples of possessing the capacity to read and write and to perform

⁶⁴⁴ See section 1.2.5 above.

⁶⁴⁵ See section 1.2.5 above.

⁶⁴⁶ Spaull N ‘A Preliminary Analysis of SACMEQ III South Africa’ (2012) Stellenbosch Economic Working Papers: 11/11 Department of Economics, University of Stellenbosch 16.

⁶⁴⁷ UNESCO Institute of Statistics *Handbook on Measuring Equity in Education* (2018) 25.

⁶⁴⁸ European Group for Research on Equity in Educational Systems *Equity in European Educational Systems: A Set of Indicators* 2 ed (2005) Department of Theoretical and Experimental Education, University of Liège 19.

simple mathematical equations as potential threshold criteria for obtaining the rudimentary abilities needed to function in today's world.⁶⁴⁹ Benadusi suggests that one of the benefits of setting and lifting a minimum standard is that it provides for the possible decrease of inequalities between individuals in society whilst avoiding the ramifications of equalising downwards (lowering the bar for everyone in an attempt to achieve equality within the schooling system).⁶⁵⁰ However, the minimum standard notion can be critiqued for possessing the potential to legitimise and perpetuate discriminatory provisioning within education.

An attempt to justify discriminatory education provisioning on the basis of the minimum threshold concept was rejected by the Supreme Court of Vermont in the United States (US) in *Brigham v. State of Vermont*.⁶⁵¹ The court was confronted with the question of whether the state's funding model for public education with its significant reliance on local property taxes denied children an equal educational opportunity under the Vermont constitution. Public education in Vermont was financed chiefly by two funding sources. These sources were monies raised through local property taxes and, monies allocated by the state through the use of a complicated formula. The formula concerned was aimed at ensuring that each school district was capable of spending an amount per learner that could deliver 'at least a minimum-quality education program'. However, this 'foundation costs' formula aimed to equalise the state's education system only to the extent that it provided for a minimum adequate education. Wealthier school districts with higher property values could simply spend in excess of foundation costs to enhance the quality of education within their district, which they usually had. As a consequence, the Vermont public education system was characterised by severe disparities in educational opportunities. The court stated that '[t]he distribution of a resource as precious as educational opportunity may not have as its determining force the mere fortuity of a child's residence.' The court rejected the state's argument that treating learners in different schooling districts differently was justified provided they all receive 'a

⁶⁴⁹ Field S, Kuczera M & Pont B *Education and Training Policy No More Failures: Ten Steps to Equity in Education* (2007) OECD 11 read with 44. According to these scholars, equity in education contains two dimensions the second of which is 'inclusion' which, they suggest, means that everyone has a minimum level of education. Hutmacher adds to this, computer literacy. Hutmacher W 'Introduction' in Hutmacher W, Cochrane D & Bottani N (eds) in *In pursuit of equity in education: Using international indicators to compare equity policies* (2001) 14.

⁶⁵⁰ Benadusi L 'Equity and Education: A critical review of sociological research and thought' in Hutmacher W 'Introduction' in Hutmacher W, Cochrane D & Bottani N (eds) in *In pursuit of equity in education: Using international indicators to compare equity policies* (2001) 54.

⁶⁵¹ *Brigham v. State of Vermont* 692 A.2d 384 (1997).

minimally “adequate” education’. The funding model was found to have violated the right to EEO under the Vermont Constitution.⁶⁵²

The Supreme Court of Montana in *Helena Elementary School District v. The State of Montana* found that certain accreditation standards relating to public and secondary schools published by the Montana Board of Public Education (which included minimum school safety standards, course curricular and class sizes) set a minimum bar only. The court explained that it was upon the foundation laid by these standards that quality education must be developed.⁶⁵³

South Africa’s wealthier fee charging schools (as with the wealthier school districts in the US) are well placed to raise additional revenue to significantly enhance the standard of schooling provision at their schools. This would be possible via income generated through school fees (as opposed to property taxes). South Africa’s non-fee charging schools are unable to generate any income through school fees as they are prohibited from charging these. Setting a minimum threshold as a standard for education delivery in South Africa will only serve to further exacerbate existing racial inequalities within the public schooling system. Such a threshold could be used to justify marked disparities within education delivery no matter how broad the gap in education standards between those in wealthy fee charging schools and those who are not. Minimum threshold as a gauge of the extent of equity in the South African context should thus not be employed.

4.4 ADEQUACY

Adequacy is traditionally understood as a noncomparative standard for measuring educational equity. Its focus is on the sufficiency of the education provided to the individual and not the nature of education supplied in comparison with others.⁶⁵⁴ There is a diversity of views on what constitutes an ‘adequate education’.⁶⁵⁵ What amounts to adequacy could potentially be determined with reference to certain objective factors which an adequate education should further.⁶⁵⁶ This approach to determining adequacy is evidenced in US case law.⁶⁵⁷ The most famous definition by a US court concerning educational adequacy was laid down by the

⁶⁵² *Brigham v. State of Vermont* 692 A.2d 384 (1997).

⁶⁵³ *Helena Elementary School District No.1 v. The State of Montana* 769 P.2d 684 (1989).

⁶⁵⁴ Satz D ‘Equality, adequacy, and education for citizenship’ (2007) 117:4 *Symposium on Education and Equality* 625.

⁶⁵⁵ Das A ‘An “adequate” education needs an “adequate” approach to school funding’ (2007) 12:2 *Public Interest Law Reporter* 82.

⁶⁵⁶ Weishart JE ‘Transcending equality versus adequacy’ (2014) 66:3 *Stanford Law Review* 529.

⁶⁵⁷ Weishart JE ‘Transcending equality versus adequacy’ (2014) 66:3 *Stanford Law Review* 529.

Supreme Court of Kentucky in *Rose v. Council for Better Education*.⁶⁵⁸ The court explained that under the Kentucky Constitution every child within the state was entitled to obtain a suitable and adequate education. The court proceeded to outline seven goals in this regard. These goals are to develop in each child, at a minimum, the following competencies (a) adequate oral and written skills to function in a fast changing modern world; (b) a sufficient understanding of political, social and economic systems; (c) an understanding of governmental processes so as to appreciate the issues faced by their community and country; (d) sufficient self-consciousness with an awareness of their own mental and physical well-being;⁶⁵⁹ and (e) an adequate grounding in the arts.⁶⁶⁰ It must also (f) prepare a child for further academic or vocational training; and (g) empower them to compete firmly in the labour market or academics.⁶⁶¹ The Supreme Court of Massachusetts has endorsed *Rose* as establishing seven minimum criteria that an educated child should meet.⁶⁶² The Supreme Courts of Arkansas,⁶⁶³ and New Hampshire too have recognised the *Rose* criteria.⁶⁶⁴ The latter court has referred to these criteria as constituting ‘general, aspirational guidelines for defining educational adequacy’,⁶⁶⁵ that amount to ‘benchmarks of a constitutionally adequate public education system.’⁶⁶⁶

The West Virginia Supreme Court in *Pauley v. Kelly* (a decision relied on in *Rose*) sets out eight outcomes-based features of a constitutionally compliant education system under the West Virginian Constitution.⁶⁶⁷ These features largely overlap with those in *Rose*. In addition, *Pauley* emphasises numeracy skills, recreational pursuits, and social ethics.⁶⁶⁸ Some scholars focus strongly on adequacy as an educational standard which enables individuals to participate in the

⁶⁵⁸ *Rose v. Council for Better Educ., Inc.* 790 S.W.2d 186 (1989).

⁶⁵⁹ An adequate education includes body development *see Wysong v. Walden*, 120 W.Va. 122, 196 S.E. 573 (1938). *McNair v. School District No. 1*, 87 Mont. 423, 288 P. 188 (1930).

⁶⁶⁰ *Rose v. Council for Better Educ., Inc.* 790 S.W.2d 186 (1989).

⁶⁶¹ *Rose v. Council for Better Educ., Inc.* 790 S.W.2d 186 (1989). According to the Tennessee Supreme Court, the availability of additional subjects such as music and art and extra-curricular activities such as athletics are essential to an adequate education system. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 145 (Tenn. 1993).

⁶⁶² *McDuffy v. SEC. of the Executive Office of Education* 615 N.E.2d 516 (1993).

⁶⁶³ *Lake View School District No. 25 v. Huckabee* 91 S.W.3d 472 (2002).

⁶⁶⁴ *Claremont School District et al v Governor* No. 97-001 (1997). One judge partially dissented on this point.

⁶⁶⁵ *Claremont School District et al v Governor* No. 97-001 (1997).

⁶⁶⁶ *Claremont School District et al v Governor* No. 97-001 (1997).

⁶⁶⁷ *Pauley v. Kelly* 255 S.E.2d 859 W. Va. (1979). The features listed in *Pauley* are (a) literacy; (b) perform basic mathematical skills; (c) familiarity with government to the degree that the child is, as a citizen, empowered to engage in the democratic process; (d) self-enlightenment and awareness of their full context to ensure they are capable of an informed selection of their occupation; (e) job and further academic instruction; (f) recreational pastimes; (g) interests in an array of arts; and (h) proper socialisation including moral behaviour.

⁶⁶⁸ *Pauley v. Kelly* 255 S.E.2d 859 W. Va. (1979).

democratic process.⁶⁶⁹ Satz, for instance, argues that in a society where democracy reigns ‘civic equality’ is core to educational adequacy.⁶⁷⁰ To further educational citizenship, Satz suggests, amongst others, the adoption of affirmative action policies.⁶⁷¹ Das explains that adequacy can be viewed from the perspective of empowering young people to manage their own future. By extension, an ‘adequate’ education would be defined as one that allows for the bulk of students to enrol in further educational institutions.⁶⁷² The US courts have emphasised that education should mould children in a holistic sense.⁶⁷³ In *Pauley*, for instance, the West Virginia Supreme Court provided an overall definition of a ‘thorough and efficient’ schooling system under the state constitution. An education system can be so classified if it grows ‘as best the state of education expertise allows the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically’.⁶⁷⁴

Many scholars support the perspective that adequacy only demands that a minimum standard of accomplishment be met.⁶⁷⁵ A critique of adequacy as an education standard is that it works to the advantage of the already advantaged by permitting perpetuation of inequality above this minimum standard for achieving adequacy.⁶⁷⁶ Rich, for instance, argues that it is possible that all children obtain an education which complies with the basic standards of adequacy but inequity remains.⁶⁷⁷ Satz, however, claims educational adequacy is an evolving concept. As the demands of achieving ‘full membership in society’ increase so too would the adequacy threshold.⁶⁷⁸ An adequacy standard that consigns some in society to second ranked citizens

⁶⁶⁹ Satz D ‘Equality, Adequacy, and Education for Citizenship’ (2007) 117:4 *Symposium on Education and Equality* 625. Das A ‘An “Adequate” Education Needs an “Adequate” Approach to School Funding’ (2007) 12:2 *Public Interest Law Reporter* 88.

⁶⁷⁰ Satz D ‘Equality, Adequacy, and Education for Citizenship’ (2007) 117:4 *Symposium on Education and Equality* 625. Das A ‘An “Adequate” Education Needs an “Adequate” Approach to School Funding’ (2007) 12:2 *Public Interest Law Reporter* 88.

⁶⁷¹ Satz D ‘Equality, Adequacy, and Education for Citizenship’ (2007) 117:4 *Symposium on Education and Equality* 648.

⁶⁷² Das A ‘An “Adequate” Education Needs an “Adequate” Approach to School Funding’ (2007) 12:2 *Public Interest Law Reporter* 88.

⁶⁷³ *McNair v. School District No. 1*, 87 Mont. 423, 288 P. 188 (1930) quoting Webster’s New International Dictionary. *Pauley v. Kelly* 255 S.E.2d 859 W. Va. (1979).

⁶⁷⁴ *Pauley v. Kelly* 255 S.E.2d 859 W. Va. (1979).

⁶⁷⁵ Rich JM ‘The basis for educational adequacy’ (1988) 16:4 *American Secondary Education* 13. Satz D ‘Equality, Adequacy, and Education for Citizenship’ (2007) 117:4 *Symposium on Education and Equality* 635.

⁶⁷⁶ Koski WS & Reich R ‘When adequate isn’t: The retreat from equity in educational law and policy and why it matters’ (2006) 56:3 *Emory Law Journal* 550. Weishart JE ‘Transcending equality versus adequacy’ (2014) 66:3 *Stanford Law Review* 482-483.

⁶⁷⁷ Rich JM ‘The basis for educational adequacy’ (1988) 16:4 *American Secondary Education* 13.

⁶⁷⁸ Satz D ‘Equality, Adequacy, and Education for Citizenship’ (2007) 117:4 *Symposium on Education and Equality* 647.

lacking access to positions of influence can never be adequate.⁶⁷⁹ According to Satz, adequacy as an educational standard must ensure that all children regardless of their class, race or socio-economic background, are represented in prominent establishments, universities and desirable careers. A standard of education that fails to achieve this is an inadequate one.⁶⁸⁰

A number of US courts have recognised an evolving dimension as intrinsic to the concept of an adequate education. Such a dimension has been viewed as essential as it ‘prepares today’s students to face the world of today and tomorrow.’⁶⁸¹ Some of these courts have interpreted a suitable education to be a shifting concept and, in that sense, have made provision for the definition of a suitable education to be tailored to modern day developments as they unfold.⁶⁸² For instance, the Wyoming High Court has stated that what constitutes a proper education is not frozen in time but will of necessity continue to develop.⁶⁸³ Similarly, the Supreme Court of Massachusetts explains that the substance of the obligation to educate must evolve in tandem with societal evolution.⁶⁸⁴ A failure to interpret the obligation in this manner, according to the Massachusetts Supreme Court, will place the right to education in constant jeopardy of ‘becoming atrophied’.⁶⁸⁵ The Supreme Court of Tennessee’s understanding on the matter is slightly different. This court has stated that innovation and progress is in fact inherent in education. Therefore, any adequate education system would, by all reasonable standards, always encompass such traits.⁶⁸⁶ The New York Court of Appeals reasoning appears similar to that of Tennessee’s Supreme Court. The court of appeals rationalises that any present-day definition of a ‘sound basic education’ must also serve the future.⁶⁸⁷

Some of the state supreme courts within the US have recognised that an adequate education demands not simply teachers but, more specifically, competent teachers.⁶⁸⁸ In *Harrison v Day*,

⁶⁷⁹ Satz D ‘Equality, adequacy, and education for citizenship’ (2007) 117:4 *Symposium on Education and Equality* 638.

⁶⁸⁰ Satz D ‘Equality, adequacy, and education for citizenship’ (2007) 117:4 *Symposium on Education and Equality* 643.

⁶⁸¹ *Board of Education, Levittown Union Free School District v. Nyquist* 57 N.Y.2d 27, 51 (1982) dissenting opinion of Fuchsberg J.

⁶⁸² The Supreme Court of New Hampshire in *Claremont School District et al v Governor* No. 97-001(1997) explains: ‘A constitutionally adequate public education is not a static concept removed from the demands of an evolving world.’ See also *Claremont School Dist. v. Governor* 138 N.H. 183 (1993).

⁶⁸³ *Campbell Co. School District v. State* 907 P.2d 1238 (1995).

⁶⁸⁴ *McDuffy v. SEC. of the Executive Office of Education* 615 N.E.2d 516 (1993).

⁶⁸⁵ *McDuffy v. SEC. of the Executive Office of Education* 615 N.E.2d 516 (1993) quoting *Seattle School District No.1. v. State of Washington* 90 Wn.2d 476 (1978).

⁶⁸⁶ *Tennessee Small School Systems v Mcwherter* 851 S.W.2d 139 (1993).

⁶⁸⁷ *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 349 (N.Y. 2003).

⁶⁸⁸ *Harrison v. Day* 106 S.E.2d 636 Va. (1959). *McDuffy v. SEC. of the Executive Office of Education* 615 N.E.2d 516 (1993). *Pauley v. Kelly* 255 S.E.2d 859 W. Va. (1979).

the Supreme Court of Virginia found that an adequate supply of skilled teachers is required by the state's constitution.⁶⁸⁹ Similarly, the Supreme Court of Pennsylvania has stated that employing qualified teachers was a requirement under the Pennsylvanian constitution.⁶⁹⁰ The Supreme Court of Massachusetts seems to suggest that a failure to secure or retain top quality and well-trained teachers amounts to failure by the state to fulfil its constitutional obligation to educate all children within the state.⁶⁹¹ In the South African context, poor content knowledge of teachers constitutes a significant constraint on quality instruction. Results from the SACMEQ III 2016 survey showed that a mere 32% of South Africa's grade six mathematics teachers possessed the desired level of content knowledge in respect of the subject they teach. Even more indicting, nearly four out of every five grade six mathematics teachers had subject knowledge below grade six mathematics.⁶⁹² A substantial number of these teachers are employed in the poorest four quintiles of schools (South Africa's school wealth classification categories).⁶⁹³ It is evident that South Africa's poorest schools who cater to impoverished black learners lack significant numbers of teachers with the necessary caliber and knowledge to confer a quality education on the learners they are tasked to teach.

South Africa's Constitution demands the existence of an equal and quality education system. The question which therefore arises is whether adequacy can serve as a suitable barometer for measuring equity within the country's schooling system. This is, notwithstanding the obvious difference in language and ordinary meaning between the two concepts. Adequacy as a standard recognises that discrepancies within education delivery are inevitable. However, if access to opportunities is not closed off or frustrated as a result, these differences are permissible. Adequacy as a standard is not simply concerned with pumping resources into South Africa's public education system in an effort to equalise inputs. It also not laser focused on ensuring equal learning outcomes. Both equality of educational inputs and outcomes serve an important purpose in assessing the extent of equity within the system. However, the ultimate focus is on ensuring that South Africa's learners have equitable access to any future

⁶⁸⁹ *Harrison v. Day* 106 S.E.2d 636 Va. (1959).

⁶⁹⁰ *Ehret v. Kulpmont Borough School District* 5 A.2d 188 Pa. (1938).

⁶⁹¹ *McDuffy v. SEC. of the Executive Office of Education* 615 N.E.2d 516 (1993). The court reasoned similarly in relation to the provision of adequate guidance counsellors.

⁶⁹² Research on Socio-Economic Policy *Laying Firm Foundations Getting Reading Right: Final Report to The Zenex Foundation On Poor Student Performance In Foundation Phase Literacy And Numeracy* (2016) RESEP 8 and 31.

⁶⁹³ Research on Socio-Economic Policy *Laying Firm Foundations Getting Reading Right: Final Report to The Zenex Foundation on Poor Student Performance in Foundation Phase Literacy and Numeracy* (2016) RESEP 8 and 31.

opportunities. The constitutional right to basic education should therefore be interpreted as conferring the right to an adequate education on everyone.

Ensuring adequacy in education delivery aligns with the constitutional duty to realise equitable access to a quality education for all and the obligation to achieve substantive equality. South Africa's basic education system fails abysmally to ensure that enough qualified and properly equipped teachers are stationed in historically black and still tremendously disadvantaged schools. Transformative zoning would allow some impoverished black children the chance to access HWS and the larger contingent of qualified teachers who teach there. It offers these children a much stronger possibility of accessing quality education. In so doing, it makes small but invaluable gains in advancing racially equitable access to schooling within South Africa.

4.5 CONCLUSION

This chapter found that the best standard for assessing equity within South Africa's public education system is that of adequacy. Both equality of inputs (the extent to which resources such as classrooms, textbooks and teachers are evenly distributed across race, socio economic status and geographical location) and equality of outcomes (a consideration of factors such as learner performance, competency levels and graduation percentages) on their own fall short of providing an effective standard for assessing the extent of racial inequities in schooling access. However, given the significantly skewed distribution of resources across South Africa's public education system and the extent of the deprivation suffered by historically black schools, equality of inputs as a standard for measuring equity has a role to play. So too does equality of outcomes, given the distinctive nature of this measurement. Whether measured in accordance with inputs, outcomes or the proposed standard of adequacy, it is clear from this chapter that for most children in South Africa the state is not fulfilling its duty to provide equal access to quality education. This finding is crucial to the question of school zoning. This is because it confirms that exclusionary zoning from the only schools that provide quality education is especially problematic. It also suggests that transformative zoning offers a unique opportunity for the state to further racially equitable access to schooling. This chapter, therefore, confirmed the need for the solutions offered by this thesis.

CHAPTER 5

LEGISLATION AND POLICY ON SCHOOL ADMISSIONS

5.1 INTRODUCTION

The previous chapter established that the state is not complying with its duty to provide equal access to quality education in South Africa. Exclusionary zoning practices of HWS have the potential to exacerbate this, since these practices prevent poor black children from accessing quality education. Moreover, transformative zoning may provide some relief since it may promote equal access to quality education.

This chapter, exams the regulatory and policy framework relevant to school zoning. An understanding of this framework is necessary for appreciating how the current legal and policy position on school zoning has contributed towards exclusionary zoning practices employed by SGBs. It is also necessary to understand the current framework for any discussion on how this framework should be used or amended to promote equal access to quality education in the context of school zoning.

This chapter begins with a discussion of South Africa's legislative and policy history regarding the regulation of school admissions. This is followed by an examination of South Africa's current national legislative and policy framework in this regard. The relevant provisions of the South African Schools Act (the Schools Act) and the National Education Policy Act (NEPA) are considered. The zoning provisions in the Admission Policy for Ordinary Public Schools (National Admission Policy) is also discussed. Proposed amendments to the National Admission Policy as they relate to school zoning are further considered.

5.2 LEGISLATIVE AND POLICY HISTORY RELEVANT TO SCHOOL ZONING

To obtain a firm grasp of the issue of feeder zones in South Africa first requires a firm grasp of the policy and legislative history in this regard. This includes the policies which served as the blueprint to what would eventually culminate in the introduction of the Schools Act. This section explores this history.

5.2.1 The Education Affairs Act

Under apartheid, the provision of education for white South African children was governed by the Education Affairs Act of 1988.⁶⁹⁴ Under this Act, the Minister of Education and Culture could, via government notice, divide a province into educational regions, determine the boundaries thereof and establish a regional council per region.⁶⁹⁵ The Minister could further divide a region into clearly marked districts and establish a school board for each district.⁶⁹⁶ The Minister held the unqualified power to morph these regional or district boundaries, or to dissolve a council or board and establish another.⁶⁹⁷ The power to determine a feeder area for a particular school rested with the HoD who was required to consult with the relevant school board before doing so. The views of white parent groups on the matter of feeder areas are described by the Constitutional Court as having been ‘largely peripheral’.⁶⁹⁸

Where a feeder area existed, no white child whose parents were resident in the feeder area could attend a school outside of that area, except with the permission of the relevant school board.⁶⁹⁹ The board held the power to deny that child admission,⁷⁰⁰ or, if already enrolled at the school, ‘terminate’ their attendance if it viewed this in the interest of education and of the child concerned.⁷⁰¹ The school board was obliged to furnish parents with written reasons for an adverse decision and parents had 30 days within which to appeal to the HoD.⁷⁰² If the HoD viewed the circumstances ‘extraordinary’, the HoD could set aside the board’s decision and direct that the child be admitted.⁷⁰³ Under the Education Affairs Act, individual white schools had no direct say on whether a feeder area was to be assigned to their school, what the boundaries for that area would be or how it was to be enforced. In contrast to the Education Affairs Act, the Coloured Persons Education Act of 1963,⁷⁰⁴ and the Indians Education Act of

⁶⁹⁴ Section 1 of the Education Affairs Act (House of Assembly) 70 of 1988. The Schools Act repealed portions of the Education Affairs Act. The repealed portions did not include the provisions dealing with feeder zones. With the exception of the North-West (who addressed the issue much later) the Education Affairs Act was either wholly or largely repealed by provincial legislation over the course of 1995 to 2000.

⁶⁹⁵ S 14(a) of the Education Affairs Act.

⁶⁹⁶ S 14(a) of the Education Affairs Act.

⁶⁹⁷ S 14(c) of the Education Affairs Act.

⁶⁹⁸ *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (4) BCLR 53.

⁶⁹⁹ Section 52(1)(a) of the Education Affairs Act.

⁷⁰⁰ Section 52(1)(b)(i) of the Education Affairs Act.

⁷⁰¹ Section 52(1)(b)(ii) of the Education Affairs Act.

⁷⁰² Section 52(2) of the Education Affairs Act.

⁷⁰³ Section 52(3) of the Education Affairs Act.

⁷⁰⁴ Coloured Persons Education Act 47 of 1963.

1965,⁷⁰⁵ made no mention of feeder areas in relation to coloured and Indian learners respectively.

5.2.2 White Papers One & Two on school admission policies

In 1995, a year after South Africa became a democracy, government released the White Paper on Education and Training, 'White Paper 1'.⁷⁰⁶ This was the first policy document of the post-democratic government which focused on education and training. White Paper 1 stressed the need for a radical reformation of the education budget so as to address the legacy of apartheid and achieve equity within education delivery.⁷⁰⁷ A large component of the new government's education strategy therefore concerned increasing the quality of education provisioning within the historically black and largest portion of the education system.⁷⁰⁸ White Paper 1 also revealed the new government's thinking on the meaning of the right to basic education under section 32(a) of the Interim Constitution. As seen in Chapter 3, section 32(a) conferred on all South Africans the right to basic education and specifically mentioned the right to 'equal access to educational institutions' for all.⁷⁰⁹ White Paper 1 explained that

[t]he precise intention of [section 32(a)] must be to establish a condition of equality and non-discrimination with respect to access to educational institutions. It is a provision which can only be satisfied by the exercise of equal and non-discriminatory admissions policies on the part of educational institutions'.⁷¹⁰

White Paper 1 conceived of section 32(a) as conferring a right to a basic education of 'acceptable quality'.⁷¹¹ According to White Paper 1, 'equal access' to educational institutions meant giving learners greater flexibility to select where to learn.⁷¹² To ensure 'equal access' any admission criteria would have to be applied 'equally to all applicants' without unfairly discriminating in any way.⁷¹³ Although parents would have the 'inalienable right' to choose the 'form of education' they think best for their children,⁷¹⁴ schools would not be required to take in every child seeking admission. Any refusal by a school to admit a child would, however,

⁷⁰⁵ Indians Education Act of 61 of 1965.

⁷⁰⁶ The *White Paper on Education and Training* (GN 196 of 15 March 1995).

⁷⁰⁷ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 11, para 13 and ch 12, para 29(3)(a).

⁷⁰⁸ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 4, para 8; ch 11, para 15(1) and ch 12, para 1.

⁷⁰⁹ The Interim Constitution Act 200 of 1993.

⁷¹⁰ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 7, para 18.

⁷¹¹ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 7, para 11 and Ch 12, para 29(3).

⁷¹² The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 4, para 6.

⁷¹³ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 7, para 21.

⁷¹⁴ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 4, para 3.

have had to be constitutionally justifiable.⁷¹⁵ Any basis for exclusions would also have had to be defined by legislation.⁷¹⁶ However, White Paper 1 does mention some (non-exclusive) ‘limiting factors’ in respect of the right of equal access. These include capacity considerations as per prescribed norms; a learner’s gender,⁷¹⁷ if applying to a same sex school; the preservation of a school’s institutional character in terms of common language, culture or religion and, the suitability of the educational programme to meet the learner’s needs.⁷¹⁸

White Paper 1 further stated that a child’s eligibility for admission must be defined chiefly on the educational need of the child and the school’s capacity to satisfy that need, on the basis that schools are duty-bound to educate. However,

‘a school cannot be obliged to admit an applicant if, when all circumstances of the case are taken into account, a school in the vicinity which would more suitably meet the applicant’s needs is able to do so’.⁷¹⁹

‘A school within the vicinity’ presumably referred to a school within the vicinity of the school to which the learner had applied. This is White Paper 1’s only reference to geography in the context of school admissions. No explanation was given as to what constituted the relevant ‘circumstances’ that ought to have been considered or how a prospective learner’s needs were to be assessed before redirecting that learner. White Paper 1 made no mention of feeder zones. A failure to comprehensively address the issue of feeder zones is perhaps unsurprising given the strong likelihood that providing any favour to proximity would have been perceived by black parents as a form of preventing their children from accessing white schools and thus reinforcing the racially inequitable status quo. Avoiding the issue of feeder zones altogether could possibly have been an attempt by policy makers to simply leave it to the legislature so as to escape dealing with what would inevitably become a highly charged issue.

White Paper 1 refers to government’s understanding of the need of every school to sustain the best level of schooling possible in that particular school’s context. However, White Paper 1 states that the preservation of high standards can never serve to legitimise ‘admissions policies which are designed, directly or indirectly, to exclude applicants from the basic education to

⁷¹⁵ The *White Paper on Education and Training* (GN 196 of 15 March 1995). Ch 7, para 19.

⁷¹⁶ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 7, para 20.

⁷¹⁷ The reference to ‘gender’ appears to be a reference to a learner’s sex.

⁷¹⁸ The *White Paper on Education and Training* (GN 196 of 15 March 1995). Ch 7, para 20.

⁷¹⁹ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 7, para 50.

which they are entitled by right.⁷²⁰ According to Beckmann and Karvelas, the ‘goals, policies and intentions’ of educational transformation as reflected in White Paper 1

‘raised the expectations of millions of black South Africans who were hopeful that their children too would now have the opportunity to be educated in a system with well-equipped schools, as previously only whites had been privileged to do . . . One would, however, have had to be extremely naïve to believe that all the schools that had once been reserved for whites and were situated in former ‘whites-only’ suburbs, would suddenly open their doors to welcome black learners. As much as some former Model C schools took up the challenge, and adopted the policy and vision to integrate and transform their schools, this step was not always taken willingly everywhere. . .’⁷²¹

From the outset it was therefore clear that, despite the right to equal access to educational institutions in a new South Africa, many historically white schools (HWS) would continue to resist desegregation. With this in mind, it is interesting to see how White Paper 1 draws a clear link between the right to equal access to educational institutions and the affirmative action provision under the Interim Constitution.⁷²² This provision empowered government to adopt measures to adequately protect and advance groups disadvantaged through unfair discrimination.⁷²³ According to White Paper 1, possible affirmative action measures in the context of grossly unequal access to education ‘would include special admissions regulations designed to remedy’ historical injustices.⁷²⁴ This policy statement was never seriously implemented (although the Schools Act does prohibit learners from being turned away simply because their parents cannot afford the fees). One can conceive of how these envisaged regulations could have, had they materialised, addressed the manner in which feeder zones ought to be equitably determined and fairly applied as an affirmative action measure.

The White Paper on the Organisation, Governance and Funding of Schools ‘White Paper 2’ was released in 1996, about nine months before the Schools Act took effect.⁷²⁵ White Paper 2, like its predecessor, provided for a parent’s ‘inalienable’ right to choose the form of their child’s education.⁷²⁶ Also like its predecessor, White Paper 2 remained silent on the issue of

⁷²⁰ The *White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 7, para 51.

⁷²¹ Beckman J & Karvelas N ‘Stifling transformation through the manipulation of enrolment : A case study of two public high schools in Gauteng Province: research article’ (2006) 1:2 *Africa Education Review* 16 and 17.

⁷²² The *White Paper on Education and Training* (GN 196 of 15 March 1995). Ch 7, para 21. See also ch 12, para 11 which states differential treatment may be justified to uphold equity.

⁷²³ Section 8(3)(a) of Constitution Act 200 of 1993 (Interim Constitution).

⁷²⁴ The *White Paper on Education and Training* (GN 196 of 15 March 1995). Ch 7, para 21.

⁷²⁵ *Education White Paper 2 on the Organisation, Governance and Funding of Schools* (GN 130 in GG 16987 of 14 February 1996).

⁷²⁶ *Education White Paper 2 on the Organisation, Governance and Funding of Schools* (GN 130 in GG 16987 of 14 February 1996) para 1.10.

feeder zones in the admission process. It did, however, provide that SGBs would be responsible for determining admissions policies but this would be subject to consultation with provincial education departments (PEDs) and in accordance with national norms and provincial regulations.⁷²⁷ By requiring consultation with the provinces, White Paper 2 contemplated a stronger role for PEDs in the setting of school admission policies than what would ultimately materialise in the legislation that followed.

Both White Papers 1 and 2 made no attempt to grapple with the issue of geographical proximity and its use as criteria in school admission policies. It is therefore unsurprising that the South African Schools Act (Schools Act),⁷²⁸ the culmination of this policy process, does not directly address the issue of school zoning either. However, the White Papers do emphasise equity within education provisioning and a parent's right to choose the type of education they believe is in their child's best interest.

5.3 LEGISLATIVE AND POLICY FRAMEWORK REGARDING SCHOOL ZONING

The national legislative and policy framework relevant to school zoning comprises mainly of three instruments. These are the Schools Act, NEPA and the National Admission Policy.⁷²⁹ All three are explained in more detail below. Also covered, is the proposed amendments to the National Admission Policy which the Minister of Basic Education (Minister) released in early 2021.⁷³⁰

5.3.1 The South African Schools Act

The Schools Act was enacted in 1996 and is aimed at converting a deeply racially fragmented education system into a unitary system that regulates the 'organisation, governance and funding' of all public schools.⁷³¹ The Act is intended to ensure that all children regardless of race can, in a democratic South Africa, access a quality education.⁷³² Consequently, at least some indigent children attending disenfranchised schools throughout South Africa would finally have the opportunity to receive a higher standard of education in well-resourced

⁷²⁷ Education White Paper 2 on the Organisation, Governance and Funding of Schools (GN 130 in GG 16987 of 14 February 1996) para 2.9(3). See also 3.21(6).

⁷²⁸ The South African Schools Act 84 of 1996 (Schools Act).

⁷²⁹ Admission Policy for Ordinary Public Schools GN 2432 GG 19377 of 19 October 1998.

⁷³⁰ Call for Comments on the Admission Policy for Ordinary Public Schools GN 38 GG 44139 of 10 February 2021.

⁷³¹ The Schools Act, header to preamble.

⁷³² The Schools Act, preamble.

schools.⁷³³ The Schools Act's intent to redress the effects of apartheid education and tackle racism and segregation is signified in its preamble which proclaims:

'WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and WHEREAS this country requires a new national system for schools which will redress the past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination.'

In line with this stated purpose, section 5(1) of the Schools Act provides that 'a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.'⁷³⁴ Section 5(2) forbids any public school from administering any test relating to the potential admission of a child.⁷³⁵ A public school is empowered to charge school fees by virtue of section 39(1).⁷³⁶ However, section 5(3) provides that

'[n]o learner may be refused admission to a public school on the grounds that his or her parent- (a) is unable to pay or has not paid the school fees determined by the [SGB] under section 39'.

Spaull explains that in the aftermath of apartheid there were concerns that creating a completely free public education system would result in white learners exiting the public education system in droves thus creating an inferior black public education system.⁷³⁷ Spaull contends that to prevent this from occurring the Schools Act allowed for the charging of fees.⁷³⁸ The author describes section 5(3) as a 'somewhat contradictory proviso' inserted in an attempt to balance the fee charging provision.⁷³⁹

Although the Schools Act does not prohibit children from applying to any school, it does not provide them with the right to attend a specific school either. Despite the Act being premised

⁷³³ Ndimande BS 'Race and resources: Black parents' perspectives on post-apartheid South African schools (2012) 15:4 *Race, Ethnicity and Education* 529.

⁷³⁴ Section 5(1) of the Schools Act.

⁷³⁵ Section 5(2) of the Schools Act.

⁷³⁶ Section 39(1) reads '[s]ubject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in section 38(2). Section 39(2) states that '[a] resolution contemplated in subsection (1) must provide for- (a) the amount of fees to be charged; and (b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees.

⁷³⁷ Spaull N 'Equity: A price too high to pay?' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7.

⁷³⁸ Spaull N 'Equity: A price too high to pay?' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7.

⁷³⁹ Spaull N 'Equity: A price too high to pay?' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7.

on school choice, in reality schools wield significant powers over which children are able to study there and who they turn away.⁷⁴⁰ This is in large because the school admission process is principally regulated through individual school admission policies. Section 5(5) of the Schools Act states that

‘[s]ubject to this Act and any applicable provincial law, the admission policy of a public school is determined by the [SGB] of such school’.

The Schools Act therefore places the power to determine admission policies in the hands of SGBs subject to provincial regulation, and the Act itself. This would include the non-discriminatory proviso contained in section 5(1) of the Act. Though there is no specific reference to school zoning in the Schools Act, SGBs’ powers to determine their own admission policies have, in practice, included the use of feeder zones within those policies.⁷⁴¹ Section 5(5), despite its qualified nature, has created space for SGBs to adopt exclusionary practices to obstruct ‘undesirable’ learners from gaining access to certain schools.⁷⁴² Such practices include the use of feeder zones premised on geographical proximity as a screening device.⁷⁴³

SGBs policy making functions, including its admission policies, have formed the subject of much litigation between SGBs and the state. This has resulted in a number of Constitutional Court judgments.⁷⁴⁴ These judgments will be examined more closely in the succeeding chapter. At the core of these conflicts lies the clash between the state’s duty to ensure an adequate education for all learners versus SGBs interest to protect the statutorily conferred autonomy over the schools they govern. These conflicts also closely implicate the state’s constitutional and statutory obligation to ensure that learners remain free from unfair discrimination both during the admission process and, once enrolled at schools. The jurisprudence emanating from

⁷⁴⁰ Sayed Y & Soudien C ‘Decentralisation and the construction of inclusion education policy in South Africa’ (2005) *Compare: A Journal of Comparative and International Education* 120.

⁷⁴¹ Equal Education Law Centre *Comment on the Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia & Related Intolerance 2016 - 2021* (2016) 7. McKay T ‘The geography of education: From race to class apartheid?’ in Knight J and Rogerson C (eds) *The geography of South Africa - 2019: Contemporary changes and new directions* (2019).

⁷⁴² Shandu P ‘Stepping in the Right Direction towards Fully Realising the Constitutional Promise of Section 29(1)(A) of the Constitution’ (2019) 13 *Pretoria Student Law Review* 199.

⁷⁴³ Shandu P ‘Stepping in the Right Direction towards Fully Realising the Constitutional Promise of Section 29(1)(A) of the Constitution’ (2019) 13 *Pretoria Student Law Review* 199.

⁷⁴⁴ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC). *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC). *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC). *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC). *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (4) BCLR 537.

the Constitutional Court has made it abundantly clear that the authority which the Schools Act confers on SGBs to determine school policy is a limited one.⁷⁴⁵ Also made clear by the Court is that SGBs have an obligation to ensure equitable access to education for all learners and not merely those attending a particular school.⁷⁴⁶

5.3.2 The National Education Policy Act and the Admission Policy for Ordinary Public Schools

NEPA, like the Schools Act, was enacted in 1996. It preceded the passing of the Schools Act by some months.⁷⁴⁷ The purpose of NEPA is to provide for ‘the determination of national education policy by the Minister in accordance with certain principles’.⁷⁴⁸ It is clear from a number of references to NEPA in the Schools Act,⁷⁴⁹ that the two statutes are intended to dovetail each other and that their provisions should therefore be interpreted in this light. For instance, section 2(2) of the Schools Act provides that a HoD and MEC ‘must exercise any power conferred upon them by or under [the Schools] Act, after taking full account of the applicable policy determined in terms of [NEPA]’.⁷⁵⁰ Section 5(5) of the Schools Act renders a SGB’s admission making power subject to the Schools Act and relevant provincial laws. However, the exercise of such power must also align with any national policy established under NEPA.⁷⁵¹ Such an approach is in keeping with the Constitutional Court’s construct of the three-tiered partnership between the Minister, PEDs and SGBs under the Schools Act.⁷⁵² Under this

⁷⁴⁵ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC). *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC). *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC). *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC). *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (4) BCLR 537.

⁷⁴⁶ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC). *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC). *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC). *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC). *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (4) BCLR 537.

⁷⁴⁷ National Education Policy Act 27 of 1996 (NEPA) commenced on 24 April 1996.

⁷⁴⁸ Section 2(a) of NEPA.

⁷⁴⁹ NEPA is referenced in sections 1; 2(2); 11(2); 20(11); and 58B(7) of the Schools Act.

⁷⁵⁰ Section 2(2) of the Schools Act.

⁷⁵¹ Courts should always interpret related legislation together ‘as forming one system and as interpreting and enforcing each other’. *Darries v City of Johannesburg* 2009 (5) SA 284 (GSJ) 35. A SGB’s admission policy making functions are therefore not only subject to the Schools Act and provincial legislation under section 5(5) of the Schools Act but also any related policies established by the Minister of Basic Education under NEPA.

⁷⁵² *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 56. *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013

partnership the Minister's primary duty is establishing the national policy framework within which the other role players must operate. The preamble to NEPA reads:

'W[hereas] it is necessary to adopt legislation to facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights'.⁷⁵³

It is evident from its preamble that NEPA, like the Schools Act, was designed to assist in revolutionising the public education system so as to render it more equitable and its provisions must therefore be understood in this light. Section 3(1) of NEPA empowers the Minister to establish national education policy in line with the Constitution and NEPA itself. Section 4 of NEPA mandates that any policy published under its terms be directed towards, certain objectives. Amongst these are, advancing and protecting the rights of every person to 'be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever',⁷⁵⁴ and 'of every person to basic education and equal access to education institutions'.⁷⁵⁵ Policies published under NEPA must also be aimed at 'achieving equitable education opportunities and the redress of past inequality in education provision'.⁷⁵⁶ The transformative role that NEPA is intended to play in improving the education system is therefore one that is expressly mandated by NEPA itself.

Section 3(4)(i) of NEPA empowers the Minister, in particular, to establish national policy on school admissions. This section reads in part:

'Subject to the provisions of subsections (1) to (3), the Minister shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system and, without derogating from the generality of this section, may determine national policy for— . . . the admission of students to education institutions'.

Acting under this section, the Minister published the National Admission Policy in 1998. The policy is intended as a national framework for PEDs and SGBs when developing school admission policies.⁷⁵⁷ In light of section 4 of NEPA, the National Admission Policy must be understood as geared towards furthering and safeguarding the rights of all to basic education

(9) BCLR 989 (CC) 49. *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 36 and 37.

⁷⁵³ Preamble to NEPA.

⁷⁵⁴ Section 4(a)(i) of NEPA.

⁷⁵⁵ Section 4(a)(ii) of NEPA.

⁷⁵⁶ Section 4(c) of NEPA.

⁷⁵⁷ Section 4 of the National Admission Policy.

and equal access to schools, protecting children from unfair discrimination at the hands of the department or a SGB during the admission process, remedying the history of racially inequitable access to schooling and attaining 'equitable education opportunities'. Any provisions of the National Admission Policy must therefore be viewed with these transformative and redress purposes in mind. Sections 33 to 35 of the National Admission Policy address the issue of feeder zones extensively. These sections read:

'33. A [HoD], after consultation with representatives of [SGBs], may determine feeder zones for ordinary public schools, in order to control the learner numbers of schools and coordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.

34. If a feeder zone is created-

(a) preference must be given to a learner who lives in the feeder zone of a school or who resides with his or her parents at an employer's home in the feeder zone;

(b) a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed.

(c) a learner who lives within the feeder zone of a school A must be referred to neighbouring school B, if school A is oversubscribed. If school B is oversubscribed, an alternative school within a reasonable distance must be found by the [HoD]. If that is not possible, school A must admit the learner;

(d) the preference order of admission is:-

(i) learners whose parents live in the feeder zone, in their own domicile or their employer's domicile;

(ii) learners whose parent's work address is in the feeder area; or

(iii) other learners: first come first served.

35. A school with a specific field of study, e.g. a technical school, must have much larger feeder zones to accommodate learners with specific aptitudes, interests or needs.'

The National Admission Policy provides for the possibility of state determined feeder zones without explicitly precluding SGBs from establishing their own in the absence thereof. Section 33 of the policy permits heads of provincial education departments (HoDs) to determine feeder zones for public schools within their respective provinces for purposes of 'controlling learner numbers' and co-ordinating 'parental preferences'. The reference to 'controlling learner numbers' makes it evident that policy makers intended that section 33 be used to ensure more equitable access to schooling across the public education system. For instance, by making use of feeder zones to help ensure that some schools do not enjoy low learner numbers at the expense of other more overcrowded ones. The word 'co-ordinate' seems to reinforce this purpose as it connotes that this section is aimed at ensuring that different aspects within the

education system, here various parental schools of choice, are accommodated in a manner that ensures that the system ‘work[s] effectively as a whole.’⁷⁵⁸

Section 33 of the National Admission Policy requires that HoDs consult with SGBs before making any determination on feeder zones. No further explicit constraints are placed on a HoD who undertakes a school zoning exercise under section 33. The National Admission Policy does make specific mention of just one factor (not to the exclusion of others) that may inform a HoD’s zoning determinations: ‘such feeder zones need not be geographically adjacent to the school or each other.’ It seems apparent that policy makers were conscious of the adverse impact that school zoning could have on certain groups of learners as a result of the spatial legacy of colonialism and apartheid. Thus, the policy explicitly provides for the non-contiguous drawing of school boundaries. That policy makers sought to isolate and expressly mention this particular factor relevant to a HoDs decision on school zoning evidently speaks to the high premium that was placed on the idea of non-aligned geographical feeder areas. Through non-contiguous school zoning, HoDs have the opportunity to align feeder areas in a manner that provides for more equitable access across the public education system through the inclusion, within a school’s feeder area, of communities that house different socio-economic and race groups. However, no HoD has established non-contiguous feeder zones under the National Admission Policy. Currently only the Gauteng HoD has set feeder zones for schools and these zones appear to be shaped solely on geographical proximity.⁷⁵⁹ This was done under the authority of regulations issued by the Gauteng MEC under the province’s School Education Act.⁷⁶⁰ These regulations oblige the Gauteng HoD to determine feeder zones for all Gauteng schools.⁷⁶¹ The approach of the Gauteng Education Department in respect of school zoning is explored in more detail in Chapter 7.

Section 34 of the National Admission Policy establishes a detailed system of preferential admission, which kicks in once a feeder zone determination is in place. A hierarchy is provided for, based on factors cascading from ‘learners whose parents live in the feeder zone, in their

⁷⁵⁸ Cambridge Online Dictionary available at <https://dictionary.cambridge.org/dictionary/english/coordinate> (accessed 24 July 2018).

⁷⁵⁹ Section 4 of the Determination of Final Feeder Zones by the Head of Department of Education in Provincial Gazette Extraordinary, 339 GN 1232 of 15 November 2018 under the Gauteng Admission Regulations.

⁷⁶⁰ Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

⁷⁶¹ Regulation 4 of the Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

own domicile or their employer's domicile',⁷⁶² to 'learners whose parent's work address is in the feeder area',⁷⁶³ to any other learner outside the zone on a 'first come first served' basis.⁷⁶⁴ It was therefore anticipated that a school would receive admissions applications from parents choosing to enrol their children in schools outside of their own zone.⁷⁶⁵

Notably, at no point does section 34 mention the learner's place of residence. Instead, the provision is formulated around where a particular learner's parent stays or rather their parent's permanent legal address. First preference is therefore given to learners whose parents live within the feeder zone regardless of whether the learner in fact lives with them. Admittedly, this would most often be the case. Woolman and Fleisch argue that the reference to parents who live with their employers within the feeder zone but who are not domiciled within that zone was an exception made to accommodate the children of domestic workers by placing them on an equal footing with children whose parents live within the feeder zone.⁷⁶⁶ Again, this would be the case regardless of whether the children of these domestic workers stayed with them at their employer's place.

Section 34 also provides for what must happen where a learner applying to a school is within a feeder zone but the school ('school x') lacks space to accommodate the learner. The learner concerned 'must be referred to the neighbouring school'. Where the neighbouring school is also filled to capacity the responsibility lies with the HoD to find 'an alternative school within a reasonable distance'. Where this is not possible, the school to which the learner first applied (that is school x) must accept the learner.⁷⁶⁷ Strangely, nothing is said on how school x would be capitated to absorb additional learners in that eventuality.

The ranking of preferential admission under section 34 does not spell automatic enrolment for those children living within a feeder zone. Nor does it limit parents in search of a school to those schools whose feeder zones overlap with their own neighbourhood.⁷⁶⁸ This is because

⁷⁶² Section 34(d)(i) of the Admission Policy.

⁷⁶³ Section 34(d)(ii) of the Admission Policy.

⁷⁶⁴ Section 34(d)(iii) of the Admission Policy.

⁷⁶⁵ Woolman, S & Fleisch B 'The Constitution in the classroom: Law and education in South Africa' 1994-2008 (2009) 27.

⁷⁶⁶ Fleisch B & Woolman S 'South Africa's unintended experiment in school choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act create the enabling conditions for quasi-markets in schools' (2006) 18:1 *Education and the Law* 41.

⁷⁶⁷ Section 34(c) of the Admission Policy.

⁷⁶⁸ du Toit S 'Parental choice in South African high schools – an urban Cape Town case study' (unpublished PhD Education thesis, University of the Western Cape, 2008) 70.

the first come, first serve principle seemingly gives effect to school choice.⁷⁶⁹ This principle keeps open the possibility (however slight) that a child can, regardless of their geographical fate, attend their desired school.

Woolman and Fleisch state that the then newly introduced National Admission Policy, by making provision for out of zone admission applications, bore particular significance for black parents as it meant that despite financial barriers the ‘doors heretofore closed to their children were now inching open’.⁷⁷⁰ These scholars surmise that those involved in the restructuring of the education system chose not to pursue the option of impenetrable feeder zones because it would have prevented learners from largely black communities from obtaining access to the more well-off schools in white and advantaged communities and would thus unfairly discriminate against these learners.⁷⁷¹ Woolman and Fleisch argue that, the true transformative impact of the ‘first come first serve’ zoning criteria is negligible as when a school is already filled to capacity, this criteria becomes inconsequential in the admission process.⁷⁷² Hunter argues that the position adopted on school zoning was underpinned by the anticipation that HWS, although accepting local children, would also make provision for some black children from outside their locale. The idea was that overtime the racial demographics of South African communities would shift resulting in desegregated schools.⁷⁷³ However, the reality is that homes in historically white areas remains accessible only to those with privilege and the HWS in those areas remain largely inaccessible to those who are black and poor.

Yusuf and Motala explain how South Africa’s education policy of rendering parents eligible to apply to any school of their choosing has created a facade of choice which has furthered apartheid injustices in the school admission process.⁷⁷⁴ This is because in practice choice is constrained by competition to secure a position in HWS. Yusuf and Motala claim that it is

⁷⁶⁹ Hill LD ‘Race, school choice and transfers to opportunity: implications for educational stratification in South Africa’ (2016) 37:4 *British Journal of Sociology of Education* 524.

⁷⁷⁰ Woolman, S & Fleisch B ‘The Constitution in the classroom: Law and education in South Africa’ 1994-2008 (2009) at 17.

⁷⁷¹ Woolman, S & Fleisch B ‘The Constitution in the classroom: Law and Education in South Africa’ 1994-2008 (2009) 16 and 17.

⁷⁷² Fleisch B & Woolman S ‘South Africa’s unintended experiment in school choice: how the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act create the enabling conditions for quasi-markets in schools’ (2006) 18:1 *Education and the Law* 42.

⁷⁷³ Hunter M ‘The Remaking of Social-Spatial Hierarchies: Educational Choice and A South African City’ Paper for panel on Education and the City Conference 14.

⁷⁷⁴ Sayed Y and Motala S ‘Getting in and staying there: Exclusion and inclusion in South African schools (2012) 18:2 *Southern African Review of Education* 112. See also Sayed Y ‘Discourses of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act’ (1999) 29:2 *Compare: A Journal of Comparative and International Education* 147.

chiefly the middle class who enjoy adequate selection of schools in light of entrenched residential patterns which still mostly mirror apartheid spatial planning. The poor continue to be imprisoned in far-off and badly resourced locations and limited to inferior schools. Allowing for geographical zoning, according to Yusuf and Motala, perpetuates apartheid residential patterns.⁷⁷⁵ However, the delineation of feeder zones based on geographical location need not necessarily sustain apartheid created spatial injustices. In fact, feeder zones may have a potential role to play in unravelling these injustices and ensuring more racially equitable access to education. The idea of transformative zoning is reflected in section 33 of the National Admission Policy to the extent that it speaks of non-contiguous zoning. If feeder zones are established and implemented in this manner, physical location need not necessarily serve as a hindrance to transformation of the public education system.

5.3.3 The proposed changes to the Admission Policy for Ordinary Public Schools

In early 2021 the Minister released a call for comments on the Draft National Admission Policy for Ordinary Public Schools (the draft policy).⁷⁷⁶ If adopted, it will replace the present policy which has been in existence for more than 25 years. The draft policy contains certain alterations to, amongst others, the provisions concerning feeder zones. Sections 34 to 37 of the draft policy reads:

‘34. A [HoD] may, after consultation with [SGBs], determine feeder zones for ordinary public schools, in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.

35. When considering the feeder zones, the [HoD] must consider all the relevant information, including but not limited to:

- (a) the capacity of the school and schools in the area to accommodate learners;
- (b) the language and curricula offered at the school and the schools in the vicinity;
- (c) information and projections regarding area population density, learner population density and learner enrolment; and
- d) the need for geographical and spatial transformation.

36. Feeder zones should be reviewed from time to time as the circumstances dictate.

⁷⁷⁵ Sayed Y and Motala S ‘Getting in and staying there: Exclusion and inclusion in South African schools (2012) 18:2 *Southern African Review of Education* 112. See also Sayed Y ‘Discourses of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act’ (1999) 29:2 *Compare: A Journal of Comparative and International Education* 147.

⁷⁷⁶ Call for Comments on the Admission Policy for Ordinary Public Schools GN 38 GG 44139 of 10 February 2021.

37. The [HoD] may exclude certain categories of schools, such as Special Schools and Focus Schools from the feeder determination based on the school's circumstances.'

Section 34 of the draft policy mirrors section 33 of the National Admission Policy. Section 34 provides that HoDs 'may' determine feeder zones 'to control the learner numbers of schools and co-ordinate parental preferences'. This is to occur following consultation with SGBs. The HoD's power to establish feeder zones is again couched in discretionary terms. Equal Education (EE) and the Equal Education Law Centre (EELC) in their joint submission to the Department of Education on the draft policy have proposed an amendment to compel HoDs to create feeder zones 'rather than make such a role discretionary for HODs.'⁷⁷⁷ However, the existing section 33 of the National Admission Policy could potentially be interpreted as compulsory. A claim can be made that where executive policies targeted at realising socio-economic rights are put in place under delegated legislative authority, such policies are binding if they are consistent with the Constitution and the relevant delegated legislation.⁷⁷⁸ This would then be all the more so in the context of an executive policy aimed at fulfilling an immediately realisable socio-economic right. Such would be the case with the National Admission Policy published under NEPA which is aimed at realising the right to basic education in the context of school admission. Under such a view, a credible argument can be proffered that section 33 of the National Admission Policy be interpreted as imposing an obligation on HoDs to establish feeder zones. Our courts have stated that the word 'may' in an empowering provision is capable of being interpreted, in certain instances, as placing a duty on the bearer of that power to exercise that power.⁷⁷⁹ Courts have considered various factors in determining whether such a duty can be inferred.⁷⁸⁰ One such factor is whether an empowering provision is aimed at vindicating a legal right.⁷⁸¹ Where this was the case the provision would lend itself to a mandatory interpretation. It has been argued that such an approach is even more appropriate

⁷⁷⁷ Equal Education and Equal Education Law Centre *Joint Comment on the Department of Basic Education's Amended National Admission Policy for Ordinary Public Schools* (2021) EE and EELC 11.

⁷⁷⁸ Fuo O 'Constitutional basis for the enforcement of "executive" policies that give effect to socio-economic rights in South Africa (2013) 16:4 *Potchefstroom Electronic Law Journal* 34. Fuo's argument that executive policies can, in certain instances, be binding is based on the State's duty to take reasonable legislative and other measures to realise *qualified* socio-economic rights (such as the right to further education).

⁷⁷⁹ *Julius v Bishop of Oxford* 5 A.C. 214 (1880). See Draga L & Fick S 'Fischer v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35:4 *South African Journal on Human Rights* 411.

⁷⁸⁰ Draga L 'On Equating 'mays' with 'musts' – When can a seemingly discretionary power be interpreted as a mandatory one?' *South African Law Journal* (2021) 138:3 (2021) 650-660.

⁷⁸¹ Draga L & Fick S 'Fischer v Unlawful Occupiers: could the court have interpreted the 'may' in section 9(3)(a) of the Housing Act as a 'must' under the circumstances of the case?' (2019) 35:4 *South African Journal on Human Rights* 423.

where the power was conferred for purposes of realising a fundamental right.⁷⁸² Here, section 33 of the National Admission Policy was published by the Minister in consultation with the Deputy Minister and all the MECs of the various PEDs,⁷⁸³ for purposes of giving effect not just to a fundamental right but rather, the immediately realisable fundamental right to a basic education. An argument for a mandatory reading of section 33 of the National Admission Policy to the effect that it compels HoDs to determine feeder zones would therefore be even more powerful. Nevertheless, an amendment unequivocally changing the language of section 33 in the manner proposed would be ideal. Section 35 of the draft policy is a fresh provision which lists four relevant criteria (not to the exclusion of others) that a HoD must consider in the zoning process. The first of these is contained in section 35(a). This section requires HoDs to consider ‘the capacity of the school and schools in the area to accommodate learners. A HoD must therefore be cognisant of existing capacity constraints within the public education system and delineate feeder zones so as to best manage learner numbers in light of these constraints.

The second factor HoDs must consider when zoning is the ‘language and curricula offered at the school and the schools in the vicinity’. This criterion, contained in section 35(b), indicates that any assessment by HoDs as to system capacity must consider the needs of learners to be instructed in certain languages. It serves as a clear reminder to HoDs that feeder zone determinations must also be informed by section 29(2) of the Constitution. That is, learners’ right to receive an education in the official language of their choosing where this is reasonably practicable. Section 35(b) also requires HoDs to undertake zoning with the curriculum program of the particular school and those within its surrounds in mind. The inclusion of this factor is presumably to ensure that, where possible, learners are not prejudiced by a lack of access to certain curricula due to the manner in which feeder zones are structured. Also, seemingly to ensure that there exists some parental choice in regard to the curricula program children would be exposed to.

Section 35(c) requires HoDs to give thought to ‘information and projections regarding area population density, learner population density and learner enrolment’. HoDs must therefore consider relevant data as well as forecasts regarding learner enrolment levels and learner population and area population density of, presumably, the area to be zoned. Section 35(c)

⁷⁸² Draga L & Fick S ‘Fischer v Unlawful Occupiers: could the court have interpreted the ‘may’ in section 9(3)(a) of the Housing Act as a ‘must’ under the circumstances of the case? (2019) 35:4 *South African Journal on Human Rights* 423-424. Draga L ‘On Equating ‘mays’ with ‘musts’ – When can a seemingly discretionary power be interpreted as a mandatory one?’ *South African Law Journal* (2021) 138:3 (2021) 667–668.

⁷⁸³ Section 5 of NEPA read with section 9 of NEPA.

speaks to the need for HoDs to ensure school zoning occurs in a manner that best manages learner numbers seemingly to overcome any potential overcrowding or underutilisation of schools within the system. This criterion is also future focused in that it requires HoDs to undertake zoning in light of existing and estimated future capacity constraints and educational needs.

Significantly, when engaging in zoning HoD's must, in terms of section 35(d), bear in mind 'the need for geographical and spatial transformation.' This provision in the draft policy is innovative and appears to show clear awareness of the potential of feeder zones to sustain apartheid spatial injustices. It does so by explicitly mandating HoDs to prioritise the development of spatially transformative feeder zones when embarking upon a zoning process. The draft policy thus clearly recognises the potential for feeder zones to undermine existing spatial injustices as regards access to education. EE and EELC in their joint submission on the draft policy have urged that criteria be included that squarely grapple with the enduring legacy of apartheid spatial injustices and inequality.⁷⁸⁴ More detailed criteria around transformative zoning would assist in ensuring that HoDs do not pay mere lip service to the requirement that they consider 'the need for geographical and spatial transformation' when zoning. In comparison with the National Admission Policy, the draft policy offers more detailed guidance to HoDs on how their zoning decision making process must take shape. The inclusion of section 35 in the draft policy reveals the potential for a more measured and contextual approach to school zoning than that underpinning the current policy.

Section 36 of the draft policy would also constitute a new development regarding feeder zones. This section requires that feeder zones be reviewed 'from time to time' where circumstances so require. Both EE and EELC,⁷⁸⁵ as well as AfriForum have criticised section 36 for lacking clarity.⁷⁸⁶ EE and EELC have called for the setting of more clear-cut parameters around how the review process ought to function. They have recommended the inclusion of review timetables to ensure that feeder zones continue to cater to the evolving needs of communities.⁷⁸⁷ Such an inclusion would be beneficial to ensure that government continues to engage with the

⁷⁸⁴ Equal Education and Equal Education Law Centre *Joint Comment on the Department of Basic Education's Amended National Admission Policy for Ordinary Public Schools* (2021) EE and EELC 11.

⁷⁸⁵ Equal Education and Equal Education Law Centre *Joint Comment on the Department of Basic Education's Amended National Admission Policy for Ordinary Public Schools* (2021) EE and EELC 11.

⁷⁸⁶ AfriForum's *Comments on the Draft Admission Policy for Ordinary Public Schools: A Breakdown of the Defects and Shortcomings of the Proposed Policy* (2021) AfriForum 11 at 6.6.

⁷⁸⁷ Equal Education and Equal Education Law Centre *Joint Comment on the Department of Basic Education's Amended National Admission Policy for Ordinary Public Schools* (2021) EE and EELC 11.

impact of school zoning in practice and to hold government accountable where it fails to do so. On the other hand, AfriForum, proposes that a review take place where a SGB itself requests that a school's feeder zone be altered and reviewed given altered circumstances.⁷⁸⁸ Fixed timeframes for the development, review and amendments to school zoning is crucial if zoning is to occur in a proactive, disciplined and structured way. SGBs are well positioned to gauge changing circumstances at school level which may influence the need for zone adjustments and to flag these with the HoD. As such, provision should be made for a SGB to initiate a request to review the feeder zone of the school they govern. However, such a request cannot be considered on demand as this would result in an ad-hoc process. Rather they should be tied to stipulated timeframes as concretised in the Schools Act or provincial legislation.

Sections 38 and 39 of the draft policy further address feeder zones and read:

- ‘38. If a feeder zone is created, the following principles must be applied:
- (a) Preference must be given to a learner who lives in the feeder zone of a school or has a sibling in the school or whose parent's work address is in the feeder of the school;
 - (b) A learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed;
 - (c) A learner who lives within the feeder zone of school A must be referred to the neighbouring school B if school A is oversubscribed. If school B is oversubscribed, an alternative school within a reasonable distance must be found by the [HoD]. If that is not possible, school A must admit the learner; and
 - (d) Preference with regard to the order of admission is as follows:
 - (i) Learners whose parent lives in the feeder zone of the school;
 - (ii) Learners who have a sibling in the school in the year for which admission is sought
 - (ii)* Learners whose parent's work address is in the feeder area; or
 - (iii)* Other learners: first come, first served.

39. A school with a specific field of study, e.g. a technical school, must have a much larger feeder zone to accommodate learners with specific aptitudes, interests or needs.’

The draft policy thus proposes certain changes to the principles around the implementation of feeder zones and preferential admission. For instance, section 38(a) of the draft makes provision for preference to be afforded to learners who already have a sibling attending their desired school regardless of whether they fall within the feeder zone. Section 38(d) of the draft

⁷⁸⁸ AfriForum's *Comments on the Draft Admission Policy for Ordinary Public Schools: A Breakdown of the Defects and Shortcomings of the Proposed Policy* (2021) AfriForum 11 at 6.6.

sets out the preferential order of admission. As with the National Admission Policy, parents who stay within the feeder zone enjoy first preference. Second preference is given to those learners who have a sibling already enrolled at the school and who will be attending the school simultaneously with their sibling in the year for which their enrolment is sought. Whilst this makes sense from a practical perspective, a danger does exist that the inclusion of the sibling criteria can be used to prejudice black learners. This is because many privileged schools continue to have a large white learner contingent and thus it is more likely that the siblings of white families will be favoured by the inclusion of the sibling provision. The sibling criteria displaces the parent's work address in the hierarchy of preferential admission. Where feeder zones are geographically aligned with more privileged schools, parent's work address offers a small avenue for impoverished black children to potentially access these schools. The sibling criteria further restricts this avenue for access.

EE and EELC have suggested that the National Admission Policy be amended to allow for a more widespread consultation process in the establishment and review of feeder zones.⁷⁸⁹ As illustrated in the next chapter, an effective zoning process would require the participation of a range of stakeholders. This would include the involvement of civil society, specialists within the field, municipal demarcation boards, SGB umbrella organisations and learners themselves. Such involvement would also ensure that HoDs fulfil the demands of participatory democracy which fall on them. The use of non-geographically aligned feeder zones to achieve spatial transformation still remains an explicit possibility under the draft policy.

5.4 CONCLUSION

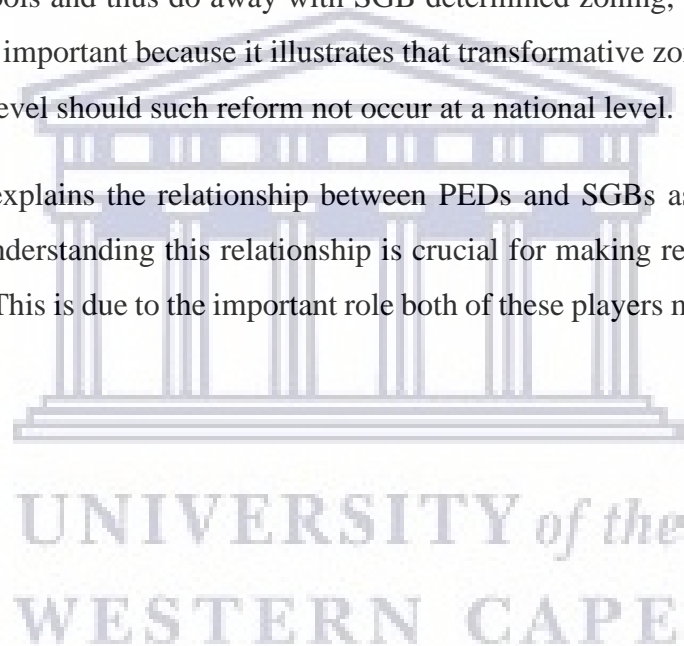
This chapter considered the legislative and policy framework on school admissions. It is necessary to understand this to recommend solutions relating to feeder zones. The chapter found that the Schools Act is silent on the issue of feeder zones. However, section 5(5) of the Act confers the power to determine admission policy on SGBs and renders this power subject to the Schools Act and any applicable provincial legislation. Relevant Constitutional Court jurisprudence suggests that the power to determine admission policy under section 5(5) includes the power to determine feeder zones where none exist. This chapter further found that a SGB's power to establish feeder zones as a component of their admission policy under section 5(5) is also subject to the National Admission Policy.

⁷⁸⁹ Equal Education and Equal Education Law Centre *Joint Comment on the Department of Basic Education's Amended National Admission Policy for Ordinary Public Schools* (2021) EE and EELC 11.

This chapter shows how the National Admission Policy falls short in terms of addressing spatial related racial inequalities within school admissions. The Minister has released the Draft National Admission Policy which, if published in its current form, will amend the zoning provisions in the National Admission Policy. The draft contemplates the use of feeder zones as a mechanism for furthering ‘geographical and spatial transformation’ within the education context. However, this chapter found that the draft can go further in ensuring the effective use of feeder zones to advance equity within education delivery. The draft thus provides an expedient opportunity to require transformative zoning via national policy.

This chapter shows that provincial legislation can also legitimately empower HoDs to establish feeder zones for all schools and thus do away with SGB determined zoning, as is the case in Gauteng. This finding is important because it illustrates that transformative zoning can also be mandated at provincial level should such reform not occur at a national level.

The following chapter explains the relationship between PEDs and SGBs as set out by the Constitutional Court. Understanding this relationship is crucial for making recommendations regarding feeder zones. This is due to the important role both of these players must fulfil in this area.



CHAPTER 6

THE TUSSLE OF SCHOOL GOVERNANCE

6.1 INTRODUCTION

In the dying days of apartheid, the incumbent National Party government was cognisant that, with the democratic transition on the horizon, white parents would have to supplement state resources with fees to maintain their schools' colonial and apartheid inherited privileged conditions.⁷⁹⁰ They proceeded to use their waning authority to influence the blueprint for the restructuring of the South African public education system.⁷⁹¹ They did so by advocating for greater parental control over the governance of their schools.⁷⁹² At the same time there existed a movement, grounded in apartheid resistance, for black parents to enjoy grassroots control over their children's education.⁷⁹³ The push for more localised control ultimately informed the school governance model which the incoming government was to adopt through the passing of the South African Schools Act (Schools Act). Some of South Africa's historically white SGBs have attempted to leverage this legislation to assert agency over historically privileged schools and render them exclusive spaces. This includes the use of feeder zones as a mechanism to prevent impoverished black children from gaining entry.⁷⁹⁴

The previous chapter focused on the legislative and policy framework regarding school admissions. The degree of autonomy that SGBs enjoy over school governance in relation to that of provincial education departments (PEDs) forms the subject matter of this chapter. More particularly, this chapter undertakes an analysis of the four central judgments of the Constitutional Court that focus on the extent of autonomy SGBs possess over the HWS they govern. Such an analysis is undertaken in an attempt to better understand the statutorily

⁷⁹⁰ Pampallis J 'Education reform and school choice in South Africa' in Plank N & Sykes G (eds) *Choosing Choice: School Choice in International Perspective* (2003) 146.

⁷⁹¹ Pampallis J 'Education reform and school choice in South Africa' in Plank N & Sykes G (eds) *Choosing Choice: School Choice in International Perspective* (2003) 146. Lemon A & Stevens L 'Reshaping education in the new South Africa' (1999) 84:3 *Geographical Association* 105.

⁷⁹² Christie P 'Transition tricks? Policy models for school desegregation in South Africa, 1990-94' (1995) 10:1 *Journal of Education Policy* 49 and 53-54. Ntshoe I 'Hidden and subtle effects of racism in law and school policy in post-apartheid South Africa' (2009) 15:2 *Southern African Review of Education with Production* 90.

⁷⁹³ van Leeve Y 'Executive heavy handedness and the right to basic education a reply to Sandra Fredman' 199 (2013) *Constitutional Court Review* 201.

⁷⁹⁴ Shandu P 'Stepping in the right direction towards fully realising the constitutional promise of section 29(1)(A) of the Constitution' (2019) 13 *Pretoria Student Law Review* 199.

designed partnership between SGBs and PEDs. Such an understanding is crucial for designing any effective and legally sound transformative zoning process.

This chapter briefly discusses some of the centralised and decentralised governance aspects of the school governance model as set out in the Schools Act. The delineation of power between SGBs, who are charged with governing schools, and HoDs, who via principals exercise professional management over schools, is examined. The Constitutional Court judgments as regards school language policies,⁷⁹⁵ pregnancy policies,⁷⁹⁶ and admission policies,⁷⁹⁷ are analysed in turn. Finally, this chapter analyses the Constitutional Court's decision in *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another (FEDSAS)*,⁷⁹⁸ as it relates to school zoning. Although not all of these cases concern the use of feeder zones, they are nonetheless beneficial to understanding the dynamic between HoDs and SGBs in relation to zoning. In particular, how HoDs are required to interact with SGBs when addressing school admissions related issues including school zoning.

6.2 SCHOOL GOVERNANCE AND DECENTRALISED POWER

The school governance model as we are familiar with it arose at the outset of the 1990s.⁷⁹⁹ The rise of this schooling model overlapped with the transition to a democratic government. As a result, the framework and policies concerning school governance were informed by both South Africa's political environment and international developments at the time. These developments concerned a new emphasis on self-controlled schools driven by community participation, local decision making and the decentralisation of financial resources.⁸⁰⁰ This push for localisation of schooling eventually culminated in the Schools Act. The Act establishes SGBs,⁸⁰¹ and explains that these bodies serve 'in a position of trust towards the school.'⁸⁰² SGBs are composed of

⁷⁹⁵ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC).

⁷⁹⁶ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

⁷⁹⁷ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

⁷⁹⁸ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC).

⁷⁹⁹ Heystek J 'School governing bodies in South African schools: Under pressure to enhance democratization and improve quality' (2011) 39(4) *Educational Management Administration & Leadership* 455.

⁸⁰⁰ Heystek J 'School governing bodies in South African schools: Under pressure to enhance democratization and improve quality' (2011) 39(4) *Educational Management Administration & Leadership* 455 and 456.

⁸⁰¹ Section 16(1) of the Schools Act.

⁸⁰² Section 16(2) of the Schools Act.

parents of learners enrolled at the school,⁸⁰³ teaching staff,⁸⁰⁴ non-teaching staff,⁸⁰⁵ and learners in grade eight and above.⁸⁰⁶ Community members may also be co-opted.⁸⁰⁷ Parent members must at all times possess the majority of voting rights on the SGB by a margin of one.⁸⁰⁸ In contradiction, members of the community have very little sway in decision making by virtue of their non-voting status.⁸⁰⁹

SGBs are required to further the best interests of the school and ensure the delivery of quality education to its learner population.⁸¹⁰ SGBs must, amongst others, formulate a mission statement,⁸¹¹ approve a constitution,⁸¹² establish a school language policy,⁸¹³ and adopt a code of behaviour for learners in attendance there.⁸¹⁴ Section 5(5) of the Schools Act confers a qualified power on SGBs to establish their own admission policy and section 5(1) prohibits SGBs from unfairly discriminating against any learner in the admissions process.

The Schools Act also differentiates between ‘school governance’ functions with which a SGB is entrusted and ‘professional management’ responsibilities with which a principal, acting on behalf of the provincial HoD, is charged.⁸¹⁵ The principal takes on the every-day management of a school. Their statutorily specified responsibilities include the implementation of all scholastic programmes and curriculum instruction,⁸¹⁶ implementing legislation and policy,⁸¹⁷ managing teachers and staff,⁸¹⁸ and executing functions delegated to them by HoDs under the Schools Act.⁸¹⁹ The Act further confers specific powers for sole exercise by HoDs. These include the power to expel a learner under certain circumstances,⁸²⁰ as well as the power to withdraw the functions of a SGB where reasonable grounds exist and provided certain procedural requirements have been met.⁸²¹ HoDs are further obliged, under section 25 of the

⁸⁰³ Section 23(2)(a) of the Schools Act.

⁸⁰⁴ Section 23(2)(b) of the Schools Act.

⁸⁰⁵ Section 23(2)(c) of the Schools Act.

⁸⁰⁶ Section 23(2)(d) of the Schools Act.

⁸⁰⁷ Section 23(6) of the Schools Act.

⁸⁰⁸ Section 23(9) of the Schools Act.

⁸⁰⁹ Section 23(8) of the Schools Act. Co-opted members of the community would ordinarily lack voting rights.

⁸¹⁰ Section 20(1)(a) of the Schools Act.

⁸¹¹ Section 20(1)(c) of the Schools Act.

⁸¹² Section 20(i)(b) of the Schools Act.

⁸¹³ Section 6(2) of the Schools Act.

⁸¹⁴ Section 20(i)(d) of the Schools Act.

⁸¹⁵ Section 16(3) of the Schools Act.

⁸¹⁶ Section 16A(2)(a)(i) of the Schools Act.

⁸¹⁷ Section 16A(2)(a)(vi) of the Schools Act.

⁸¹⁸ Section 16A(2)(a)(ii) of the Schools Act.

⁸¹⁹ Section 16A(2)(a)(iv) of the Schools Act.

⁸²⁰ Section 9(2) of the Schools Act.

⁸²¹ Section 22 of the Schools Act.

Act, to intervene where a SGB is no longer performing its functions. In such a case the HoD must ‘appoint sufficient persons to perform all such functions’ for a maximum period of three months.⁸²² Both centralised and decentralised democracy is therefore at work in the Schools Act.⁸²³

The distribution of authority under the legislation between PEDs and SGBs has been described as an ‘uneasy division’.⁸²⁴ Predictable conflict has arisen between PEDs and SGBs over who has the authority to do what. This includes contestations over school language policies,⁸²⁵ codes of conduct,⁸²⁶ and admissions policies.⁸²⁷ What the state intended to achieve by the devolution of power through the Schools Act was that at a local level the law would be construed within the spirit of the Constitution and its rights-based focus.⁸²⁸ What has in fact materialised is that legislation has been interpreted to further narrow interests which has resulted in new methods of exclusion of certain learners.⁸²⁹

6.3 CONSTITUTIONAL COURT JURISPRUDENCE

The jurisprudence on school governance foregrounds the way in which SGBs of historically white schools (HWS) have surreptitiously applied legislation to frustrate largely black and poor children from gaining entry to these better equipped schools.⁸³⁰ Although most of these judgments have not directly involved the right to basic education, they remain pertinent due to the systemic effect of SGB policies in preventing impoverished black children from accessing certain schools.⁸³¹ The four central Constitutional Court judgments concerning the divisions of authority between SGBs and PEDs are discussed and analysed below. The Constitutional

⁸²² Section 25(1) of the Schools Act.

⁸²³ Dieltiens V ‘The fault-lines in South African school governance: policy or practice? (2011) 30 *Journal of Educational Studies* 42.

⁸²⁴ Woolman S and Fleisch B ‘Democracy, social capital and school governing bodies in South Africa’ (2008) 20:1 *Education and the Law* 55.

⁸²⁵ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC).

⁸²⁶ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

⁸²⁷ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

⁸²⁸ Sayed Y ‘Decentralisation and the construction of inclusion education policy in South Africa’ (2005) 35:2 *Compare: A Journal of Comparative and International Education* 118.

⁸²⁹ Sayed Y ‘Decentralisation and the construction of inclusion education policy in South Africa’ (2005) 35:2 *Compare: A Journal of Comparative and International Education* 118.

⁸³⁰ Mestry R ‘A critical analysis of the learners’ constitutional rights to basic education in South Africa’ (2017) 82:3 *KOERS* 10.

⁸³¹ Veriava F ‘Realising the right to basic education in South Africa’ in ‘Socio-economic Rights: Progressive Realisation?’ (2016) 100.

Court's decisions regarding school language and admissions policies are particularly important to understanding the mechanics of the legal relationship between PEDs and the state in the context of feeder zone determinations. Such an understanding is important as it informs the way HoDs must work with SGBs in admissions related issues including school zoning issues.

6.3.1 Battle of the language policy: The case of Ermelo

In *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* the Constitutional Court was faced with deciding whether an HoD had the authority to withdraw a SGB's function to create its own school language policy.⁸³² Under Hoerskool Ermelo's existing language policy Afrikaans was the exclusive language of learning and teaching.⁸³³ A group of grade eight learners in the Ermelo area sought tuition in English but could not be accommodated by surrounding schools due to capacity constraints.⁸³⁴ Hoerskool Ermelo, however, had sufficient capacity to accommodate them.⁸³⁵ Ermelo's school enrolment numbers were significantly lower as a result of its Afrikaans only language policy. The PED requested Hoerskool Ermelo to accept the unplaced learners who were all black children and make provision for them to be taught in English. It was by no co-incidence that these children were exclusively black since the school's Afrikaans only language policy had a disparate and adverse impact on black learners who preferred learning in English.⁸³⁶ The school refused to accept these unplaced learners.⁸³⁷ Later that same year the HoD again wrote to the SGB with the same request. Again, the school refused.⁸³⁸

At the start of the following academic year the HOD invited the SGB chairperson and principal of Hoerskool Ermelo to attend a meeting regarding learner admissions. However, the HoD failed to arrive for this meeting and instead the chairperson and principal were met by

⁸³² *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 41.

⁸³³ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 1.

⁸³⁴ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 12.

⁸³⁵ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 9 and 10.

⁸³⁶ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 38.

⁸³⁷ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 12. Accepting these learners who wished to be taught in English would have run contrary to Ermelo's Afrikaans only language policy. Therefore, it would effectively have amounted to a change in the school's language policy.

⁸³⁸ *Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 15.

department officials who furnished them with a letter. The letter advised that the principal would be subjected to disciplinary proceedings without notice should the school fail to accommodate 113 unplaced learners seeking tuition in English for grade eight.⁸³⁹ That same day the chairperson wrote a letter in response, directing the principal to admit learners only in line with the school's admission policy and advising the department that the school would receive all learners willing to learn in Afrikaans.⁸⁴⁰ The next day certain of the unplaced learners arrived at the school escorted by department officials. The school refused to accept the learners unless they were prepared to receive tuition in Afrikaans. As a result, the HoD summarily removed the language policy making function of Hoërskool Ermelo's SGB and appointed an interim committee tasked with determining a new language policy for the school. The interim committee chose to alter Ermelo's language policy to include English as a medium of learning and teaching. The school challenged these decisions.⁸⁴¹

The court found that the HoD acted unlawfully when he appointed the interim committee.⁸⁴² Although the HoD had the authority to withdraw the language policy making functions of SGBs on reasonable grounds,⁸⁴³ the HoD was required to do so in a procedurally fair manner.⁸⁴⁴ The court stressed that where a matter impacts on the workings of every aspect of a school (such as a language policy), procedural fairness and a sufficient period for implementation take on even more significance. This is because it would affect a SGB's ability to properly plan its affairs and ultimately ensure institutional excellence.⁸⁴⁵

Feeder zone determinations are akin to school language policy selections as they are both criteria which must be applied to prospective learners' admissions applications. Both the implementation of feeder zones and the application of language policies possess the inherent danger of indirectly discriminating against black children. In the one, because of the

⁸³⁹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 16.

⁸⁴⁰ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 17.

⁸⁴¹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 21-23 and 25-26.

⁸⁴² *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 84-88.

⁸⁴³ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 68-71. The decision to withdraw the language policy was based on s 22 of the Schools Act.

⁸⁴⁴ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 73. See sections 22(2) and 22(3) of the South African Schools Act.

⁸⁴⁵ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 75.

indisputable racialised dimensions of language and its effect on educational access and, in the other, because of the racialised implications of space. More specifically, the influence of the entrenched colonial and apartheid spatial geography that continues to define South Africa.⁸⁴⁶ Like language policies, feeder zone determinations influence the daily operations of every facet of a school. It impacts upon a SGB's ability to properly plan and implement its admissions process, finalise enrolment, settle class lists and adequately manage its physical and financial resources accordingly. In fact, the Constitutional Court has recognised that feeder zones have a material impact on a school.⁸⁴⁷ One can easily see why the requirements of procedural fairness which the court emphasised in *Ermelo*, would take on equal importance in the establishment and implementation of feeder zones.

In *Ermelo*, the Constitutional Court did not interrogate whether Hoërskool Ermelo's Afrikaans only language policy constituted indirect racial discrimination. However, the court was conscious of the racialised overtones that marked the case. In reaching its findings the court paid heed to the legacy of Bantu Education and the deep racialised inequalities that continue to characterise South Africa's schooling system.⁸⁴⁸ Moreover, it recognised the constitutional demand for sweeping social transformation within public education.⁸⁴⁹ The court therefore proceeded to construct SGB's authority within South Africa's transformative project which guarantees the delivery of basic education to everyone.⁸⁵⁰ An interpretation of the Schools Act which rendered the language policy making function of the school within the exclusive domain of SGBs had the potential to frustrate the constitutional imperative of social transformation. The court appreciated that the matter implicated a number of constitutional guarantees including the right not to be unfairly discriminated against and the right to a basic education.⁸⁵¹ The court was therefore acutely aware of the apartheid stained educational context which underscored the dispute and the need to dismantle racial inequalities within education.

⁸⁴⁶ See section 1.2.1 above.

⁸⁴⁷ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 37.

⁸⁴⁸ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 45-46. Lear M 'Why Isn't A, B, C as Easy as 1, 2, 3: Why the Education Laws in South Africa regarding Language Discrimination Are Ineffective' (2018) 26:2 *Michigan State International Law Review* 391.

⁸⁴⁹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 47.

⁸⁵⁰ Skelton A 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law' (2013) 46:1 *De Jure* 16.

⁸⁵¹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 47.

Skelton explains how, despite *Ermelo* dealing solely with issues of procedural fairness and legality, the court's reasoning occurred within a wider right focused context.⁸⁵² The court's decision was informed by three separate duties imposed on the state. First, the state's duty to guarantee adequate realisation of the right to receive an education in the official language(s) of one's choosing. Secondly, its responsibility to ensure that there are sufficient school places for all children within a province and, lastly that public schools do not unfairly discriminate on the basis of race or any other grounds during their admissions process.⁸⁵³ As in *Ermelo*, the issue of school zoning implicates the state's duty to realise the right to basic education and guard against racial discrimination within the school admissions process.

The Constitutional Court, in reaching its conclusions in *Ermelo*, placed great emphasis on what it referred to as a 'crucial' partnership between the Minister of Basic Education (Minister), the MEC of Basic Education and SGBs who are collectively tasked with running public schools.⁸⁵⁴ The court explains, in broad terms, the role of the three partners within public education. The Minister is primarily responsible for establishing overarching uniform norms and standards in relation to all public schools.⁸⁵⁵ MECs are charged with ensuring that there are sufficient public schools in a given province.⁸⁵⁶ The MEC must take timeous and proactive steps way before the start of a new school year to achieve as much.⁸⁵⁷ The MEC in conjunction with the HoD exerts executive power over public schools via school principals.⁸⁵⁸ Finally, the parents of learners attending a school and 'members of the community in which the school is located' find representation in the SGB which 'exercises defined autonomy over some of the domestic affairs of the school.'⁸⁵⁹ This includes the qualified power to establish admission policy under section

⁸⁵² Skelton A 'The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law' (2013) 46:1 *De Jure* 16.

⁸⁵³ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 76.

⁸⁵⁴ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 56.

⁸⁵⁵ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 56. Sections 5(4)(c), 5A(1) and (2), 6(1), 6A(1), 8(3), 14(6), 16A(1)(b)(i), 20(11), 35 and 39(4), (7), (8) and (10) of the Schools Act.

⁸⁵⁶ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 56. Section 12(1) read with sections 3(3) and (4) of the Schools Act.

⁸⁵⁷ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 103.

⁸⁵⁸ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 56. Sections 16(3), 16A, 19(2) and 24(1)(j) of the Schools Act.

⁸⁵⁹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 56. Sections 5(5), 6(2), 7, 8(1), 16(1) and 20(1) of the Schools Act.

5(5) of the Schools Act. As was established in Chapter 5, it is this provision that SGBs have been able to misuse to create racially exclusionary feeder zones.

The court's language regarding a trio partnership in *Ermelo* already points to its later demand that a collaborative relationship must exist between these role players. They must work together to ensure the effective functioning of the public education system and avoid the type of stand-off that unfolded between the Mpumalanga PED and Hoërskool Ermelo. Considerable effort is made by the court in *Ermelo* to validate the legitimacy of bestowing SGBs with certain policy making functions such as the creation of a school language policy. The court harps on the conception of SGBs as democratically constituted institutions which are intended to operate in a democratic fashion.⁸⁶⁰ SGBs are described by the court as a 'vital part of the democratic governance envisioned by the Schools Act.'⁸⁶¹ SGBs, the court explains, are primarily responsible for safeguarding the interests of both the school and the learners attending there. As such they are intended to 'be a beacon of grassroots democracy in the local affairs of the school.'⁸⁶² The court reasoned that those parents of children attending the school and the 'local community' are usually best placed to create a suitable language policy for a school.⁸⁶³ What the court alludes to here is that vesting SGBs with policy making functions acknowledges those at the coal face of education delivery and the need for them to have a meaningful say over education provisioning at the schools they govern. Such a need to provide SGBs with a meaningful say would extend to the determination of feeder zones. However, the court reasons, SGBs do not enjoy untrammled control over the contents of their language policies.⁸⁶⁴ The determination of language policies by SGBs remains sub-ordinate to the Constitution, the Schools Act, and any relevant provincial legislation.⁸⁶⁵ A SGB's power to determine admission policy (including feeder zones) too remains subject to regulation in the same way. In other words, a SGB does not hold unconstrained power on the issue of feeder zones.

⁸⁶⁰ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 57.

⁸⁶¹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 79.

⁸⁶² *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 57.

⁸⁶³ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 57.

⁸⁶⁴ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 58-59.

⁸⁶⁵ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 59. Section 6(2) of the Schools Act.

The court appears cognisant of at least one shortfall in its depiction of SGBs as vibrant democratic institutions ensuring the realisation of the right to a quality education at ground level. If a SGB is tasked with furthering the interests of the school and learners attending there, what then of the educational interests of those learners who are not enrolled in the school but nevertheless have a stake in that SGB's decision-making process (such as the learners seeking tuition in English at Hoërskool Ermelo). The court attempts to address this issue in one fell swoop. Decent leaders, the court explains, will be aware of the need for institutions to be flexible. SGBs have a fiduciary duty towards schools as a component of an ever changing society. SGBs must therefore, the court states, appreciate that they have been charged with taking care of a public resource. This resource should be governed in the interests of both the school body and 'the broader community in which the school is located and in the light of the values of our Constitution.'⁸⁶⁶ Relevant considerations when determining a language policy therefore extend beyond the interests or needs of the school body. The court in *Ermelo* essentially envisions SGBs as positive 'agents of change' within their community.⁸⁶⁷ By the court's reasoning, a SGB when engaging in school zoning must also act in the interests of the broader community in which the school is located'. Serfontein points out that the court in *Ermelo* failed to define what it meant by 'broader community'.⁸⁶⁸ Given the facts of the case (the focus on the overcrowding in the Ermelo circuit) it seems that the court was likely speaking in the sense of geographical nearness to the school. However, this does not mean that the court must be understood to have only meant it in this limited sense. The 'broader community' which the school must serve need not necessarily be framed through physical proximity. The court's reference to the 'interests of the broader community' in *Ermelo* was underpinned by the wider social need to eliminate racial inequality within public education. A definition of 'broader community' phrased solely from the perspective of geographical nearness undermines the very purpose of the court's reasoning. It provides lee way for schools to evade their obligation to be agents of change in an ever-developing society. Such a narrow definition of 'broader community' would, by its very nature, perpetuate racial inequality given the racialised context of South Africa's spatial legacy.⁸⁶⁹ The 'broader community' which the Constitutional Court

⁸⁶⁶ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 80.

⁸⁶⁷ Merabe MJ *The core content of public school learners' right to a basic education in terms of section 29 (1)(a) of the Constitution* (unpublished master's thesis, University of the Free State) 144.

⁸⁶⁸ Serfontein EM & de Waal E 'The effectiveness of legal remedies in education: A school governing body perspective' (2013) 46:1 *De Jure* 62.

⁸⁶⁹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 44.

speaks of in *Ermelo* can therefore be any community which a school has been zoned to serve and not necessarily one near that school.

Such a wider interpretation of the notion of ‘broader community’ is further supported by the court’s demand that SGBs govern schools, as a public resource, ‘in the light of the values of our Constitution.’⁸⁷⁰ As seen in Chapter 3, the value of equality requires that all races can have access to and enjoy their constitutional rights and freedoms. This would of necessity require racially equitable access to education. A narrow interpretation of ‘broader community’ would be inimical to the achievement of such equality in schooling access. It would undermine the constitutional promise of a transformed South Africa reflected in the value of equality.⁸⁷¹ Where SGBs of HWS establish and implement feeder zones shaped purely on geographical proximity, they are flouting the Constitutional Court’s demand in *Ermelo* that they govern in light of constitutional values, including the value of equality.

Venter,⁸⁷² and Reyneke,⁸⁷³ credit the court in *Ermelo* for having widened the responsibilities of SGBs in the course of balancing the contesting rights of children enrolled in the school and those children who are part of the larger community.⁸⁷⁴ However, it is unclear as to how precisely the concerns of children in the broader community are to be factored. This is because the court failed to prescribe any principles against which to measure the SGBs decisions to ensure that it is living up to this laudable approach the court speaks of. Such guidance would have at the very least, provided an inkling of a measurement with which to hold SGBs to account. The absence of such guidance makes it even harder to visualise how SGBs will ever pay more than lip service (if any service at all) to the notion that its responsibilities extend beyond the immediate interests of the school and its learners.

⁸⁷⁰ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 80.

⁸⁷¹ Mashele R ‘The right to equality under South Africa’s transformative constitutionalism: A myth or reality’ (2015) 2015:2015 *Acta Universitatis Danubius Juridica* 28-29.

⁸⁷² Venter F ‘Quality and equality in South African education after 20 years’ in de Groof J and du Plessis G (eds) *International Journal of Educational Leadership Preparation Special Issue 2014: South African education after twenty years of democracy* (2014).

⁸⁷³ Reyneke M ‘The Development of the best-interests-of-the-child concept by the South African Constitutional Court - Implications for school discipline’ (2014) 2014 *International Journal for Education Law and Policy*.

⁸⁷⁴ Venter F ‘Quality and equality in South African education after 20 years’ in de Groof J and du Plessis G (eds) *International Journal of Educational Leadership Preparation Special Issue 2014: South African education after twenty years of democracy* (2014) 156. Reyneke M ‘The development of the best-interests-of-the-child concept by the South African Constitutional Court - Implications for school discipline’ (2014) 2014 *International Journal for Education Law and Policy* 142.

Arendse states that the court in *Ermelo* was naïve to surmise that SGBs will always operate to further the interests of both the school community and broader community.⁸⁷⁵ She explains that in actual fact there exists a strong likelihood that SGBs will always place the needs of (privileged) ‘insiders’ above ‘outsiders’.⁸⁷⁶ This conflict of interest raises scepticism regarding the effectiveness of local democracy as a model in addressing disputes between PEDs and SGBs on the establishment and implementation of school policies.⁸⁷⁷ As Grant Lewis and Motala explain, the form of democracy being touted via SGBs is really a scheme of jostling for power.⁸⁷⁸ Fredman points out that SGBs, by their very nature, are answerable to the school community and will therefore invariably make choices that advance their narrow concerns. The parents of learners who are not enrolled at the school are deprived of a say in this governing process. A SGB’s natural inclination would be to further the interests of those already part of the school body and to repel efforts to incorporate the interests of the ‘outs.’ It is the SGB who manages the quality of education provisioning at school level in line with the resources at that specific school’s disposal. Access to a quality education is therefore designed in a manner that favours the fortunate and disadvantages the disadvantaged.⁸⁷⁹

Brickhill and Van Leeve criticise the court in *Ermelo* for its failure to effectively grapple with the restricted franchise that defines SGBs and the manner in which their interests have the potential to and frequently do clash with the concerns of the ‘broader community’.⁸⁸⁰ Van Leeve also criticises the court for simply accepting that SGBs operate in a democratic manner without questioning whether these bodies may in fact be functioning in a parochial way that favours a certain race and class.⁸⁸¹ Brickhill, Bishop and Finn convey a similar sentiment. They assert that the court’s grassroots and democratic characterisation of SGBs calls for vigilance.

⁸⁷⁵ Arendse L ‘The South African Constitution’s empty promise of radical transformation: Unequal access to quality education for black and/or poor learners in the public basic education system’ (2019) 23 *Law, Democracy and Development* 133.

⁸⁷⁶ Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 238. Fredman makes the same point in respect of the Rivonia judgment. Fredman S ‘Procedure or principle: The role of adjudication in achieving the right to education’ (2013) 6 *Constitutional Court Review* 185.

⁸⁷⁷ Fredman S ‘Procedure or Principle: The role of adjudication in achieving the right to education’ (2013) 6 *Constitutional Court Review* 186. Fredman’s discussion takes place in the context of the Rivonia judgment.

⁸⁷⁸ Grant Lewis S and Motala S ‘Educational de/centralisation and the quest for equity, democracy and quality’ in Chisholm L (ed) *Changing class: Education and social change in post-apartheid South Africa* (2004) 121.

⁸⁷⁹ Fredman S ‘Procedure or Principle: The role of adjudication in achieving the right to education’ (2013) 6 *Constitutional Court Review* 186.

⁸⁸⁰ Brickhill J and van Leeve Y ‘From the classroom to the courtroom: Litigating education rights in South Africa’ in Fredman S, Campbell M & Taylor H (eds) in *Human Rights and Equality in Education: Comparative Perspectives on the Right to Education for Minorities and Disadvantaged Groups* (2018) 154.

⁸⁸¹ van Leeve Y ‘Executive heavy handedness and the right to basic education a reply to Sandra Fredman’ 199 (2013) *Constitutional Court Review* 211.

Public schools, they point out, have a legacy as places of subjugation and the segregated demographics of feeder areas are still characteristic of apartheid geography.⁸⁸² This skewed racial demographic combined with segregation based on class will invariably find reflection in the composition of SGBs and inevitably influence their decisions, including those regarding admissions. School governance, Moorosi explains, is one aspect of the education system where colonialist and apartheid skewed power dynamics continue to thrive. Those ruling over school governance can wield their control by infusing their dominant cultures and class advantage into their form of governing.⁸⁸³ Indeed, the dispute in *Ermelo* was very much about classism and the preservation of school resources for the benefit of an elite group. This much can be gathered from an interview conducted by Boersema with the SGB chairperson of Hoërskool Ermelo at the outset of the litigation. As the chairperson framed it: ‘it is money from the parents of the last 13 years that has made the school what it is. They have paid for the new fitness room and the auditorium. We laid the first brick ourselves!’⁸⁸⁴

The use of language policies to perpetuate racial discrimination within the school admission process is no secret.⁸⁸⁵ The racial dynamic at play in *Ermelo* is quite evident in that it was the parents of white children in the community that rallied in opposition to the admission of black children.⁸⁸⁶ Woolman describes *Ermelo* as ‘a case of racial exclusion masquerading as cultural autonomy’.⁸⁸⁷ The racially discriminatory motivations behind Hoërskool Ermelo’s heel digging refusal to alter its language policy was tacitly recognised by the lower court judge who presided over the matter.⁸⁸⁸ This includes the judge’s reference to the ‘callous’ behaviour of the school towards learners coming from ‘other sections of the communities’ that was

⁸⁸² Brickhill J, Bishop M, Finn M et al. ‘Constitutional Law’ (2016) 2016 *Annual Survey of South African Law* 202 and 203.

⁸⁸³ Moorosi P, Bongani B & Molale I et al ‘School governance and social justice in South Africa: A review of research from 1996 to 2016’ (2020) 24 *Education As Change* 17.

⁸⁸⁴ Boersema JR ‘Resisting change: former Afrikaner schools and education reform in post-apartheid South Africa’ in Nicolai S (ed) *Opportunities for Change: Education Innovation and Reform During and After Conflict* (2009) 172. Boersema’s interviews occurred between April to June 2007 and the Ermelo litigation commenced with an urgent interim order in January 2007. *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 28.

⁸⁸⁵ FEDSAS itself admits that there have been occurrences where language policies have been employed by schools as a tool for screening admissions applications in a way that intimates that such screening takes place with racist purposes. FEDSAS Replying Affidavit in *FEDSAS v MEC for Education, Gauteng and Head of Department of Education* (case no 18246/15) (Part B) para 40.1 of page 581.

⁸⁸⁶ Daniel PTK & Greytak S ‘Recognising situatedness and resolving conflict: Analysing US and South African education law cases’ (2013) 46:1 *De Jure* 37.

⁸⁸⁷ Woolman S *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013) Cape Town: Juta.

⁸⁸⁸ Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 115-116. *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others* [2007] ZAGPHC 232 at 66.

‘reminiscent’ of Bantu Education.⁸⁸⁹ The Constitutional Court in *Ermelo* can be criticised for its failure to fully engage with the race based dimension that attached to the dispute. However, the court can also be commended for endeavouring to address the systemic problems with school capacity that helped fuel the dispute. It attempted to do so by ordering the SGB to review its language policy in view of the considerations found in the judgment,⁸⁹⁰ and to file a copy of its new policy with the court. It was also to account to the court on the procedures adopted during the review process. The HoD was directed to report to the court on the expected demand for grade eight English spaces within the Ermelo circuit in the coming academic year, and the actions adopted by the department to ensure that this was met.⁸⁹¹

In crafting its judgment, the court, although not explicitly stating as much, latched onto the concept of meaningful engagement.⁸⁹² To achieve compliance with the order, Liebenberg argues, would have required that the department undertake a fact finding and wide-ranging consultative process. Such an approach, explains Liebenberg, was needed to secure the necessary information from role players, settle disagreements via fair and structured debate and encourage wider community acceptance and active support for the department’s suggested policy and strategic solutions.⁸⁹³ All of this was essential for a feasible answer to be found. Liebenberg criticises the court in *Ermelo* for not clarifying that such a participatory approach was required.⁸⁹⁴



⁸⁸⁹ Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 115-116. *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others* [2007] ZAGPHC 232. *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others* [2007] ZAGPHC 232 at 66.

⁸⁹⁰ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 98 and 106.

⁸⁹¹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 106.

⁸⁹² Liebenberg S ‘Remedial Principles and Meaningful Engagement in Education Rights Disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 16. Meaningful engagement has been used as a court remedy aimed at stimulating the parties to engage with each other in a participatory manner to resolve the dispute amongst themselves in an effective way. Meaningful engagement was pioneered in the context of the constitutional right to housing and eviction disputes. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC).

⁸⁹³ Liebenberg S ‘Remedial principles and meaningful engagement in education rights disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 16 and 17.

⁸⁹⁴ Liebenberg S ‘Remedial principles and meaningful engagement in education rights disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 17.

The tailpiece to the Ermelo saga is that the SGB amended its language policy to make provision for tuition in both Afrikaans and English.⁸⁹⁵ This occurred following a phase of fervent discussions between the SGB and PED.⁸⁹⁶ The school also held a meeting with the community and a separate meeting solely with the school's parent body to discuss the policy.⁸⁹⁷ However, one should be careful not to overstate the 'victory' of meaningful engagement in the context of *Ermelo*. The nature of the participatory process and its outcome was always going to have to pass constitutional scrutiny. This much would not have been lost on the parties. Some positives can, however, be taken. From interviews conducted by Serfontein and de Waal with SGB members of Hoërskool Ermelo following the decision, it seems that at least some on the SGB had established a good working relationship with the Free State HoD.⁸⁹⁸ There also appeared to be an appreciation by at least a few SGB members for what they saw as the certainty that the court order had delivered.⁸⁹⁹

Justice Khampepe, whilst flattering of the Constitutional Court's remedial approach in *Ermelo*, cautions that engagement can only truly be meaningful where there is an appreciation of the views held on each side.⁹⁰⁰ The dispute in *Ermelo*, however, went far deeper than any lack of meaningful engagement and mutual understanding between the HoD and Ermelo's SGB. Rather, the dispute was of such scale and intensity that it severed the agricultural community of Ermelo into two factions.⁹⁰¹ On the one side, was the Afrikaans community in both Ermelo and the wider Mpumalanga buttressed by several Afrikaans institutions across South Africa and driven by the SGB chairperson of Hoërskool Ermelo. On the other side, sat an overwhelming proportion of Ermelo's black community steered by the local branch of the African National Congress. This intense divisiveness over the fate of Hoërskool Ermelo's

⁸⁹⁵ van der Vyver JD 'Constitutional protection of the right to education' (2012) 27:2 *South African Public Law* 336. Khampepe S 'Meaningful participation as transformative process: The challenges of institutional change in South Africa's constitutional democracy' (2016) 27:3 *Stellenbosch Law Review* 450.

⁸⁹⁶ Khampepe S 'Meaningful participation as transformative process: the challenges of institutional change in South Africa's constitutional democracy' (2016) 27:3 *Stellenbosch Law Review* 450.

⁸⁹⁷ Serfontein EM & de Waal E 'The effectiveness of legal remedies in education: A school governing body perspective' (2013) 46:1 *De Jure* 61.

⁸⁹⁸ Khampepe S 'Meaningful participation as transformative process: the challenges of institutional change in South Africa's constitutional democracy' (2016) 27:3 *Stellenbosch Law Review* 450. Serfontein EM & de Waal E 'The effectiveness of legal remedies in education: A school governing body perspective' (2013) 46:1 *De Jure* 59.

⁸⁹⁹ Serfontein EM & de Waal E 'The effectiveness of legal remedies in education: A school governing body perspective' (2013) 46:1 *De Jure* 59.

⁹⁰⁰ Khampepe S 'Meaningful participation as transformative process: the challenges of institutional change in South Africa's constitutional democracy' (2016) 27:3 *Stellenbosch Law Review* 450.

⁹⁰¹ Boersema JR 'Resisting change: former Afrikaner schools and education reform in post-apartheid South Africa' in Nicolai S (ed) *Opportunities for Change: Education Innovation and Reform During and After Conflict* (2009) 172.

language policy also spilled over onto news headlines. Nyika conducted an analysis of the media coverage relating to the litigation. After analysing news story headlines on the issue, she concludes that these reports reveal the ideological partisanship and content bias reflective of the controversial nature of the issue within larger South African society.⁹⁰² To simplify *Ermelo* as an admirable model for meaningful engagement is to lose sight of the magnitude of the ideological and class divide that fueled the conflict in Ermelo and which is likely to persist long after. As Arendse explains in her dissection of *Ermelo*, the concept of meaningful engagement has not produced any seismic shift in the rest of South Africa as regards the creation, execution, and effect of school language policies on matters of racial inequality.⁹⁰³

In chorus with school language policies, demarcating and amending feeder zones—especially in the case of transformative zoning—can be a highly contentious issue. This much is illustrated in Chapter 9, in the context of the reconfiguration of attendance zones in the US to make these zones more racially equitable.⁹⁰⁴ Decisions surrounding school rezoning in the US are invariably politically charged,⁹⁰⁵ and frequently met with resistance,⁹⁰⁶ by more affluent and white families in pursuit of their own narrow agenda.⁹⁰⁷ It can be anticipated that it will be these same category of stakeholders in South Africa who are most likely to resist any attempts at transformative zoning. More affluent black families whose children are enrolled in these schools will also most likely resist such change. As Fredman, Arendse and others have demonstrated, South Africa’s localised governance model with its emphasis on the democratic provisioning of education lends itself particularly vulnerable to the dominance of these privileged voices and their limited interests.⁹⁰⁸ Given the ideological battles at play, HoDs should tread particularly cautiously if considering transformative zoning. An HoD’s failure to adequately involve parents and SGBs in the mapping of feeder areas has a real likelihood to result in litigation against the relevant PED. This is evidenced by the case of *Gerrit Maritz*

⁹⁰² Nyika N ‘Media coverage as an instrument of language rights activism: The case of Hoërskool Ermelo’ (2010) 28:1 Southern African Linguistics and Applied Language 94-95.

⁹⁰³ Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 115-116. *High School Ermelo and Another v Head of Department Mpumalanga Department of Education and Others* [2007] ZAGPHC 232 at 244.

⁹⁰⁴ See section 9.7.4 below.

⁹⁰⁵ Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s Public Schools’ (2018) 111. Monarrez T ‘School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA’ (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8.

⁹⁰⁶ Richards M P ‘Gerrymandering educational opportunity’ (2017) 65-70.

⁹⁰⁷ See section 9.7.4 below.

⁹⁰⁸ Fredman S ‘Procedure or principle: The role of adjudication in achieving the right to education’ (2013) 6 *Constitutional Court Review* 186. Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 238.

Secondary School vs. Gauteng Department of Education.⁹⁰⁹ The matter concerned a dispute about the establishment of a feeder area for a secondary school in Gauteng but was eventually settled out of court.⁹¹⁰ The participatory method of meaningful engagement Liebenberg conceives of in her criticism of *Ermelo*,⁹¹¹ would therefore be equally vital in the context of transformative zoning. Such wide ranging and thorough community engagement is needed to ensure that feasible and effective transformative zoning occur and to increase the legitimacy of feeder zones once declared. It is also necessary to help immunise such transformative zoning from likely legal attack.

6.3.2 Fighting for the final say: Welkom/Harmony

In *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another*,⁹¹² the Constitutional Court was once more confronted with the power struggles between SGBs and PED officials over who had ultimate control concerning the establishment and application of school policies.⁹¹³ Like in *Ermelo*, the *Welkom* decision was the end-result of litigation initiated by SGBs of relatively well-off schools.⁹¹⁴ As with *Ermelo*, the case turned on the rule of law with the underlying substantive issues essentially the same—access to education, non-discrimination, and the protection of vulnerable learners within the public education system. In *Welkom*, however, the two learners concerned were already enrolled at the respondent schools. These learners fell victim to their school's pregnancy policy. The schools' policies had the effect of barring learners who had fallen pregnant from school for a protracted period. Acting under these policies each of these schools had barred a learner from

⁹⁰⁹ Prinsloo S 'The dual role of the principal as employee of the Department of Education and ex officio member of the governing body' (2016) 36:2 *South African Journal of Education* 6 and 7.

⁹¹⁰ Prinsloo S 'The dual role of the principal as employee of the Department of Education and ex officio member of the governing body' (2016) 36:2 *South African Journal of Education* 6 and 7.

⁹¹¹ Liebenberg S 'Remedial principles and meaningful engagement in education rights disputes.' (2016) 19 *Potchefstroom Electronic Law Journal* 16, 17, 25 and 26.

⁹¹² *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC).

⁹¹³ Franklin S & McLaren D 'Realising the Right to a Basic Education in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to a Basic Education' (2015) Working paper 10, *Studies in Poverty and Inequality Institute (SPII)* 8. Liebenberg S 'Remedial principles and meaningful engagement in education rights disputes.' (2016) 19 *Potchefstroom Electronic Law Journal* 20. Brickhill J and van Leeve Y 'From the classroom to the courtroom: Litigating education rights in South Africa' in Fredman S, Campbell M & Taylor H (eds) in *Human rights and equality in education: Comparative perspectives on the right to education for minorities and disadvantaged groups* (2018) 155.

⁹¹⁴ Van Leeve Y 'Executive heavy handedness and the right to basic education a reply to Sandra Fredman' 199 (2013) *Constitutional Court Review* 203.

attending there.⁹¹⁵ The HoD of the Free State PED ordered the schools to allow the learners to return. After finally acceding to the HoD's request both SGBs, lodged a court application.⁹¹⁶ The SGBs sought to prohibit the HoD from meddling with the execution of their school policies. They argued that the Schools Act does not authorise HoDs to ignore these policies. The court, via majority, agreed that the HoD was not so authorised.⁹¹⁷ Instead, the HoD was duty bound to participate in an exhaustive consultative process about the specific policies with the SGB and, where reasonable, to assume its policy making function through the applicable mechanism in the Schools Act.⁹¹⁸ Alternatively, the HoD was always free to turn to the courts for an effective remedy.⁹¹⁹ Thus where SGBs implement racially discriminatory zoning policies an HoD can lawfully intervene in only one of two ways. Conduct an exhaustive consultation process with the particular school concerned around changing their discriminatory feeder zone policy or, challenge that school's feeder zone policy in court. Such an ad hoc approach to tackling racially inequitable feeder zones would be resource draining, time consuming and ineffective.

As it had done in *Ermelo*, the majority of the court in *Welkom* (per Justice Khampepe) emphasised the partnership model upon which the Schools Act is based.⁹²⁰ This partnership requires close co-operation.⁹²¹ Co-operative governance, the court explains, is a crucial norm of South Africa's democracy. This norm is fixed in the Schools Act as an organising concept for the provision of access to education.⁹²² Justices Froneman and Skweyiya in their concurring

⁹¹⁵ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 8 and 15.

⁹¹⁶ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 14 and 21.

⁹¹⁷ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 72.

⁹¹⁸ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 72. See s 22 of the School's Act.

⁹¹⁹ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 72 and 105.

⁹²⁰ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 36.

⁹²¹ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 124.

⁹²² *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 123.

judgment link the concept of co-operative governance with the best interests of the child principle.⁹²³ An approach centred on the best interests of the learners must, the Justices explain, be understood against the HoD and SGBs responsibility to engage and collaborate with each other in furtherance of the learners' long-term interests.⁹²⁴ Discussing the Justices' reasoning here, Watt explains that meaningful engagement is categorically connected with the best interest of the child principle. If the parties do not attempt to meaningfully engage in search of a solution the best interests of the affected children are imperilled.⁹²⁵

Justices Froneman and Skweyiya ground their concurring judgment in South Africa's form of participatory democracy.⁹²⁶ Such participation, the Justices explain, requires the substantial involvement of people in matters that impact their lives.⁹²⁷ This entails more than ensuring that the necessary procedures and architecture for facilitating participation are in place.⁹²⁸ Instead it is about ensuring that individuals are enabled to contribute towards the decision making process. Substantive democracy, Arendse explains, prizes a diversity of opinions and no one voice should be elevated during the deliberative process. Rather, all opinions should be meaningfully considered.⁹²⁹ In the context of feeder zone determinations, participatory democracy would require HoDs to devise a process which provides a platform for a multiplicity of voices to share their ideas and views on school zoning. This would entail HoDs going beyond simply consulting with SGBs. Justices Froneman and Skweyiya in *Welkom* highlight the need for learners' best interest to form the point of departure where PEDs and SGBs interact

⁹²³ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 129.

⁹²⁴ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 134.

⁹²⁵ Watt NR *A critical examination of 'meaningful engagement' with regard to education law* (unpublished LLM thesis, University of Pretoria, 2014) 30, 33-34 and 50.

⁹²⁶ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 137-140.

⁹²⁷ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 139.

⁹²⁸ The Constitutional Court has elaborated on the concept of meaningful opportunities for public participation in the context of the law making process. See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) 129.

⁹²⁹ Arendse L 'The South African Constitution's empty promise of radical transformation: Unequal access to quality education for black and/or poor learners in the public basic education system' (2019) 23 *Law, Democracy and Development* 135.

regarding school policies.⁹³⁰ In *Welkom*, the best interests being highlighted was the best interest of the pregnant learners who were already enrolled in the school but barred from attending. However, the Constitutional Court has made clear that SGBs carry a responsibility to consider not just the best interest of the learners who happen to be enrolled at the time but also ‘the interest of the broader community’.⁹³¹ This would necessarily include what is in the best interests of learners within that broader community. It is therefore the best interest of both ‘inside’ and ‘outside’ learners that must form the starting point of any engagement between PEDs and SGBs on feeder zone policies. Justices Froneman and Skweyiya in *Welkom* reason that substantive democratic participation finds special acknowledgment in the co-operative governance provisions of the Constitution.⁹³² HoDs and SGBs as organs of state are bound by these provisions.⁹³³ They are therefore constitutionally obliged to collaborate in a spirit of reciprocal trust and good faith through assisting and strengthening each other. This includes a duty to notify and confer with each other on issues of mutual interest. SGBs and HoDs must co-ordinate their activities and avoid litigating against each other.⁹³⁴ The duty to engage in good faith persists even where there is an immediate crisis and interim action is needed to protect learners’ rights.⁹³⁵ Justices Froneman and Skweyiya stressed that timeous behaviour and continual communication are the most effective barriers to guard against the type of conflict that had arisen in *Welkom*. This approach, the Justices explain, would prevent learners’ interests being endangered in the process.⁹³⁶ The Justices’ statements about the need for adequate scheduling by HoDs resonates with Deputy Chief Justice Moseneke’s comments in

⁹³⁰ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 134.

⁹³¹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 80.

⁹³² *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 140.

⁹³³ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 141.

⁹³⁴ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 141.

⁹³⁵ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 166.

⁹³⁶ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 166.

Ermelo concerning the importance of procedural fairness in relation to language policies.⁹³⁷ The takeaway from these judgments is, that in matters relating to educational access—including matters concerning feeder zones—timeous communication is everything.

Justices Froneman and Skweyiya describe the SGBs' attitudes in *Welkom* as obstinate, yet the Justices assume that if the HoD had only acted in good faith and collaboratively at the outset there would have been no need for the HoD to issue instructions to the SGBs.⁹³⁸ However, this is by no means a safe assumption to be drawn from the facts. In *Welkom High*'s instance, the South African Human Rights Commission had written to the school highlighting how the school's pregnancy policy infringed the constitutional rights of the learner concerned.⁹³⁹ However, even the intervention of an institution with a constitutional mandate to guard against the infringement of human rights was not sufficient for *Welkom High* to budge. This is indicative of how deep-rooted the discriminatory attitudes and biases of SGBs may be. It also illustrates how problematic it is to glorify the status of these bodies and the co-operative governance design associated with them. The Constitutional Court's judgment in *Welkom* is far removed from the reality of potential biases and discrimination on the side of SGBs. Fredman criticises Justices Froneman and Skweyiya's reasoning around a constructive partnership between HoDs and SGBs working in a collaborative spirit as nothing more than lofty goals which fail to work through the real-life consequences of the decision for the particular case.⁹⁴⁰ It is for this reason that the issue of transformative zoning and the manner in which HoDs and SGBs should engage in such a process should be closely regulated by policy and/or law.

Justice Khampepe, writing for the majority in *Welkom*, hails SGBs as a lodestar for grassroots democracy which ensure schools operate democratically.⁹⁴¹ The Justice explains that these

⁹³⁷ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 75.

⁹³⁸ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 165.

⁹³⁹ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 17.

⁹⁴⁰ Fredman S 'Procedure or principle: The role of adjudication in achieving the right to education' (2013) 6 *Constitutional Court Review* 174.

⁹⁴¹ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 123

bodies, given their democratic structure, represent ‘the interests of the school community’.⁹⁴² SGBs, the Justice reasons, are best placed (at least as a starting point) to craft certain policies that consider their school’s particular needs.⁹⁴³ Fredman explains that what Justice Khampepe was alluding to was that SGBs, with their ear to the ground, are most familiar with the local environment and thus best suited to create policies that cater to their specific needs.⁹⁴⁴ Justice Khampepe, however, assumes that SGBs create space for all stakeholders to provide their input.⁹⁴⁵ In truth, Dieltiens explains, the SGB has come to operate more like a board of directors in a corporate set up than a space for communities to participate in educational discussions.⁹⁴⁶ Moreover, not all voices on the SGB have equal weight. For instance, the input of co-opted members from the community have—by virtue of their ordinarily non-voting status—less sway. The Constitutional Court’s collaborative engagement approach fails to account for the fact that the majority on the SGB might ride roughshod over the rights of the minority (as it did in *Welkom*).⁹⁴⁷

Justice Khampepe describes SGBs as akin to mini legislatures within the public-school environment as their mandate is to create particular policies to steer the everyday management of the school and guarantee an adequate schooling environment so that the right to education can be fulfilled.⁹⁴⁸ The Justice states that it is vital to the successful functioning of the education system that HoDs and SGBs appreciate the division of powers between them.⁹⁴⁹ These powers are tightly regulated through checks and balances and accountability processes in the Schools

⁹⁴² *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 125.

⁹⁴³ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 66 and 125.

⁹⁴⁴ Fredman S ‘Procedure or principle: The role of adjudication in achieving the right to education’ (2013) 6 Constitutional Court 174.

⁹⁴⁵ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 123.

⁹⁴⁶ Dieltiens V ‘The fault-lines in South African school governance: Policy or practice?’ (2011) 30 *Journal of Educational Studies* 35. Dieltiens’ statement is made in reference to fee generating schools and appears in particular to relate to HWS.

⁹⁴⁷ Fredman S ‘Procedure or Principle: The role of adjudication in achieving the right to education’ (2013) 6 Constitutional Court 174.

⁹⁴⁸ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 63.

⁹⁴⁹ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 121 and 124.

Act. Justice Khampepe reasons, the legislature has chosen to create law on this matter in a ‘fair amount of detail . . . to ensure the democratic and equitable realisation of the right to education. That detail must be respected by the executive and the judiciary.’⁹⁵⁰ Fredman points to this passage and explains how Justice Khampepe here addresses the dispute from a democratic standpoint which draws on the concept of separation of powers.⁹⁵¹ Arendse argues that the court’s uncompromising stance that the detail of the law concerning the three tiered partnership ‘must be respected’ by the executive and judiciary presents an excessively constricted interpretation of the separation of powers theory.⁹⁵² The logical extension of Justice Khampepe’s separation of powers reasoning would be that PEDs owe a level of deference to SGBs when involved in conflicts concerning school policies in all instances. However, such logic is deeply problematic. The PED with a mandate to safeguard and realise the right of access to education for all within a given province, should not be required to give deference to a body with a vested interest in doing the same only for a select few.

In the end, the SGBs of Welkom and Harmony High were ordered to reassess their pregnancy policies in view of the judgment, and thereafter file a report to the court laying out the procedures that were observed in the review process.⁹⁵³ Copies of the revised policies were also to be filed.⁹⁵⁴ The parties were ordered to meaningfully engage during the review of their policies.⁹⁵⁵ The court in *Welkom* was at pains to point out that the case was not about the questionable pregnancy policies but rather the rule of law. Having framed the case in this manner, the court unfortunately limited its concern to the two parties. Liebenberg criticises the court’s order in *Welkom* for failing to fully provide for comprehensive and fair involvement in the engagement proceedings. This, she explains, is because the court restricted its meaningful

⁹⁵⁰ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 49.

⁹⁵¹ Fredman S ‘Procedure or principle: The role of adjudication in achieving the right to education’ (2013) 6 *Constitutional Court Review* 174.

⁹⁵² Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 236.

⁹⁵³ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 125 and 128.

⁹⁵⁴ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 128. Like in Ermelo, the court delivered no subsequent judgment on whether the SGBs and HoD complied with the court’s supervisory orders. Liebenberg S ‘Remedial principles and meaningful engagement in education rights disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 28.

⁹⁵⁵ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 125 and 128.

engagement order to the parties whereas successful and consequential engagement on school pregnancy policies necessitates the contributions of a wide variety of stakeholders with specialised knowledge and experience within the field.⁹⁵⁶ Examples of other stakeholders listed by Liebenberg include relevant chapter nine institutions, SGB umbrella organisations, civil society and researchers in the field. Involving these wider stakeholders, Liebenberg argues, would have resulted in more widely accepted school pregnancy policies,⁹⁵⁷ and assisted in achieving a larger more systemic effect.⁹⁵⁸ Mahomedy speculates that should the court in *Welkom* have made provision for the involvement of wider stakeholders in the engagement process this would not only have increased the legitimacy of any resultant decisions but would have produced better calibre decisions that provide for more responsive solutions.⁹⁵⁹ Mahomedy postures that had other pertinent voices been included in the engagement process it would also have guard against the reinforcement of existing stigmas and prejudices concerning learner pregnancies.⁹⁶⁰

The establishment of transformative feeder zones is a far more technical, complex and intricate challenge to solve than that presented in *Welkom*. The designation of these zones have significant knock on effects for educational access across the public education system within a given province. A HoD when determining feeder zones needs to consider a variety of factors and draw from an array of disciplines. Pertinent factors include the location of schools and their relative distance from each other, shifting populations, learner demographics, capacity constraints within the public education system and, ultimately, ensuring access to quality education for all children within the particular province. Designating feeder zones would therefore require the involvement of specialists who possess relevant information and expertise within the field of urban geography and town and regional architecture and spatial planning. Geo-analysts are particularly well placed to assist PEDs to anticipate and ready itself for potential modification to existing feeder zones as a result of shifting spatial conditions or location-centred issues. The expertise of municipal demarcation boards and civil society

⁹⁵⁶ Liebenberg S ‘Remedial principles and meaningful engagement in education rights disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 26.

⁹⁵⁷ Liebenberg S ‘Remedial principles and meaningful engagement in education rights disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 25 and 26.

⁹⁵⁸ Liebenberg S ‘Remedial principles and meaningful engagement in education rights disputes.’ (2016) 19 *Potchefstroom Electronic Law Journal* 26.

⁹⁵⁹ Mahomedy S *The potential of meaningful engagement in realising socio-economic rights: Addressing quality concerns* (unpublished LLD thesis, University of Stellenbosch, 2019) 76.

⁹⁶⁰ Mahomedy S *The potential of meaningful engagement in realising socio-economic rights: Addressing quality concerns* (unpublished LLD thesis, University of Stellenbosch, 2019) 133.

(especially those who have worked on school zoning related issues), and SGB umbrella organisations should also be drawn on.⁹⁶¹ Liebenberg's call to draw on experts in the process of meaningful engagement by stakeholders within education therefore takes on a much-added dimension in the context of feeder zone determinations and more particularly, transformative zoning. For HoDs to draw on different experts here is vital to ensure better calibre decisions that ultimately result in feeder zones that can achieve their intended transformative effect. Of course, the transformative zoning process would still require meaningful engagement with SGBs to first, obtain valuable insights into the most effective way to achieve transformative zones, second, to secure school community buy in and finally, to avoid successful legal challenge to the zoning process.

Although *Welkom* concerned a conflict between the PED and the two SGBs on determined policy, it was the absence of clear and non-discriminatory national policy that contributed towards the dispute.⁹⁶² It would take nearly a decade post *Welkom* for the Department of Basic Education to replace its own discriminatory policy with a new national policy on learner pregnancy.⁹⁶³ *Welkom* serves as testimony to the colossal constraints of addressing discriminatory school policies at the micro level when broader intervention is needed. It is the quintessential example of the types of bias and prejudicial policies that run rampant within the public education system where SGBs are left to their own devices. As revealed in Chapter 2, such biases and prejudicial policies have clearly manifested in the context of feeder zones. Addressing exclusionary feeder practices require a systematic solution at PED level. A school zoning process in which HoDs establish racially transformative feeder zones for schools within the respective provinces provides such a solution.

6.3.3 On capping capacity: The case of Rivonia

The case of *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others (Rivonia)*,⁹⁶⁴ centred on a highly desired school, Rivonia

⁹⁶¹ The then MEC for education, Mr Panyaza Lesufi, in his approach to zoning consulted with a variety of stakeholders. Gous N 'Panyaza Lesufi proclaims end to apartheid's education urban planning' *Times Live* 15 November 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-11-15-panyaza-lesufi-proclaims-end-to-apartheids-education-urban-planning/> (accessed 11 November 2021).

⁹⁶² Draga L, Jamieson L, Lake L et al 'Legislative and policy developments 2012/2013' in Berry L, Biersteker K, Dawes H, et al (eds) *Child Gauge* (2013) 18.

⁹⁶³ Department of Basic Education Policy on the Prevention and Management of Learner Pregnancy in Schools (2021).

⁹⁶⁴ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC).

Primary,⁹⁶⁵ situated on the periphery of the wealthiest square mile of the African continent.⁹⁶⁶ Rivonia is an affluent and historically advantaged suburb, and the learner who formed the subject of the litigation resided within the school's feeder zone.⁹⁶⁷ In *Rivonia*, the Constitutional Court again found itself faced with the question concerning the lawfulness of a HoD's actions in relation to a school policy. This time, whether the Gauteng HoD had the authority to admit a child to Rivonia Primary despite the school having reached its capacity under its admission policy.⁹⁶⁸ The Constitutional Court ruled that the HoD possessed such a power,⁹⁶⁹ but had acted procedurally unfairly.⁹⁷⁰

Justice Mhlantla, writing for the majority, undertakes a textual analysis of the South African Schools Act. The Justice points out that section 5(5) of the Act confers the power to determine admission policies on SGBs. This power is inclusive of decisions about school capacity. The Justice, in commending the legislative provision, explains that SGBs serve on the front line of education provisioning. As such, they have the ability to consider an array of interrelated aspects regarding the governance and planning of their entire school.⁹⁷¹ Justice Mhlantla thus echoes the grassroots theme which permeates *Ermelo* and *Welkom* and gives credence to the intimate knowledge that SGBs are seen to possess in establishing what is best for their schools. HoDs lack this detailed perspective in relation to individual schools. It is therefore this same intimate knowledge that HoDs must draw from to ensure that effective transformative zoning occur.

Justice Mhlantla, in *Rivonia*, explains that no national laws extend the SGB's role concerning the execution of admission policies or decisions about capacity beyond the relevant provisions

⁹⁶⁵ Veriava F 'Realising the right to basic education in South Africa' in *Socio-economic Rights: Progressive Realisation?* (2016) The Foundation for Human Rights 101.

⁹⁶⁶ Cooperative Governance and Traditional Affairs *City of Johannesburg, GAU: Profile and Analysis District and Development Model* (2020) 9 read with Meridian 'The Point: Rivonia' available at <http://thepointproperties.com/sites/default/files/THE%20POINT%20Rivonia%20digital%20brochure%20Meridian%20contact%20details%20rev%201.pdf> (accessed 10 November 2020).

⁹⁶⁷ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 9. Devenish GE 'Proactive jurisprudence – A triumph for co-operative government and an exercise in partnership between educational role players: MEC for Education v Governing Body of the Rivonia Primary school 2013 (12) BCLR 1365 (CC)' (2015) 2015 *Obiter* 500.

⁹⁶⁸ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 33.

⁹⁶⁹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 52 and 53.

⁹⁷⁰ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 68.

⁹⁷¹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 40.

of the Schools Act.⁹⁷² The Justice reasons that the Schools Act itself makes it abundantly clear that SGBs' power to determine their admissions policy is subject to other provisions within the Act itself as well as relevant provincial legislation. As such, SGBs determination of admissions policy under section 5(5) of the Act would be subordinate to the PED's intervention under the Act itself or other relevant provincial law.⁹⁷³ Shandu explains how, despite the explicit limitations which the legislature has placed on SGBs' powers under section 5(5), this provision has nonetheless created space for SGBs to employ exclusionary strategies to prevent 'undesirable' learners from entering their doors. In elaboration Shandu cites, amongst other examples, the use of geography (feeder zones) as a screening mechanism.⁹⁷⁴

Arendse criticises the Constitutional Court's approach to the interpretation of section 5(5) on the basis that the court failed to adopt a contextual method of interpretation. Arendse argues that such an approach was required by the principles of transformative constitutionalism.⁹⁷⁵ The court, Arendse states, failed to address the dispute in this way despite being mandated by its own jurisprudence to do so, and despite submissions by the department calling for as much.⁹⁷⁶ Section 39(2) of the Constitution requires a court to 'promote the spirit, purport and objects of the Bill of Rights', when interpreting any statute. Arendse claims that had the court followed this approach it would have explored the social and historical context of well-off schools like Rivonia Primary in view of structural inequalities and social power relations pertinent to allowing SGBs sole say over school capacity.⁹⁷⁷ Such an approach would have required that the Constitutional Court be alive to the opportunistic use of section 5(5), as Shandu speaks of. Continuing in her textual analysis of the Schools Act in *Rivonia*, Justice Mhlantla points out that the Act itself provides for the direct involvement of the PED in the implementation of a learner's admission to a particular school.⁹⁷⁸ Thus, SGBs' powers under section 5(5) remains sub-ordinate to these other provisions within the Act.

⁹⁷² *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 40.

⁹⁷³ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 41.

⁹⁷⁴ Shandu P 'Stepping in the right direction towards fully realising the constitutional promise of section 29(1)(A) of the Constitution' (2019) 13 *Pretoria Student Law Review* 199.

⁹⁷⁵ Arendse L 'Beyond Rivonia: Transformative constitutionalism and the public education system' (2014) 29 *South African Public Law* 167.

⁹⁷⁶ Arendse L 'Beyond Rivonia: Transformative constitutionalism and the public education system' (2014) 29 *South African Public Law* 167.

⁹⁷⁷ Arendse L 'Beyond Rivonia: Transformative constitutionalism and the public education system' (2014) 29 *South African Public Law* 167.

⁹⁷⁸ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 42-44. See s 5(7)-(9) of the School's Act. Whilst the SGB establishes admission

In *Rivonia*, provincial regulations on learner admissions were intact. Consequently, the section 5(5) powers were also subject to these. The provincial regulations empowered the principal or HoD, to depart from the admissions policy in certain instances.⁹⁷⁹ In this regard, *Rivonia* can be distinguished from *Welkom*. In the latter decision the HoD lacked the authority to ignore the pregnancy policies and instruct that the affected learners be allowed to return. It is for this lack of authority that Justice Khampepe found the Free State HoD's intervention unlawful.⁹⁸⁰ In *Rivonia*, the provincial regulations allowed such intervention in learner admissions where good reasons were present.⁹⁸¹ This is provided that the HoD act reasonably and in a procedurally fair way.⁹⁸² Fairness, Justice Mhlantla explains, required that the school be given a chance to address the HoD about the effect that the learner's enrolment would have had on related issues. Such issues include the quality of schooling enjoyed by other learners attending the school, resources available for the learner, and the period needed to effectively accommodate her.⁹⁸³ One can see how these factors could apply equally in instances where SGBs are owed a hearing by HoDs on other aspects related to the placement of learners. This would include the designation of feeder zones under section 33 of the National Admission Policy.⁹⁸⁴ HoDs must act in a procedurally fair manner when exercising their power under section 33. Procedural fairness will include engaging with the relevant SGBs on proposed feeder zones.

Following *Rivonia* it seems settled, by extension of reasoning, that SGBs can legitimately rely on section 5(5) to establish their own feeder zones as part of their admission criteria. However, their power to establish feeder zones remains subject to applicable legislation including provincial legislation. The Schools Act, in its current form, allows HoDs to assume the powers of SGBs in a procedurally fair manner where the HoD is justifiably dissatisfied with a school's feeder zone and the school refuses to amend it. This would include if the HoD is of the reasonable view that the school's feeder zone discriminates unfairly on the basis of race and perpetuates racial inequality in access to education. However, this approach would only

policy, decisions on individual admission applications are made only conditionally through the principal acting on behalf of the HoD. An individual learner may always appeal a rejection to the MEC.

⁹⁷⁹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 56 and 58.

⁹⁸⁰ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 53.

⁹⁸¹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 56.

⁹⁸² *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 58.

⁹⁸³ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 64.

⁹⁸⁴ The 'Admission Policy for Ordinary Public Schools' in GN 2432 GG 19377 of 19 October 1998.

empower HoDs to tackle the issue of racially discriminatory feeder zones as part of a school's admissions policy on a reactive and uncoordinated basis. Such ad-hoc interventions would be time consuming, inefficient, and never achieve any form of broader system change as regards racially equitable access to education.

In *Rivonia*, Justice Mhlantla adopts a sympathetic tone towards both PEDs and SGBs. These role players, the Justice states, contend with a common struggle—the systematic capacity issues within the schooling system and its effect on education provisioning.⁹⁸⁵ PEDs have a duty to realise the rights of all learners to access a basic education. These departments are charged with ensuring that there exists sufficient space within the public education system to accommodate every learner.⁹⁸⁶ In contrast, individual SGBs and parents are concerned with the children currently enrolled at the particular school and their immediate needs to a quality education. These parents, the court states, ‘play an important role in improving [the] quality [of education in a particular school] by supplementing state resources with school fees.’ In the same breath, the court mentions that SGBs cannot discount the needs and interests of other children within the public education system.⁹⁸⁷ It is notable that the parents the court speaks of in *Rivonia* is only a specific subset of parents (those who pay school fees) and the particular parental interests the court speaks of is thus merely their mutual and confined one. As such, the significance of parental voices hailed in the judgment, are voices who pursue a very narrow agenda. Those seeking to preserve the privileges that they have bought into.

According to Sayed, the notion of parents as consumers of education fuels self-interest and possessive attitudes.⁹⁸⁸ This, he argues, can be observed in almost all (if not all) HWS. South Africa's model of soft zoning, that gives space to schools to prefer learners within the school's immediate surrounds, he argues, furthers this type of marketisation of schools. Given the continued existence of apartheid geography, allowing schools to determine their own feeder zones works to the advantage of whites and the rising non-white elite.⁹⁸⁹ It is important to note

⁹⁸⁵ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 70.

⁹⁸⁶ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 71.

⁹⁸⁷ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 70.

⁹⁸⁸ Sayed Y ‘Understanding educational decentralization in post-apartheid South Africa’ (1997) 66:4 *The Journal of Negro Education* 361. Sayed Y ‘Discourses of the policy of educational decentralisation in South Africa since 1994: An examination of the South African Schools Act’ (1999) 29:2 *Compare: A Journal of Comparative and International Education* 147.

⁹⁸⁹ Sayed Y ‘Understanding educational decentralization in post-apartheid South Africa’ (1997) 66:4 *The Journal of Negro Education* 361.

that the existing parent body on a SGB will, by statutory dictate, always constitute the majority and thus their interests (as parents of enrolled learners) will always carry more weight.⁹⁹⁰ Any processes designed around school zoning must therefore be alive to the narrow agendas and biases that many SGBs' input will inevitably bring and the role of these bodies should be tempered accordingly. This is not to negate the vested and legitimate interest that fee-paying parents have in ensuring that their children benefit from a good quality education. Considering the views of these parents, as expressed through the SGB or otherwise, remains important to any school zoning process. This is also not a contention that transformative zoning be effected in a manner that undermines the quality of education provisioning at wealthy schools. These well-functioning schools 'are also beacons of hope, examples of quality public education, and they should not be vilified or suffocated by. . . one-sided policy'⁹⁹¹ or laws. A transformative zoning approach should ensure that fee-paying parents continue to enjoy the benefits of the monies they pump into schools whilst simultaneously shouldering a small portion of the burden of providing access to quality education for impoverished black learners. This will admittedly call for a delicate balancing exercise.

Unlike in *Ermelo and Welkom*, the court in *Rivonia* seems to at least somewhat appreciate that education can be a contentious space. The court recognises the reality that stakeholders in education serve a wide range of interests in the provision of education, and some pursue rival ends. As a consequence, the court accepts, tensions will invariably arise.⁹⁹² However, according to the court, the Constitution provides a compass with which to navigate these conflicts of interests and diversity of views—the best interest of the child.⁹⁹³ Though, lacking in the judgment is substantive direction on how this compass should work. Fredman criticises the court in *Rivonia* for neglecting to provide tangible guidance on what principles to apply to ensure that the needs and interests of 'outsiders', and not solely those of the school and learner body count.⁹⁹⁴

⁹⁹⁰ Section 23(9) of the Schools Act.

⁹⁹¹ Draga L & Isaacs D 'Equal education is a basic right' *The Star* 9 May 2013 <https://www.pressreader.com/south-africa/the-star-south-africa-late-edition/20130509/281900180722125> (accessed 11 October 2022).

⁹⁹² *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 2.

⁹⁹³ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 2.

⁹⁹⁴ Fredman S 'Procedure or principle: the role of adjudication in achieving the right to education' (2013) 6 *Constitutional Court Review* 186-188.

Justice Mhlantla in *Rivonia* directs PEDs to appreciate the complexity of the process of capacity determination and the need to deliberate with SGBs on this. PED's capacity determinations, the Justice explains, should consider a variety of intertwined factors regarding school governance and planning.⁹⁹⁵ Unfortunately, the Justice does not provide any clear guidance on what these intertwined factors may be. The court's silence on this issue is a pity. Some indication of relevant factors would have provided much needed guidance to HoDs on how to engage with SGBs in matters relating to access to education and structural inequalities. This would include the establishment of feeder zones.

Justice Mhlantla in *Rivonia* again affords much value to the concept of a statutorily designed partnership, as first mentioned in *Ermelo* and further developed in *Welkom*. The department and SGBs must work together in furtherance of the realisation of the right to basic education. HoDs planning and organising with SGBs as partners is therefore vital to the process.⁹⁹⁶ Nurturing this partnership, the Justice explains, is of utmost importance to ensure that children's educational needs are satisfied.⁹⁹⁷ The parties must, as a consequence of co-operative governance demands, engage in good faith.⁹⁹⁸ Such co-operation is the binding general standard in disputes between the state and SGBs and is grounded in their mutual objective of guaranteeing that learners' best interests are advanced and the right to basic education fulfilled.⁹⁹⁹ A partnership of this nature, the court states, is of crucial significance when tackling capacity limitations within the public education system.¹⁰⁰⁰ However, Dieltiens states that assurances of collaborative community-based governance on the side of SGBs are nothing more than romanticised notions neglecting to recognise the intense forces of competition and power intrinsic to school level decision-making processes.¹⁰⁰¹

Arendse argues that the Constitutional Court in *Rivonia* insinuated that challenges concerning access to quality education and systemic capacity constraints can simply be fixed by

⁹⁹⁵ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 71.

⁹⁹⁶ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 71.

⁹⁹⁷ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 2.

⁹⁹⁸ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 49(d).

⁹⁹⁹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 69.

¹⁰⁰⁰ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 68.

¹⁰⁰¹ Dieltiens V 'The fault-lines in South African school governance: policy or practice?' (2011) 30 *Journal of Educational Studies* 40.

collaboration between particular PEDs and specific SGBs.¹⁰⁰² The simplistic manner in which the court depicts the conflict between the Rivonia SGB and Gauteng HoD and the court's solution that they should work closely together to resolve admissions issues belies reality. Scholarly research reveals that there is an indisputable tension which exists between SGBs and the state.¹⁰⁰³ This friction exposes the delicate relation between SGBs and the state's transformative agenda.¹⁰⁰⁴ According to Davids, this tension cannot be downsized as a simple tiff or disagreement.¹⁰⁰⁵ Or, to put it in Justice Mhlantla's words, a 'skirmish'.¹⁰⁰⁶ Rather, says Davids, this tension can frequently be ascribed to the politics of exclusion and inclusion. In elaboration, Davids cites the use of feeder zones by SGBs to stymie transformation and to block access to those who are seen as the 'other'.¹⁰⁰⁷

That some SGBs are blatantly dismissive towards government policy, can be seen from the research of scholars Clase, Kok and van der Merwe. These researchers conducted an empirical investigation via questionnaire, to detect and analyse the source and expansiveness of the tension which exists between PEDs and SGBs. Their extensive research involved 65 PED officials from the Free State who were very familiar with the workings of SGBs as well as all the representatives on 40 SGBs in the province.¹⁰⁰⁸ Clase, Kok and van der Merwe identified 'SGB's unilateral preferment of their own school's interest without concern for departmental guidelines' as an aspect of the problem.¹⁰⁰⁹ What the court in *Rivonia* misses is the extent of the ideological and political battles underlying and simultaneously amplifying the dispute. School admissions policies and practices are a fervent issue in South Africa. News articles on

¹⁰⁰² Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 236.

¹⁰⁰³ Clase P, Kok J & van der Merwe M 'Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof' (2007) 27:2 *South African Journal of Education* 244.

¹⁰⁰⁴ Davids N 'Governance in South African schools: Democratic advancement or hindrance?' (2020) *Educational Management Administration & Leadership* 9.

¹⁰⁰⁵ Davids N 'Governance in South African schools: Democratic advancement or hindrance?' (2020) *Educational Management Administration & Leadership* 9.

¹⁰⁰⁶ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 78.

¹⁰⁰⁷ Davids N 'Governance in South African schools: Democratic advancement or hindrance?' (2020) *Educational Management Administration & Leadership* 9.

¹⁰⁰⁸ Clase P, Kok J & van der Merwe M 'Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof' (2007) 27:2 *South African Journal of Education* 252.

¹⁰⁰⁹ Clase P, Kok J & van der Merwe M 'Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof' (2007) 27:2 *South African Journal of Education* 256-258. The various items on the questionnaire were grouped into six factors by means of a factor analysis. The sixth factor is described as 'deliberate abstention from collaboration by SGBs and an unwillingness to adapt to change'. An aspect of factor 6 is titled 'D19' and reads '[t]he unilateral preferment of their own school's interest without concern for departmental guidelines by SGB.' The authors find that one of the underlying and elemental problems surrounding the tension are SGBs 'apparent deliberate refusal to adapt to the new changes in the education system.'

school capacity have varied in views, with some remarking on how SGBs seem to be discriminating against prospective learners and, others lauding these bodies for executing their admissions functions admirably.¹⁰¹⁰ The Rivonia case itself garnered significant media attention and captured the imagination of the public.¹⁰¹¹

The politicised climate in which the school admissions process unfolds is revealed by Sibanda in her research. Sibanda undertook a study which involved unguided open-ended interviews with Gauteng PED representatives, SGBs, principals, parents, and legal and policy experts in the field.¹⁰¹² The study was aimed at investigating and understanding the opinions and experiences of these stakeholders regarding the application of primary school admissions policies as a means of accessing the right to basic education. Some of the responses elicited by Sibanda alluded to heavy political predispositions and overtones around admission policies.¹⁰¹³ Sibanda describes admission policies and customs followed by public primary schools in the country as politically polarised and racialised.¹⁰¹⁴ It is against this atmosphere that the limitations of meaningful engagement between the PED and SGBs must be understood. Systemic issues within the public education system of the kind the court was confronted with in *Rivonia* cannot be effectively addressed on a reactive basis as was done in that case. Meaningful engagement should not be limited to when a particular admission policy becomes contentious. Other targeted interventions are needed to regulate the criteria employed by SGBs in their admissions policies so as to achieve more racially equitable access to education. Such interventions must of necessity involve meaningful engagement at the outset. Transformative feeder zoning is one such potential intervention.

Justice Mhlantla, to her credit, was not oblivious to the issue of race and equitable access underlying the dispute in *Rivonia*. This much can be detected from the Justice's statements concerning access to education and racial discrimination. More specifically, how a history of drastically skewed resource provisioning grounded in systematic racial discrimination has

¹⁰¹⁰ Maithufi IP 'Gauteng Province v Governing Body of the Rivonia Primary School Case CCT 135/12 [2013] ZACC 34' (2014) 2014 *Obiter* 740.

¹⁰¹¹ Maithufi IP 'Gauteng Province v Governing Body of the Rivonia Primary School Case CCT 135/12 [2013] ZACC 34' (2014) 2014 *Obiter* 740 and 741.

¹⁰¹² Sibanda GM *Stakeholder experiences of enabling children's rights to basic education through public primary school admission policies* (unpublished doctorate thesis, University of Pretoria, 2018) 5.

¹⁰¹³ Sibanda GM *Stakeholder experiences of enabling children's rights to basic education through public primary school admission policies* (unpublished doctorate thesis, University of Pretoria, 2018) 165.

¹⁰¹⁴ Sibanda GM *Stakeholder experiences of enabling children's rights to basic education through public primary school admission policies* (unpublished doctorate thesis, University of Pretoria, 2018) 166.

prevented many South Africans from accessing their right to a basic education.¹⁰¹⁵ These perpetual discrepancies in accessing adequate education, the Justice explains, preserves such historical inequalities, and creates an on-going cycle of socio-economic disadvantage.¹⁰¹⁶ The Justice's statements here highlights the urgent need to halt racial discrimination within education and its perpetual and devastating effects on the socio-economic circumstances of many black South Africans. It also indicates that any effective legislative or policy interventions aimed at improving upon the school admissions process must target this discrimination. Transformative zoning presents a unique method to bring about at least some system wide change to the racial inequities that characterise access to schooling in South Africa. Whilst access to the functional component of the education system will only impact a modest number of impoverished black children, policies designed to achieve as much are disproportionately significant. Such significance lies in the influence of further education and its implications for ensuing job market possibilities. This influence is arguably the greatest for impoverished communities.¹⁰¹⁷

6.3.4 Whose school is it anyways: The case of FEDSAS

The *FEDSAS* decision concerned a challenge instituted by FEDSAS against amendments to the province's Regulations Relating to the Admission of Learners to Public Schools (2012 Gauteng admission regulations). These amendments were meant to increase the role of the Gauteng Education Department (GDoE) in the school admissions process, especially as it relates to issues of school capacity and feeder zones. The Constitutional Court resoundingly upheld the 2012 Gauteng admission regulations.¹⁰¹⁸

Included in FEDSAS' challenge to the regulations was an amendment that empowered a district director of education to place any unplaced learner at any school in Gauteng once the admission phase had lapsed if the school in question had not been proclaimed full and had no other learners on its waiting list.¹⁰¹⁹ Also included was an amendment which furnished the HoD with

¹⁰¹⁵ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 1.

¹⁰¹⁶ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 2.

¹⁰¹⁷ Spaul N 'Equity: A price too high to pay?' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 16 and 17.

¹⁰¹⁸ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 106.

¹⁰¹⁹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 40-46.

authority to establish school capacity and to proclaim a school full.¹⁰²⁰ FEDSAS argued that the effect of these amendments was to oust SGBs from the statutorily envisaged partnership model of the public education system.¹⁰²¹ Relying on *Rivonia*, the court emphasised that as per the Schools Act, SGBs' power to establish admission policies is subordinate to the Act itself and provincial legislation.¹⁰²² Admission policies must 'conform to all applicable law including provincial law'.¹⁰²³ This would include the 2012 Gauteng admission regulations.

As further support for his findings Justice Moseneke builds on the argument first articulated by the court in *Ermelo*,¹⁰²⁴ which requires schools to look beyond the immediate interests of their current learners on admissions related issues. However, unlike in *Ermelo*, Justice Moseneke specifically acknowledges the conflict of interests that this principle invokes. Schools, the Justice explains, when creating admissions policies will be motivated by the needs of their own learners. They will, understandably, strive to be hubs of excellence producing sterling outcomes.¹⁰²⁵ However, public schools are not 'rarefied spaces only for the bright, well-mannered and financially well-heeled learners'.¹⁰²⁶ Schools, explains Justice Moseneke, are in fact 'public assets which must advance not only the parochial interest of its immediate learners'.¹⁰²⁷ Justice Moseneke makes it clear that a far more extensive obligation regarding access to education rests upon more well-off schools. In the strongest language used by the court to date, the Justice explains that schools 'may, by law, also be required to help achieve universal and non-discriminatory access to education.'¹⁰²⁸

By upholding these amendments, the court rightly ensured that the Gauteng MEC and HOD are adequately equipped to fulfil their mandate to place all unplaced children within the

¹⁰²⁰ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 40-46.

¹⁰²¹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 41.

¹⁰²² *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 43.

¹⁰²³ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 43 and 44.

¹⁰²⁴ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (3) BCLR 177 (CC) 80.

¹⁰²⁵ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 44.

¹⁰²⁶ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 44.

¹⁰²⁷ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 44.

¹⁰²⁸ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 44.

province's public education system. As justification for his findings, Justice Moseneke reiterates the court's characterisation of SGBs as a hotbed for democratic participation in the provisioning of education. The Justice also re-emphasises the court's jurisprudence on co-operative governance and its demand that PEDs and SGBs work together to realise—not just the right to basic education as the court had previously and more narrowly pitched it—but 'effective and universal access to basic education.'¹⁰²⁹

The most contentious issue the Constitutional Court faced in *FEDSAS* related to feeder zones.¹⁰³⁰ The 2012 Gauteng admission regulations empowered the MEC, subject to relevant legislation, to establish feeder zones for any Gauteng school after consulting with the relevant role-players.¹⁰³¹ The regulations also created default feeder zones which would operate until the MEC declared feeder zones.¹⁰³² Under the default regime a residential address or place of employment are within the feeder area if 'relative to that place of residence or place of work, the school is the closest school which the learner is eligible to attend',¹⁰³³ or 'that place of residence or place of work for that parent is within a 5 km radius of the school.'¹⁰³⁴ This meant that if the Gauteng MEC failed to determine feeder zones, the sole criteria for establishing whether a learner was situated within a feeder zone was the geographical proximity of that learner's home or their parent(s) place of employment in relation to the specific school. Where such distance was less than 5km a learner would fall under the feeder zone.

Both *FEDSAS* and Equal Education (EE as amicus) agreed that the GDoE was justifiably authorised to determine feeder areas for schools. *FEDSAS* contended that the MEC was obliged to determine feeder zones after consultation with the applicable role-players. This is because an alternative interpretation would potentially thwart applicable role-players right to be consulted prior to the establishment of such zones. *FEDSAS* implored the court to order the MEC to invoke the MEC's power under the regulations to establish feeder zones.¹⁰³⁵ The court

¹⁰²⁹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 47.

¹⁰³⁰ Brickhill J, Bishop M, Finn M et al. 'Constitutional Law' (2016) 2016 *Annual Survey of South African Law* 205.

¹⁰³¹ Regulation 4(1) of the Regulations Relating to the Admission of Learners to Public Schools in General Notice 1160 Provincial Gazette 127 of 9 May 2012.

¹⁰³² Regulation 4(2) of the Regulations Relating to the Admission of Learners to Public Schools in General Notice 1160 Provincial Gazette 127 of 9 May 2012.

¹⁰³³ Regulation 4(2)(a) of the Regulations Relating to the Admission of Learners to Public Schools in General Notice 1160 Provincial Gazette 127 of 9 May 2012.

¹⁰³⁴ Regulation 4(2)(b) of the Regulations Relating to the Admission of Learners to Public Schools in General Notice 1160 Provincial Gazette 127 of 9 May 2012.

¹⁰³⁵ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 35.

followed a textual approach in reaching its decision. The court agreed that, despite the discretionary language in which the power was couched, the MEC was compelled to determine feeder zones. This, the court reasoned, was supported by the wording of the regulation itself which clearly showed that the default feeder zones were an interim arrangement. A transitory regime that could possibly apply endlessly would mean that relevant role-players could forever be precluded from meaningfully contributing to an issue with considerable consequence for a school.¹⁰³⁶ The MEC was therefore ordered to establish feeder zones within a year.¹⁰³⁷ Venter explains that if the MEC in *FEDSAS* could have escaped the duty to consult with SGBs it would have undermined the ability of SGBs to arrange their school's affairs effectively, to devise their admission policies or provide valuable input to MECs on how these zones ought to be shaped.¹⁰³⁸ Venter argues that by ordering the MEC to establish feeder zones the court enlivened the statutory responsibilities of SGBs to regulate their own admissions policy.¹⁰³⁹

EE also challenged the constitutionality of the interim feeder zone regime. EE argued that the interim regime unfairly discriminated on the grounds of race. Justice Moseneke explained that

‘[t]he gut of [EE’s] objection is that default feeder zones are defined in spatial terms of place of residence or of work. Since the apartheid residential and workplace lines remain firm, the impact of the criteria of the MEC is to prolong and legalise racial exclusion’.¹⁰⁴⁰

EE requested that the court order the MEC to establish feeder zones under the regulations within a specified date or in line with a published schedule.¹⁰⁴¹ EE, in its submissions, asked that the MEC be ordered to shape these feeder zones on grounds ‘other than geographical proximity’ so as to advance a transformative agenda.¹⁰⁴² Although, it seems that what EE really contended was that the feeder zones should not be shaped purely on the basis of geographically proximity.¹⁰⁴³ Justice Moseneke commented that although EE’s argument held weight, he was

¹⁰³⁶ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 37.

¹⁰³⁷ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 37 and 51.

¹⁰³⁸ Venter R and Doreen K ‘School admission policy versus equal access to education: The end of the road for school governing bodies’ (2017) 2017:3 *Journal of South African Law* 671-672.

¹⁰³⁹ Venter R and Doreen K ‘School admission policy versus equal access to education: The end of the road for school governing bodies’ (2017) 2017:3 *Journal of South African Law* 672.

¹⁰⁴⁰ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 38.

¹⁰⁴¹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 35.

¹⁰⁴² Equal Education, *Heads of Argument in Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* (14 April 2016) 32.

¹⁰⁴³ Equal Education, *Heads of Argument in Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* (14 April 2016) 25. Equal Education’s

doubtful that EE, as an amicus, could present a fresh cause of action (unfair discrimination) and urge for an order other than that sought by the parties. The court therefore followed a formalistic approach and refused to engage in the question of transformative zoning raised by EE.¹⁰⁴⁴ Justice Moseneke easily sidestepped this important issue on the basis that the court had already concluded that the MEC was obliged to create feeder zones. However, Justice Moseneke found ‘traction’ with EE’s arguments.¹⁰⁴⁵ The Gauteng MEC’s authority and obligation to establish feeder zones was grounded in law, whereas HoDs are empowered to do the same via the National Admissions Policy.¹⁰⁴⁶ Any opponents of transformative zoning would likely highlight this distinction to frustrate arguments for compulsory transformative zoning. However, as discussed in the previous chapter, it can reasonably be argued that the National Admission Policy, as an executive policy aimed at giving life to the right to basic education, also has a binding effect.¹⁰⁴⁷

Sayed describes *FEDSAS* as a momentous judgment which, if adequately applied, erodes the selective admission policies of better-off schools and thus allows for more cohesion across the different classes.¹⁰⁴⁸ Arendse, however, reminds that the judgment concerned provincial regulations and is thus specific to Gauteng. The judgment’s reach does not extend beyond the boundaries of that province.¹⁰⁴⁹ Indeed, barely a month after *FEDSAS* was handed down the MEC of the Western Cape Education Department released an official statement to this effect.¹⁰⁵⁰ The department’s spokesperson has also publicly disavowed the department from the *FEDSAS* judgment.¹⁰⁵¹ This occurred after a black parent had threatened the Western Cape MEC of Basic Education with litigation. The parent had applied to have his three children

Notice of Application for Admission as Amicus Curiae in terms of Rule 10 in *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 29.1.

¹⁰⁴⁴ Brickhill J, Bishop M, Finn M et al. ‘Constitutional Law’ (2016) 2016 *Annual Survey of South African Law* 205.

¹⁰⁴⁵ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 39.

¹⁰⁴⁶ The ‘Admission Policy for Ordinary Public Schools’ in GN 2432 GG 19377 of 19 October 1998.

¹⁰⁴⁷ See section 5.3.3.

¹⁰⁴⁸ Sayed Y ‘The governance of public schooling in South Africa and the middle class: social solidarity for the public good versus class interest’ (2016) 91 *Transformation: Critical Perspectives on Southern Africa* 101.

¹⁰⁴⁹ Arendse L *Inequality in the public education system: The role of the South African courts in effecting radical transformation* (unpublished LLD thesis, University of Pretoria, 2020) 249.

¹⁰⁵⁰ Western Cape Education Department Statement: statement by Minister Debbie Schäfer ‘Media release: WCED appeals for patience while schools finalise registration process’ (13 June 2016). The MEC released a further statement to this effect in 2019. Western Cape Education Department: statement by Minister Debbie Schäfer ‘School admissions for 2020 close today’ 15 March 2019.

¹⁰⁵¹ Villette F ‘Gauteng school feeder zones not applicable in the Cape’ *Cape Times* 15 December 2016 available at <https://www.pressreader.com/south-africa/cape-times/20161215/281663959648567> (accessed 13 November 2021).

admitted to a school in a former whites only wealthy neighbourhood in the province. However, their applications were rejected on the basis of not falling within the feeder zone. The parent appealed these decisions to the MEC arguing racial discrimination and citing *FEDSAS* in justification. Responding to these events, the spokesperson was at pains to point out that the court's order in *FEDSAS* relates specifically to the provincial regulations of Gauteng and does not implicate the Western Cape.¹⁰⁵² Nevertheless, Justice Moseneke's sentiments in *FEDSAS* regarding the relationship between feeder zones, persistent apartheid spatial patterns and the perpetuation of racial discrimination has set a positive tone. The Justice's utterances provide 'traction' for those within the education sector, civil society, and beyond who seek to lobby and/or litigate for spatially transformative zoning.

As per the *FEDSAS* order, the Gauteng MEC had until 20 May 2017 to designate feeder zones for schools in the province. After being unable to meet this deadline, the court granted the MEC an 18 month extension.¹⁰⁵³ About two years after the order, the MEC published a policy regarding feeder zones in the province.¹⁰⁵⁴ It is claimed that Gauteng schools now have feeder areas stretching 30 km in every direction.¹⁰⁵⁵ In 2019, the MEC also published amendments to the regulations which had formed the subject of the litigation in *FEDSAS*.¹⁰⁵⁶ These amendments show an attempt to engage in more transformative school zoning. The Gauteng MEC's approach to transformative zoning is discussed in more detail in the next chapter.

6.4 CONCLUSION

The purpose of this chapter was to discuss the jurisprudence regarding the relationship between SGBs and PEDs. The jurisprudence that has emerged from disputes between these parties has a significant bearing on the issue of transformative zoning.

¹⁰⁵² Villette F 'Gauteng school feeder zones not applicable in the Cape' *Cape Times* 15 December 2016 available at <https://www.pressreader.com/south-africa/cape-times/20161215/281663959648567> (accessed 13 November 2021). It seems that the three children were eventually admitted to the school who had refused them. Tembo T 'Parents challenge 'racist' school feeder zone system' *Cape Argus* 2 March 2017 available at <https://www.pressreader.com/south-africa/cape-argus/20170302/281569470511238> (accessed 13 November 2021).

¹⁰⁵³ Shandu P 'Stepping in the right direction towards fully realising the constitutional promise of section 29(1)(A) of the Constitution' (2019) 13 *Pretoria Student Law Review* 206.

¹⁰⁵⁴ The GDE Policy for the Delimitation of Feeder Zones for schools (18 September 2018).

¹⁰⁵⁵ The inaccuracy of this claim is discussed in section 7.4.3.4.4 below.

¹⁰⁵⁶ Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

The chapter shows how the Constitutional Court has crystallised certain principles regarding how PEDs and SGBs ought to manage any disputes that arise between them. These principles include close collaboration and mutual co-operation in ensuring the achievement of universal and equitable access to education. Understanding these various principles that have emanated from the court are important as they have obvious implications for the design and implementation of any transformative zoning model.

The discussed jurisprudence is not without valid criticism. This chapter explained and substantiated on some of these criticisms. This includes the court's failure to recognise the inherent conflict of interest between SGBs vying to maintain their existing privileges and PEDs seeking to secure the right to education for all learners. The criticisms discussed illustrate why it is necessary to unequivocally remove the ability to determine feeder zones from SGBs and to ensure that school zoning occur at the provincial level instead. These criticisms also show the importance of designing a finely tuned transformative zoning model that allows fee pay parents to continue reaping the benefits of the monies they plough into HWS whilst requiring these schools to help ensure quality schooling for impoverished black learners. This will admittedly call for a delicate balancing exercise.

The following chapter considers provincial approaches to school zoning. It considers whether these approaches have been successful in curbing the negative effects of exclusionary zoning. This is an important exercise because a failure on their part would show a need for action. Moreover, lessons can be learnt from the measures they have implemented.

CHAPTER 7

PROVINCIAL APPROACHES TO SCHOOL ZONING

7.1 INTRODUCTION

A tourist travelling to South Africa have their spoil of major cities to visit. On the southern side of the country one finds Cape Town based in the Western Cape province. It is here where one can observe the magnificent Table Mountain flaunting her beauty at all who are lucky enough to be in her presence. Cape Town is dotted with beaches, forests, and world renowned establishments.¹⁰⁵⁷ Trace the coast in an easterly direction and one will eventually stumble upon Durban and its pleasant subtropical climate.¹⁰⁵⁸ Durban, located in the province of KwaZulu-Natal (KZN), is acclaimed for its world class surf sporting spots,¹⁰⁵⁹ and loved for its mouth-watering Indian cuisine.¹⁰⁶⁰ Then there is the hustle and bustle of the vibrant metropolitan that is Johannesburg, situated in the country's economic powerhouse province of Gauteng.¹⁰⁶¹ It is here where tourists have ample choice of museums to explore. Some of these pay homage to the heroes who fought against oppressive apartheid rule.¹⁰⁶² However, for the tourist who pays close enough attention, it is not difficult to discern that apartheid in these South African cities is anything but an artefact in a historical museum. Almost 30 years post democracy, these urban centres continue to exhibit the hallmarks of colonial and apartheid spatial engineering.¹⁰⁶³ Their landscapes remain substantially spatially divided in accordance with race.¹⁰⁶⁴ Adding to this indictment, is the close relationship between the standard of education provisioning and residential locale within these cities. The quality of schooling a

¹⁰⁵⁷ *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* 2021 4 ALL SA 69 (WCC) 32.

¹⁰⁵⁸ Travel Guide 'The climate of Durban: when to go to Durban' available at <https://www.travelguide-en.org/durban-climate/> (accessed 9 February 2022).

¹⁰⁵⁹ Reef Break 'Surf Durban' available at <https://reefbreak.net/surf-durban/> (accessed 2 February 2022).

¹⁰⁶⁰ Sing A & Bhoola S 'Durban's Indian cuisine: Origins, popularity, and prospects for developing culinary tourism' (2018) 32:1-3 *Anthropologist* 107.

¹⁰⁶¹ Joburg 'About the City: Facts about Johannesburg' available at <https://www.joburg.org.za/about/Pages/About%20the%20City/About%20Joburg/Facts-about-Joburg.aspx> (accessed 9 February 2022).

¹⁰⁶² Examples include the Apartheid Museum, Hector Pieterse Museum and Constitution Hill.

¹⁰⁶³ Christopher AJ 'The slow pace of desegregation in South African cities, 1996–2001' (2005) 42:12 *Urban Studies* 2305 and 2318.

¹⁰⁶⁴ Statistics South Africa *Racial Segregation in South African Cities According to Census 2011* (2016) StatsSA as depicted in figure 1.1 of Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 4. Ballard R, Mkhize T, Hamann C, et al 'Johannesburg: repetitions and disruptions of spatial patterns' in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid: Homes Still Apart?* (2021) 37. Moodley S 'Why do planners think that planning has failed post-apartheid? The case of eThekweni municipality, Durban, South Africa' (2019) 30 *Urban Forum* 310. Musvoto G, Lincoln G & Hansmann R 'The role of spatial development frameworks in transformation of the eThekweni Municipality, KwaZulu-Natal, South Africa: Reflecting on 20 years of planning' (2016) 27 *Urban Forum* 206.

child living in Cape Town, Johannesburg and Durban can access is still very much aligned with where they live.¹⁰⁶⁵ Given this reality, feeder zones that turn exclusively on geographic proximity perpetuate existing racial inequalities in access to schooling within the provincial education systems of all three cities.

The previous chapter focused on the central judgments of the Constitutional Court regarding the way SGBs and PEDs must work together to ensure the achievement of universal and equitable access to basic education. This chapter is geared towards establishing what interventions the KwaZulu-Natal Department of Education (KZNDoe), the Western Cape Education Department (WCED) and the Gauteng Department of Education (GDoE) have implemented or attempted to implement to eliminate feeder zone induced racially inequitable access to schooling. These three PEDS have all adopted distinctive approaches in this regard. These approaches make for interesting study and comparison. This chapter investigates whether any of these interventions can serve as an effective template for addressing racial inequalities resulting from the use of feeder zones.

This chapter begins with a focus on the influence of geography on access to quality schooling in Cape Town, Durban and Johannesburg. This is followed by a brief discussion on the concurrent powers of the national and provincial legislature to legislate on basic education and its relevance to school zoning. Next, this chapter concentrates on attempts made by the KZNDoe to address feeder zone related racial inequalities within the province's education system. Thereafter, attention is given to the WCED and the GDoE and their respective approaches to school zoning in turn.

7.2 THE MANGLED FACE OF SOUTH AFRICA'S MODERN DAY CITIES

Despite the doing away with legalised segregation, the mangled nature of South Africa's urban geography, as a result of colonial and apartheid spatial planning persists.¹⁰⁶⁶ South Africa's

¹⁰⁶⁵ Parker A, Hamann C & de Kadt J 'Accessing quality education in Gauteng: Intersecting scales of geography, educational policy and inequality' (2021) 32 *Urban Forum* 151. Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 110. Naidoo AGV, Eeden A, Much Z 'Spatial Variation in school performance, a local analysis of socio-economic factors in Cape Town' (2014) 3:1 *South African Journal of Geomatics* 84. Samuel M and Sayed Y 'Inside and outside the school gates: Exploring marginalisation in KwaZulu-Natal schools in South Africa' (2003) 34:1 *IDS Bulletin* 91.

¹⁰⁶⁶ Christopher AJ 'The slow pace of desegregation in South African cities, 1996–2001' (2005) 42:12 *Urban Studies* 2305 and 2318.

urban areas are considered as some of the most segregated and unequal places on earth.¹⁰⁶⁷ The Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* describes the ingenuity of apartheid zoning laws and the tragic imprint it has left on the landscape of urban South Africa:

‘The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stone throw reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia.’¹⁰⁶⁸

The persistent segregative nature of Cape Town, Johannesburg and Durban are discussed in what follows. Such insight is important as it highlights the significant extent of the spatial injustices flowing from the use of feeder zones based purely on geographical proximity by South Africa’s historically white urban schools.

7.2.1 On mountainous beach views and dusty plains: A Cape Town divided

The below image depicts Cape Town’s African and coloured designated areas in the mid 1900’s.

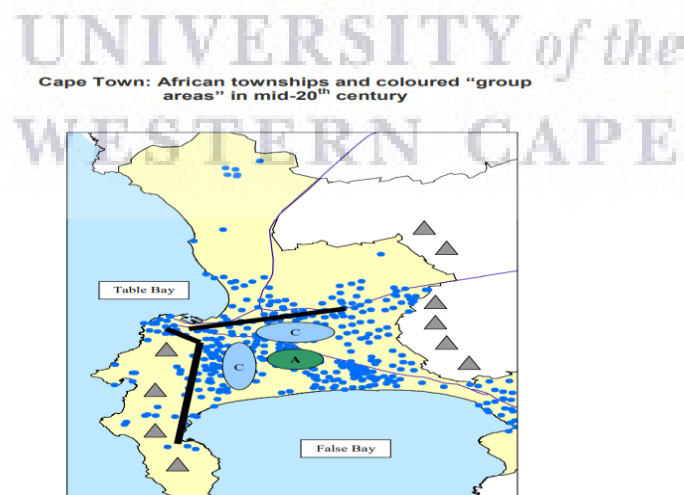


Figure 2

¹⁰⁶⁷ Agence française de développement *Policy Dialogues: Social Housing and Spatial Inequality in South African Cities* (2021) 41 AFD.

¹⁰⁶⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) 122.

This image shows how Cape Town's inner city, the southern suburbs extending downwards to the Cape Peninsula, and the city's northern suburbs winding across hilly land in a north-easterly direction inward were almost exclusively reserved for white residence (as depicted by the black outlines). African areas were continuously shifted eastwards, far from the city's urban centre to the locations labelled "A". Whilst Cape Town's coloured residence—the foremost casualty of the 1960's and 1970's forced displacements—were shifted from areas designated white to more remote locations particularly towards the Cape Flats in the south-east, labelled "C".¹⁰⁶⁹

Present day Cape Town continues to suffer the scars of this devastating history. Cape Town exhibits palpably high levels of residential racial segregation.¹⁰⁷⁰ The city is broadly thought to be the most spatially divided of South Africa's cities.¹⁰⁷¹ In fact, fractures run so deep that the city is commonly named the most segregated one in the world.¹⁰⁷² Cape Town has been described as a 'polarised city with wealthy suburbs in the [central business district], south, east, north and north-east with overcrowded and impoverished areas in the south-east.'¹⁰⁷³ Segregation in Cape Town is evident from the concentration of distinct townships on the south-east fringes of the city.¹⁰⁷⁴ This includes the grim settlements on the sandy and barren plains that is the Cape Flats.¹⁰⁷⁵ Historically white areas (HWA) are separated from coloured communities on the Cape Flats by train tracks, power plants, highways and expanses of land.¹⁰⁷⁶ A testimony to the success of an apartheid spatial engineering design in which the city would have an exclusively white centre surrounded by enclosed coloured and, followed

¹⁰⁶⁹ Illustration extracted from Seekings J 'Race, class and inequality in the South African City' (2010) Working Paper No. 283 Centre for Social Science Research Social Surveys 2 and 3.

¹⁰⁷⁰ Statistics South Africa *Racial Segregation in South African Cities According to Census 2011* (2016) StatsSA as depicted in figure 1.1 of Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 4. Van Rooyen JM *Persistent Segregation: Spatial Patterns and Dynamics of Residential Segregation in Cape Town* (unpublished doctorate thesis, Birkbeck, University of London, 2022) 166.

¹⁰⁷¹ Visagie J, Turok I & Scheba A 'Social inequality and spatial segregation in Cape Town' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 71.

¹⁰⁷² Hungwe MS 'Factors behind urban land justice and inequality in Cape Town' (2017) 18:1 *ESR Review Economic and Social Rights in South Africa* 5.

¹⁰⁷³ Damons MH 'The nature, extent and locational dynamics of Tygervalley businesses in the Cape Town economic inequality context' (unpublished MPhil Economics thesis, University of Stellenbosch, 2017) 41.

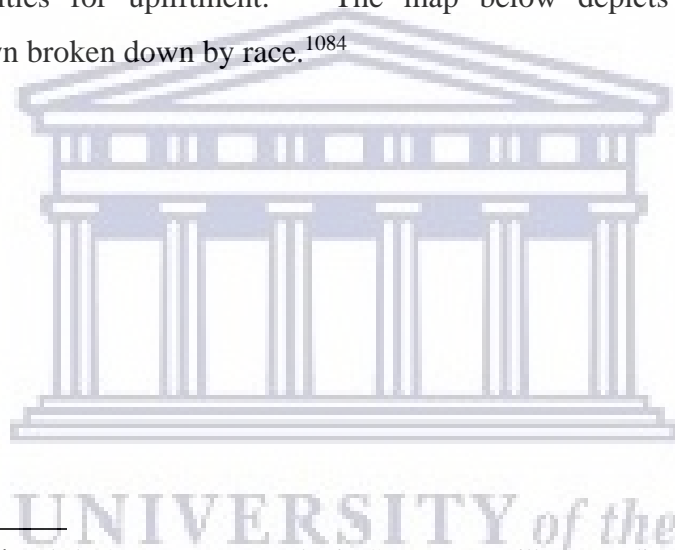
¹⁰⁷⁴ Horn A 'The history of urban growth management in South Africa: Tracking the origin and current status of urban edge policies in three metropolitan municipalities' (2019) 34:6 *Planning Perspectives* 970.

¹⁰⁷⁵ Visagie J, Turok I & Scheba A 'Social inequality and spatial segregation in Cape Town' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 73. Horn A 'The history of urban growth management in South Africa: Tracking the origin and current status of urban edge policies in three metropolitan municipalities' (2019) 34:6 *Planning Perspectives* 970.

¹⁰⁷⁶ Hänel E *The Legacy of Apartheid: Spatial Injustices in South Africa* (unpublished, Karlstad University, 2019) 8. See also Scheba A, Turok I & Visagie J 'Inequality and urban density: Socio-economic drivers of uneven densification in Cape Town' (2021) 12(IS) *Environment and Urbanization Asia* 110S.

thereafter, African communities to the east.¹⁰⁷⁷ Most of the city's white population inhabit its leafy suburbs as well as those neighbourhoods with pristine ocean views. These wealthy lush HWA boast excellent amenities, and its residents enjoy the pleasure of ocean and mountain scenery.¹⁰⁷⁸ In sharp contrast, Cape Town's highly impoverished and largely black population languish in over 200 dusty and congested informal settlements.¹⁰⁷⁹

Cape Town has expanded in a manner that has replicated segregation.¹⁰⁸⁰ In 2019, only 9% of coloured people in Cape Town resided outside of areas that were previously designated coloured.¹⁰⁸¹ The majority of government housing programmes have also been implemented on the south eastern periphery,¹⁰⁸² in places like Mitchells Plain, Delft and Khayelitsha— far removed from possibilities for upliftment.¹⁰⁸³ The map below depicts the population distribution in Cape Town broken down by race.¹⁰⁸⁴



¹⁰⁷⁷ Wainwright O 'Apartheid ended 20 years ago, so why is Cape Town still "a paradise for the few"?' *The Guardian* 30 April 2014 available at <https://www.theguardian.com/cities/2014/apr/30/cape-town-apartheid-ended-still-paradise-few-south-africa> (accessed 12 April 2020). Quoting Edgar Pieterse in his capacity as director of the African Centre for Cities at the University of Cape Town. Visagie J, Turok I & Scheba A 'Social inequality and spatial segregation in Cape Town' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 74.

¹⁰⁷⁸ Visagie J, Turok I & Scheba A 'Social inequality and spatial segregation in Cape Town' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 73.

¹⁰⁷⁹ Makoni M 'We must end Cape Town's housing "apartheid" - think-tank' *Reuters* 4 May 2017 available at <https://www.reuters.com/article/safrica-capetown-housing-idUSL8N1HW2YQ> (accessed 1 July 2022).

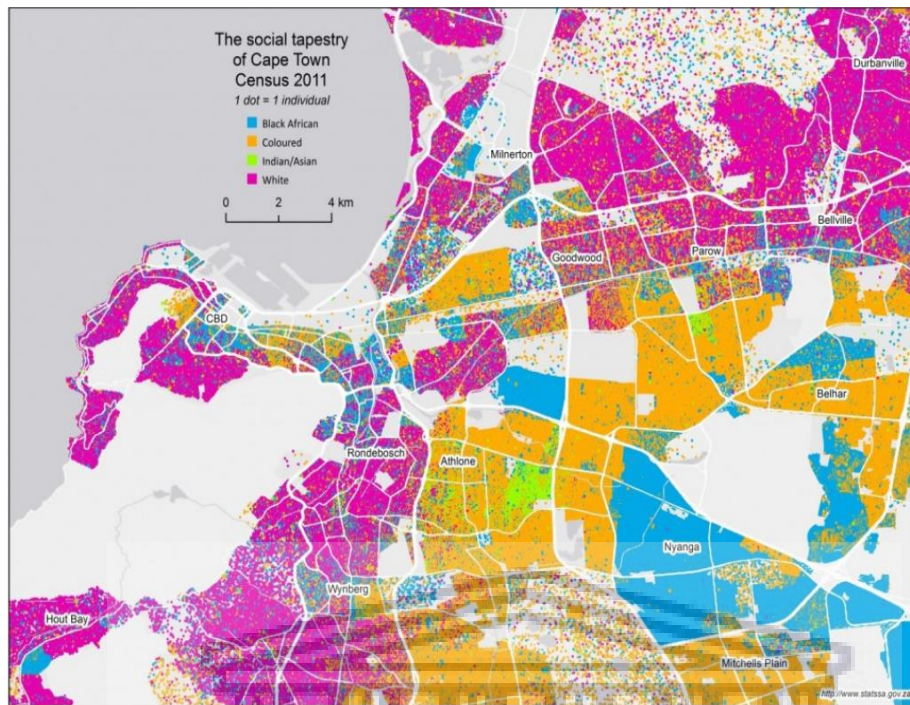
¹⁰⁸⁰ Seekings J 'Centre for Social Science Research Social Surveys Unit: Race, Class and Inequality in the South African City' (2010) CSSR Working Paper, 9 and 10.

¹⁰⁸¹ Hänel E *The Legacy of Apartheid: Spatial Injustices in South Africa* (unpublished, Karlstad University, 2019) 8.

¹⁰⁸² Horn A 'The history of urban growth management in South Africa: Tracking the origin and current status of urban edge policies in three metropolitan municipalities' (2019) 34:6 *Planning Perspectives* 970.

¹⁰⁸³ Visagie J, Turok I & Scheba A 'Social inequality and spatial segregation in Cape Town' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 88.

¹⁰⁸⁴ Image attributed to Adrian Frith. Retrieved from Hypertext 'Map Monday: The most racially segregated and integrated major cities in SA' 23 May 2016 available at <https://htxt.co.za/2016/05/map-monday-johannesburg-is-the-most-racially-integrated-city-in-sa/> (accessed 29 July 2022). Full sized interactive version can be retrieved from Frith A 'Dot-maps of racial distribution in South African cities' available at <https://adrian.frith.dev/dot-maps/> (accessed 29 July 2022).



Census data map for Cape Town, South Africa showing clear distinctions of race by neighborhood. ©Adrian

Figure 3

Geyer’s research shows that there is a widening of the poverty gap between Cape Town’s neighbourhoods with low and very high poverty neighbourhoods increasingly spatially polarised.¹⁰⁸⁵ Below, on the left, is an image of an upmarket gated estate in Rondebosch, one of Cape Town’s most highly sought after neighbourhoods in the southern suburbs.¹⁰⁸⁶ The image on the right reveals the impoverished townships of Mitchells Plain and Khayelitsha.¹⁰⁸⁷

¹⁰⁸⁵ Geyer Jnr HS & Mohammed F ‘Hypersegregation and class-based segregation processes in Cape Town 2001–2011’ (2016) 27 *Urban Form* 35.

¹⁰⁸⁶ Rondebosch Oval ‘Welcome to the Rondebosch Oval’ available at <https://www.rondeboschoval.co.za/> (accessed 31 July 2022).

¹⁰⁸⁷ Johnny Miller / Millefoto ‘Khayelitsha (Mitchell’s Plain) (2018)’ accessible at <https://www.millefoto.com/online-store/khayelitsha2> (accessed 31 July 2022).

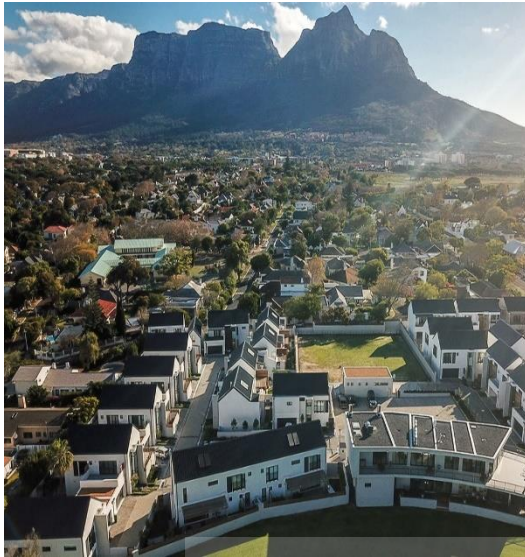


Figure 4



Figure 5

The significant wealth disparities in the city have further cemented Cape Town's apartheid geography through the workings of the property market.¹⁰⁸⁸ Steep property prices,¹⁰⁸⁹ frustrates the capacity of most of the city's inhabitants to relocate to its more attractive locations.¹⁰⁹⁰ The city's lower-income groups simply do not have the money to move to better housing.¹⁰⁹¹ There has thus been 'little movement of disadvantaged communities' into better areas.¹⁰⁹²

Naidoo, van Eeden and Much's research shows that schools in Cape Town are clustered, in that 'high performing schools' are bunched together in terms of geographical proximity and 'many low performing schools' are also clustered in this way.¹⁰⁹³ These scholars analysed the 2010 matric results of 261 high schools within Cape Town.¹⁰⁹⁴ They discovered that of the 12 schools whose pass rates exceeded 90%, all were to be found in the northern and southern suburbs. Of the schools studied, 41 scored a pass rate of below 40%. The authors point out that

¹⁰⁸⁸ Hungwe MS 'Factors behind urban land justice and inequality in Cape Town' (2017) 18:1 *ESR Review Economic and Social Rights in South Africa* 6.

¹⁰⁸⁹ Scheba A, Turok I & Visagie J 'Inequality and urban density: Socio-economic drivers of uneven densification in Cape Town' (2021) 12(IS) *Environment and Urbanization Asia* 123S.

¹⁰⁹⁰ Visagie J, Turok I & Scheba A 'Social inequality and spatial segregation in Cape Town' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 73.

¹⁰⁹¹ Hänel E *The Legacy of Apartheid: Spatial Injustices in South Africa* (unpublished, Karlstad University, 2019) 20.

¹⁰⁹² Damons MH 'The nature, extent and locational dynamics of Tygervalley businesses in the Cape Town economic inequality context' (unpublished MPhil Economics thesis, University of Stellenbosch, 2017) 41.

¹⁰⁹³ Naidoo AGV, Eeden A, Much Z 'Spatial variation in school performance, A local analysis of socio-economic factors in Cape Town.' (2014) 3:1 *South African Journal of Geomatics* 78.

¹⁰⁹⁴ Naidoo AGV, Eeden A, Much Z 'Spatial Variation in School Performance, A Local Analysis of Socio-economic Factors in Cape Town' (2014) 3:1 *South African Journal of Geomatics* 82.

these abysmally scoring schools are located in places where socio-economic conditions are poor, unemployment rates high and education levels low (usually beneath matric).¹⁰⁹⁵ These areas, located in the direction of south-east of the city, are typically associated with a majority African population and include the suburbs of Langa, Gugulethu and Khayelitsha.¹⁰⁹⁶ In Cape Town, in fact in the Western Cape province as a whole,¹⁰⁹⁷ one's postal code is very much determinative of one's educational fate. Thus, Cape Town's property market reinforces the spatial and educational injustices arising from the use of feeder zones by the city's historically white schools (HWS).

7.2.2 On lush forests and high fences: Johannesburg's spatial divide

The figure below shows the racial zoning of Johannesburg under the Group Areas Act.¹⁰⁹⁸

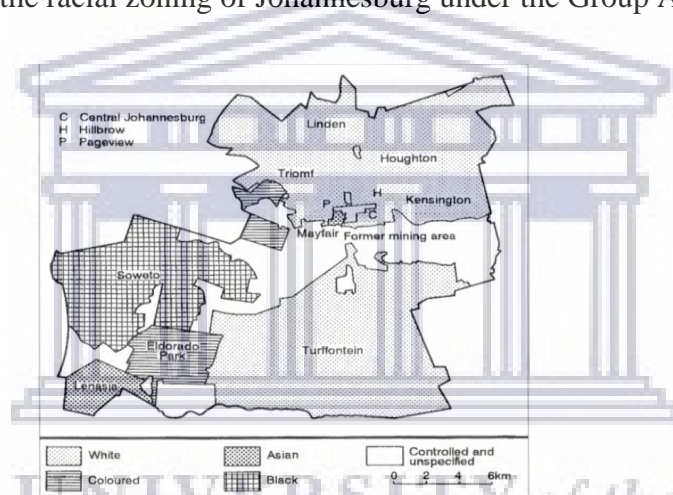


Fig. 1.— Urban racial zoning in Johannesburg.

Figure 6

Johannesburg is described as a ‘socially divided city’ in that some of its residents suffer an extreme degree of poverty whilst others relish in great wealth.¹⁰⁹⁹ Poverty and residential patterns in Johannesburg are closely entangled and reflect the city's group areas legacy.¹¹⁰⁰

¹⁰⁹⁵ Naidoo AGV, Eeden A, Much Z ‘Spatial Variation in School Performance, a Local Analysis of Socio-economic Factors in Cape Town’ (2014) 3:1 *South African Journal of Geomatics* 84.

¹⁰⁹⁶ Naidoo AGV, Eeden A, Much Z ‘Spatial Variation in School Performance, a Local Analysis of Socio-economic Factors in Cape Town’ (2014) 3:1 *South African Journal of Geomatics* 84.

¹⁰⁹⁷ Hoadley UK ‘For better or worse: school choice in a South African working-class context’ in Chisholm L (ed) *Critical perspectives in South African education: Reconstituting the educational realm* (1990) 30.

¹⁰⁹⁸ Christopher AJ ‘Towards the post-apartheid city’ (1999) 28:4 *Espace géographique* 302.

¹⁰⁹⁹ Machard D and McKay TM ‘School choice, school costs: The case of inner city Johannesburg private schools’ (2015) 47:2 *Acta Academica* 146.

¹¹⁰⁰ Beall J, Crankshaw O & Parnell S ‘Local government, poverty reduction and inequality in Johannesburg’ (2000) 12:1 *Environment and Urbanisation* 116.

Despite some desegregation having taken place,¹¹⁰¹ the city still exhibits spatial fractures that align with socio-economic conditions,¹¹⁰² and remains significantly spatially divided in accordance with race.¹¹⁰³ In fact, residential segregation along racial lines continues to plague the whole of Gauteng.¹¹⁰⁴

Artificial structures such as light industrial plants and highways as well as natural barriers such as streams and rivers (buffer zones) all conspire to ensure that Johannesburg maintains its colonial and apartheid inflicted deformities.¹¹⁰⁵ For instance, the township of Alexandra, despite its prime position, remains a miniature version of apartheid spatial engineering. Buffer zones enclose all sides of Alexandra, and, by design, the township does not directly adjoin the exclusive Sandton area in the north of the city.¹¹⁰⁶ Below are aerial views of Alexandra juxtaposed with Sandton. A former mining hostel can be seen in the image of Alexandra on the left.¹¹⁰⁷ The image on the right shows the M3 highway which serves as a ‘buffer zone’ separating the township (on the right) from the Sandton area (on the left).¹¹⁰⁸



¹¹⁰¹ Hamann C & Ballard R ‘Income inequality and socio-economic segregation in the city of Johannesburg’ in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 93.

¹¹⁰² Hofer E, Musakwa W & van Lanen S et al ‘Inclusivity insights: Two urban development projects in Johannesburg’ (2021) *Journal of Housing and the Built Environment*.

¹¹⁰³ Ballard R, Mkhize T, Hamann C, et al ‘Johannesburg: Repetitions and disruptions of spatial patterns’ in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid: Homes Still Apart?* (2021) 37.

¹¹⁰⁴ McClinton Griffith F ‘Intercensal changes in measures of residential segregation among population groups in Gauteng, South Africa, 1996-2001’ (2013) 14:1 *The Southern African Journal of Demography* 47, 48 and 52.

¹¹⁰⁵ Abrahams C & Everatt D ‘City profile: Johannesburg, South Africa’ (2019) 10:2 *Environment and Urbanization ASIA* 258.

¹¹⁰⁶ Huchzermeyer M, Karam A & Main M ‘Informal settlements’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 162.

¹¹⁰⁷ Image attributed to Johnny Miller. Retrieved from Jus’t Spatial Design ZA ‘Spatial inequality: The unequal distribution or access to resources and/or opportunities based on location’ available at <https://justspatialdesignza.com/spatial-inequality/> (accessed 28 July 2022).

¹¹⁰⁸ Unequal Scenes ‘Unequal Scenes: Alexandra/Sandton’ available at <https://unequalscenes.com/alexandra-sandton> (accessed 30 July 2022).



Figure 7

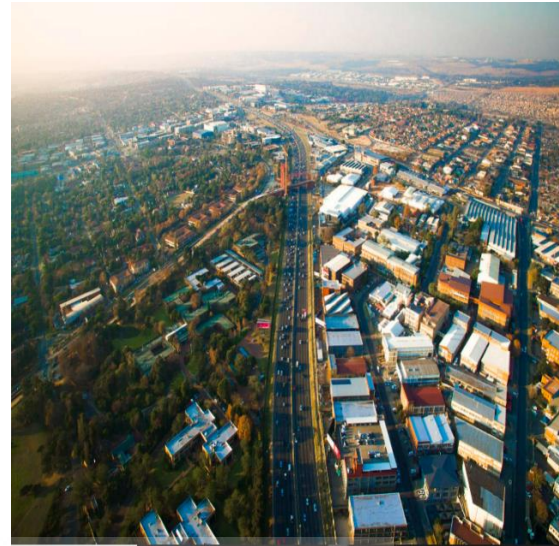


Figure 8

In the main, there is a dichotomy between the northern and southern areas of the city with the affluent communities inhabiting the north and the more impoverished ones settled in the south.¹¹⁰⁹ The northern suburbs take up hundreds of square kilometres.¹¹¹⁰ Trees in their millions prettify the landscape and public open spaces, including renowned parks surrounding ‘small lakes’, provide ample space for relaxation and play.¹¹¹¹ Most of Johannesburg’s gated communities and enclosed neighbourhoods are based in the north.¹¹¹² It is in the north of the city, specifically Sandton and its surrounds, where one will find some of the wealthiest neighbourhoods on the continent.¹¹¹³ Although Johannesburg’s northern neighbourhoods are extremely low density,¹¹¹⁴ a strong majority of the city’s white residents reside there.¹¹¹⁵ Unlike

¹¹⁰⁹ Ahmad P & Pienaar H ‘Tracking changes in the urban built environment: An emerging perspective from the City of Johannesburg’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 102.

¹¹¹⁰ Mabin A ‘In the forest of transformation: Johannesburg’s northern suburbs’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 395.

¹¹¹¹ Storie M ‘Changes in the natural landscape’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg After apartheid* (2014) 140, read with Mabin A ‘In the forest of transformation: Johannesburg’s northern suburbs’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 395.

¹¹¹² Landman K & Badenhors W ‘Gated communities and spatial transformation in Greater Johannesburg’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 222.

¹¹¹³ Hamann C & Ballard R ‘Income inequality and socio-economic segregation in the city of Johannesburg’ in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 93.

¹¹¹⁴ Katumba S & Everatt D ‘Urban sprawl and land cover in post-apartheid Johannesburg and the Gauteng City-Region, 1990–2018’ (2021) *12:IS Environment and Urbanization Asia* 148S.

¹¹¹⁵ Mabin A ‘In the forest of transformation: Johannesburg’s northern suburbs’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 407.

in the south, the north has not seen a high volume of black home owners or residents move into these neighbourhoods.¹¹¹⁶

Upon entering the southern suburbs, one can scarcely miss the spatial divide that defines Johannesburg.¹¹¹⁷ These suburbs are described as ‘a motley, poorly connected collection of neighbourhoods, developed separately at different times, with little apparent thought for internal integration or citywide connections.’¹¹¹⁸ The contradictions between the ‘affluent northern white [suburbs] and poorer black townships in the south’ of Johannesburg are so stark that it has been termed ‘the green divide’ (a reference to the lush greenery that decorates the landscape of the north).¹¹¹⁹ The township of Soweto borders Johannesburg’s mining belt in the south. In 2019, Soweto housed about a third of Johannesburg’s overall population.¹¹²⁰ Townships such as Soweto and others have stayed almost completely impoverished and black in sharp contrast to the city’s northern neighbourhoods.¹¹²¹

Large new public funded housing projects have been constructed most often on Johannesburg’s periphery,¹¹²² usually in or nearby long-standing townships in the south such as Soweto.¹¹²³ The map below shows the spread of Johannesburg’s population in accordance with race.¹¹²⁴

¹¹¹⁶ Mabin A ‘In the forest of transformation: Johannesburg’s northern suburbs’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 407.

¹¹¹⁷ Harrison P & Zack T ‘The wrong side of the mining belt? Spatial transformations and identities in Johannesburg’s southern suburbs’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 269 and 270.

¹¹¹⁸ Harrison P & Zack T ‘The wrong side of the mining belt? Spatial transformations and identities in Johannesburg’s southern suburbs’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 270.

¹¹¹⁹ Van Staden E ‘Undertaking a Tree and Urban Forest Assessment in The City of Johannesburg’ (2018) A paper for the 2018 Convention of the Institute of Environment and Recreation Management 2.

¹¹²⁰ Quantec ‘Population group at 2011 local municipal/ward-based metro region level 1993–2017 (2021)’ available at <https://www.easydata.co.za/> (accessed 14 July 2022).

¹¹²¹ Hamann C & Ballard R ‘Income inequality and socio-economic segregation in the city of Johannesburg’ in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 93.

¹¹²² Todes A & Turok I ‘Spatial inequalities and policies in South Africa: Place-based or people-centred’ (2018) 123 *Progress in Planning* 12 read with Ahmad P & Pienaar H ‘Tracking changes in the urban built environment: An emerging perspective from the City of Johannesburg’ in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 104.

¹¹²³ Horn A ‘The history of urban growth management in South Africa: Tracking the origin and current status of urban edge policies in three metropolitan municipalities’ (2019) 34:6 *Planning Perspectives* 966. See also Phosho MH, Gumbo T, Moyo T et al ‘Investigation of the State of Spatial Transformation Policy and Practice: Lessons from The City of Johannesburg’ (2021) University of Johannesburg Institutional Repository 464.

¹¹²⁴ Image attributed to Adrian Frith. Retrieved from Hypertext ‘Map Monday: The most racially segregated and integrated major cities in SA’ 23 May 2016 available at <https://htxt.co.za/2016/05/map-monday-johannesburg-is-the-most-racially-integrated-city-in-sa/> (accessed 29 July 2022). Full sized interactive version can be retrieved from Frith A ‘Dot-maps of racial distribution in South African cities’ available at <https://adrian.frith.dev/dot-maps/> (accessed 29 July 2022).

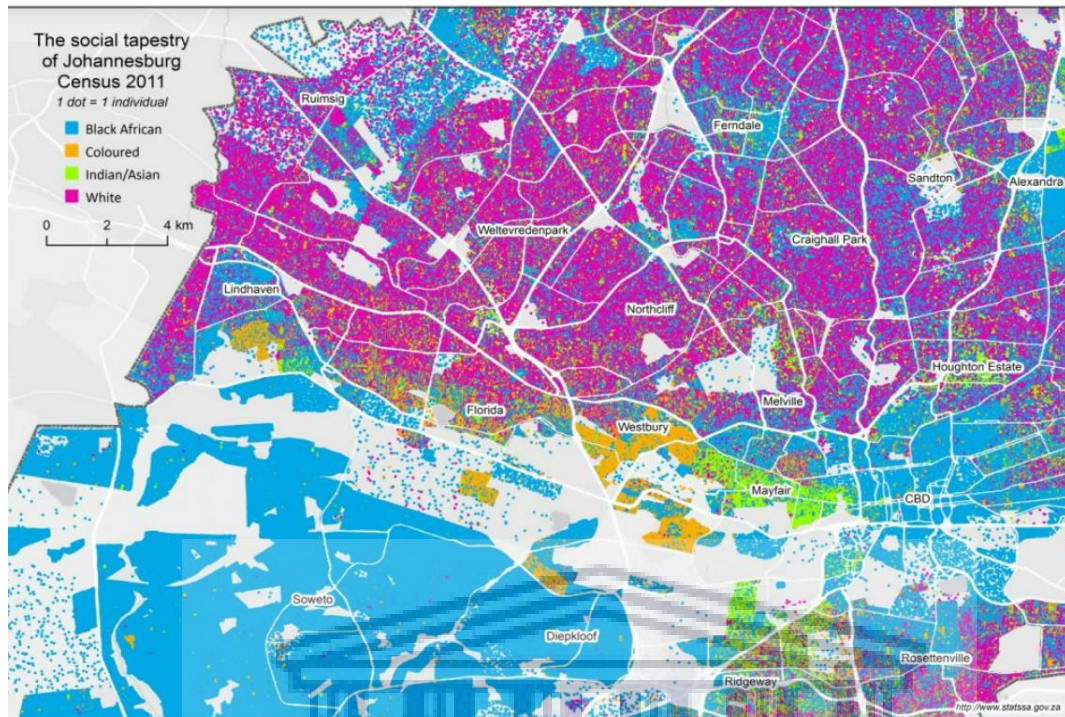


Figure 9

It was the intent of those who fashioned apartheid urban geography that there be manoeuvring space to allow group areas to be extended outwards without confronting areas designated for other races.¹¹²⁵ The post-apartheid government has, perhaps unwittingly, given effect to this plan. It has been established that planning approvals obtained before the end of apartheid still impacted the growth of Johannesburg long after the turn of the millennium.¹¹²⁶

Johannesburg's apartheid legacy has been further exacerbated with the formation of new informal settlements the majority of which have sprung up in areas far removed from the prosperous suburbs and frequently close to townships.¹¹²⁷ Moreover, the growing real estate industry has contributed to strengthening existing spatial inequalities.¹¹²⁸ This is because Johannesburg's low-income earners, who are predominantly black, are unable to attain housing

¹¹²⁵ Mosiane SN, Ballard R & Hamman C 'Spatial Trends in Gauteng' (2021) Gcro Occasional Paper no. 19 Gauteng City-Region Observatory 19.

¹¹²⁶ Ahmad P & Pienaar H 'Tracking changes in the urban built environment: An emerging perspective from the City of Johannesburg' in Harisson P, Gotz G, Todes A et al (eds) *Changing Space, Changing City: Johannesburg after apartheid* (2014) 102.

¹¹²⁷ Ballard R, Mkhize T, Hamann C, et al 'Johannesburg: repetitions and disruptions of spatial patterns' in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid: Homes Still Apart?* (2021) 1 and 2.

¹¹²⁸ Todes A & Turok I 'Spatial inequalities and policies in South Africa: Place-based or people-centred' (2018) 123 *Progress in Planning* 11.

in the city's middle class and exclusive neighbourhoods.¹¹²⁹ Thus, despite being legally capable the city's impoverished are financially unable to live in former whites-only spaces.¹¹³⁰

There still exists a 'strong relationship' between the apartheid inherited residential layout and resourced schooling in Gauteng.¹¹³¹ The historically privileged and more opulent, well-achieving Gauteng schools are mostly situated in middle-class neighbourhoods, lengthy distances from where the bulk of Gauteng's African population reside.¹¹³² Enrolment trends of white children in Gauteng also reflect South Africa's apartheid history. These trends illustrate that segregation in the province's schools remains widespread.¹¹³³ Hamann, Parker and de Kadt's 2018 analysis of the statistics on the demographics of schools in the province illustrate that most schools are racially split. This is notwithstanding that all races have been free to apply to any Gauteng school since 1994. Of the over 2000 schools located in Gauteng in 2016, 61% had an exclusive African learner population. Moreover, 7% had a white learner population in excess of 80%. Slightly more than 20% of African learners were enrolled in HWS in comparison with 99.7% of their white peers.¹¹³⁴ The bulk of Gauteng's learners attend schools situated less than 5km from where they stay.¹¹³⁵

Racial disparities in schooling attainment within Gauteng persist.¹¹³⁶ Predictably there exists a 'strong positive correlation' between matric pass rate averages in Gauteng education districts and the number of HWA falling within those districts.¹¹³⁷ The best performing Gauteng schools are generally located in HWA which, is seemingly the most likely reason that Gauteng parents

¹¹²⁹ Ballard R, Mkhize T, Hamann C, et al 'Johannesburg: repetitions and disruptions of spatial patterns' in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid: Homes Still Apart?* (2021) 1 and 17.

¹¹³⁰ Hamann C & Ballard R 'Income inequality and socio-economic segregation in the city of Johannesburg' in van Ham M, Tammaru T, Ubarevičienė et al (eds) *Urban Socio-Economic Segregation and Income Inequality: A Global Perspective* (2021) 93.

¹¹³¹ Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 105.

¹¹³² Parker A, Hamann C & de Kadt J 'Accessing quality education in Gauteng: Intersecting scales of geography, educational policy and inequality' (2021) 32 *Urban Forum* 151.

¹¹³³ Amsterdam CEN, Nkomo M & Weber E 'School desegregation trends in Gauteng Province' (2012) 9:1 *Africa Education Review* 43.

¹¹³⁴ Hamann C, de Kadt J & Parker A 'The Long and Short of School Commutes' Gauteng City-Region observatory (31 May 2018) The Gauteng City-Region Observatory is a partnership between the Universities of Johannesburg and Witwatersrand and the Gauteng Provincial government.

¹¹³⁵ Parker A, Hamann C & de Kadt J 'Accessing quality education in Gauteng: Intersecting scales of geography, educational policy and inequality' (2021) 32 *Urban Forum* 144.

¹¹³⁶ McClinton F 'Why Schooling Matters? The Link between Schooling and Residential Segregation in Pretoria, Johannesburg, and Vereeniging' (2008) Paper presented at the annual meeting of the American Sociological Association Annual Meeting, Boston 12.

¹¹³⁷ Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 110.

choose to relocate.¹¹³⁸ Those Gauteng schools that consistently underperform are found in African areas.¹¹³⁹ As Pienaar & McKay's work shows, for many learners in Gauteng the schools in their own areas are unlikely to equip them to excel in their school exit examinations.¹¹⁴⁰ Gauteng employs the use of feeder zones determined at provincial level. However, the ability to access quality schooling in Gauteng remains heavily contingent on the area in which one stays. The bulk of Gauteng's black families are simply not by financial means to move into the areas in which the province's historical white and better resourced schools are based.

7.2.3 Tracing the rivers and ravines: Durban's spatial extremes

The figure below depicts Durban's zoning under the Group Areas Act.¹¹⁴¹

Fig. 1 Durban's apartheid zoning (Group Areas Act)

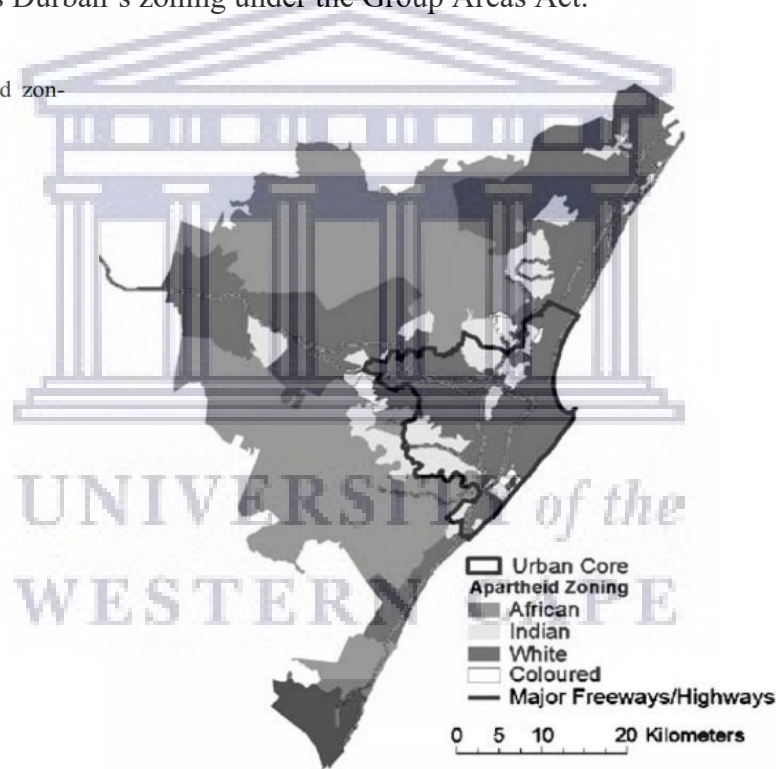


Figure 10

¹¹³⁸ Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 110.

¹¹³⁹ Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 119.

¹¹⁴⁰ Pienaar R & McKay T 'Mapping socio-economic status, geographical location and matriculation pass rates in Gauteng, South Africa' (2014) 32(1) *Perspectives in Education* 118.

¹¹⁴¹ Illustration extracted from Schensul D 'From resources to power: The state and spatial change in post-apartheid Durban, South Africa' (2008) 43 *Studies in Comparative International Development* 295.

Durban's settlement design remains largely the same as its apartheid form.¹¹⁴² The city has been defined as 'powerful, its inequalities are durable, and . . . most neighbourhoods have undergone little change.'¹¹⁴³ The apartheid government's use of 'buffer strips' that frequently traced natural imprints such as ravines and rivers to separate the race groups within Durban continue to influence the city's urban structure.¹¹⁴⁴ Schensul characterises the city as one of the 'most extreme cases of urban segregation' in cities worldwide.¹¹⁴⁵ Moodley claims that spatial imbalances in the city have actually worsened.¹¹⁴⁶

In 2000, the city of Durban together with some of its surrounding towns were amalgamated into what is now called the single metropolitan area of eThekweni. The metropolitan's spatial extremes are painfully visible in its mushrooming informal settlements contrasted with its bundles of affluent housing and gated estates located in HWA.¹¹⁴⁷ Maharaj explains how racial segregation in Durban continues through the conduit of class segregation which strengthens existing spatial inequalities.¹¹⁴⁸ This class stratification can be observed in the wealthy middle class historically white areas such as Berea located on the upper banks of the hills which tower over central Durban. Those black and Indian people who have managed to move into these areas form part of the 'professional and managerial middle class'.¹¹⁴⁹ Consequently, the overwhelming majority of black people remain trapped on the city's fringes.¹¹⁵⁰

¹¹⁴² Moodley S 'Why do planners think that planning has failed post-apartheid? The case of eThekweni municipality, Durban, South Africa' (2019) 30 *Urban Forum* 310. Musvoto G, Lincoln G & Hansmann R 'The role of spatial development frameworks in transformation of the eThekweni Municipality, KwaZulu-Natal, South Africa: Reflecting on 20 years of planning' (2016) 27 *Urban Forum* 206. Schensul D and Heller P 'Legacies, change and transformation in the post-apartheid city: Towards an urban sociological cartography' (2010) *International Journal of Urban and Regional Research* 4. The authors' research is based on their analysis of 406 neighbourhoods in Durban, KwaZulu-Natal.

¹¹⁴³ Schensul D and Heller P 'Legacies, change and transformation in the post-apartheid city: Towards an urban sociological cartography' (2010) *International Journal of Urban and Regional Research* 4. The authors' research is based on their analysis of 406 neighbourhoods in Durban, KwaZulu-Natal.

¹¹⁴⁴ Marx C & Charlton S 'Urban Slums Report: The Case of Durban, South Africa' (2003) Case studies commissioned in preparation for the United Nations Global Report on Human Settlements – the Challenge of Slums 3.

¹¹⁴⁵ Schensul D 'From resources to power: The state and spatial change in post-apartheid Durban, South Africa' (2008) 43 *Studies in Comparative International Development* 293.

¹¹⁴⁶ Moodley S 'Why do planners think that planning has failed post-apartheid? The case of eThekweni municipality, Durban, South Africa' (2019) 30 *Urban Forum* 314.

¹¹⁴⁷ Maharaj B 'Durban: Betraying the struggle for a democratic city in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid* (2021) 76.

¹¹⁴⁸ Maharaj B 'Durban: Betraying the struggle for a democratic city in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid* (2021) 76.

¹¹⁴⁹ Crankshaw O 'Urbanisation, racial desegregation and the changing character of interracial contact' in Lefko-Everett K, Govender R & Foster D (eds) *Re-thinking Reconciliation: Evidence from South Africa* (2017) 96.

¹¹⁵⁰ Schensul D *Remaking an Apartheid City: State-Led Spatial Transformation in Post-Apartheid Durban, South Africa* (unpublished doctorate thesis, Brown University, 2009) 3.

Below are aerial images of Morningside (an area bordering Berea). Morningside is one of the wealthiest neighbourhoods in Durban.¹¹⁵¹ Numerous roads dip from Morningside sharply downwards towards the Umgeni River. Several shacks that serve as home to thousands of individuals line these steep roads.¹¹⁵²



Figure 11

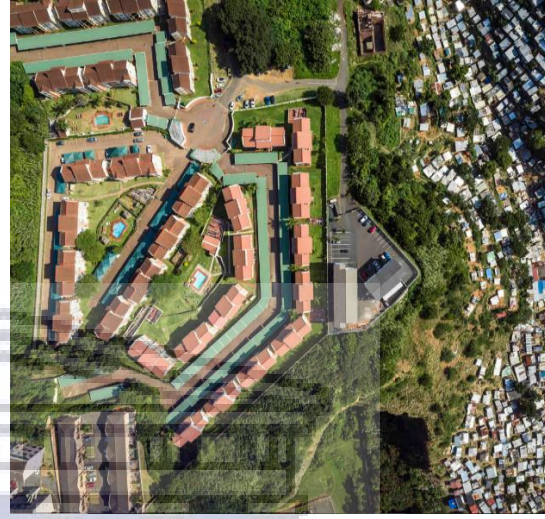


Figure 12

Spatial growth trends within eThekweni continue to mimic apartheid spatial arrangements.¹¹⁵³ Historically designated black townships are characterised by low education levels, soaring unemployment rates and low household earnings.¹¹⁵⁴ The map below illustrates how eThekweni's population is distributed in relation to race.¹¹⁵⁵

¹¹⁵¹ Unequal Scenes 'Unequal scenes Durban Metro' available at <https://unequalscenes.com/durban-metro> (accessed 30 July 2022).

¹¹⁵² Unequal Scenes 'Unequal scenes Durban Metro' available at <https://unequalscenes.com/durban-metro> (accessed 30 July 2022).

¹¹⁵³ Mnyandu MM *Investigating the Implications of Edge-City Development on Integrated Spatial Planning: Case Study of Umhlanga, (Prestondale) eThekweni Municipality* (unpublished master's thesis, University of KwaZulu-Natal, 2021) 141. Todes A 'New African suburbanisation? Exploring the growth of the northern corridor of eThekweni/Kwadakuza' (2014) *African Studies* 6.

¹¹⁵⁴ Bannister S & Sutcliffe M 'Case Study Metropolitan Governance EtheKwini (Durban), South Africa' (2015) Case studies commissioned by the United Nations Human Settlements Programme (UN-Habitat) 25.

¹¹⁵⁵ Image attributed to Adrian Frith. Retrieved from Hypertext 'Map Monday: The most racially segregated and integrated major cities in SA' 23 May 2016 available at <https://htxt.co.za/2016/05/map-monday-johannesburg-is-the-most-racially-integrated-city-in-sa/> (accessed 29 July 2022). Full sized interactive version can be retrieved from Frith A 'Dot-maps of racial distribution in South African cities' available at <https://adrian.frith.dev/dot-maps/> (accessed 29 July 2022).

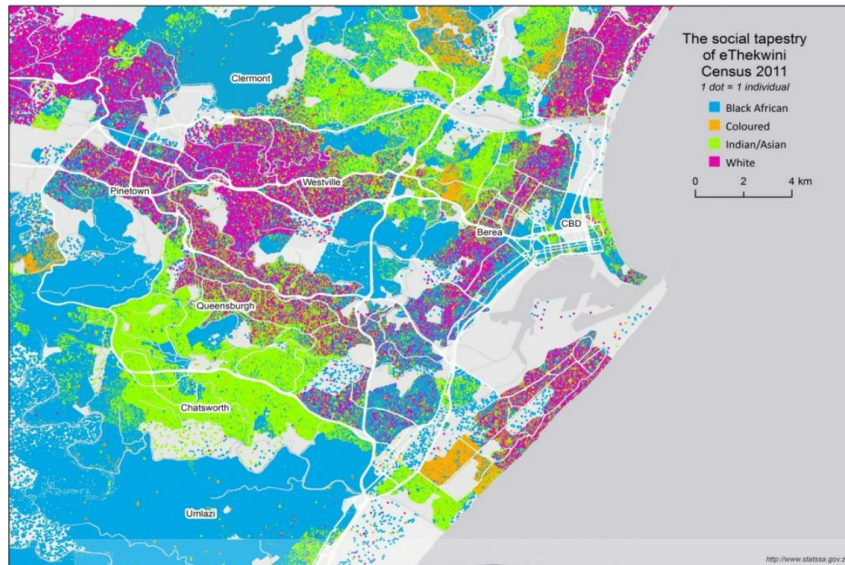


Figure 13

Many of the low income housing projects in eThekweni have been implemented in peripheral locations.¹¹⁵⁶ It is African people who live here.¹¹⁵⁷ Post-apartheid urban policies have therefore entrenched the apartheid legacy of race and class-based segregation.¹¹⁵⁸ Also indicating, is that some of the post democratic spatial developments that have occurred in the north stem from pre-planned developments birthed in the apartheid era.¹¹⁵⁹ eThekweni's opportunities for addressing social polarisation within the urban structure is limited as a result of having amongst the most exorbitant property markets comparative to income when viewed against other metropolitans.¹¹⁶⁰

Where a child resides in Durban determines the school they will attend and the standard of education they will receive.¹¹⁶¹ In fact, for the entire KZN, the school to which a learner gains

¹¹⁵⁶ Vermeulin S 'Socio-Spatial Dynamics in The Post-Apartheid City: The case of the eThekweni Municipality Area' (2004) presented at the African Studies Association of Australia and the Pacific (AFSAAP) Annual Conference in University of Western Australia, Australia 2004.

¹¹⁵⁷ Musvoto G, Lincoln G & Hansmann R 'The role of spatial development frameworks in transformation of the eThekweni Municipality, KwaZulu-Natal, South Africa: Reflecting on 20 years of planning' (2016) 27 *Urban Forum* 206.

¹¹⁵⁸ Maharaj B 'Durban: Betraying the struggle for a democratic city in Lemon A, Donaldson R & Visser G (eds) *South African Urban Change Three Decades After Apartheid* (2021) 64.

¹¹⁵⁹ Mnyandu MM *Investigating the Implications of Edge-City Development on Integrated Spatial Planning: Case Study of Umhlanga, (Prestondale) eThekweni Municipality* (unpublished master's thesis, University of KwaZulu-Natal, 2021) 143.

¹¹⁶⁰ Mnyandu MM *Investigating the Implications of Edge-City Development on Integrated Spatial Planning: Case Study of Umhlanga, (Prestondale) eThekweni Municipality* (unpublished master's thesis, University of KwaZulu-Natal, 2021) 66.

¹¹⁶¹ Wagner AL 'Why have youth from different neighborhoods of Durban, South Africa developed different opinions regarding the role and importance of voting in the current state of South African democracy?' (2017) *Student Publications* 21 and 22.

admission is ‘very much the result of geographical location’.¹¹⁶² There is evidence that some African people in the province are even moving house to access better quality schools.¹¹⁶³ However, Durban’s black and low income families simply cannot afford to purchase homes in HWA to access better schooling. Tying school admission criteria with geographical proximity thus perpetuates racial inequities in schooling access within the province.

South Africa’s urban areas have yet to unshackle themselves from the bonds of race based dispossession of land. In fact, residential segregation by race has become further entrenched in these cities. Preventing black families from accessing good schools in areas that they have been forcibly displaced from and/or historically prevented from staying in purely because they do not reside there perpetuates these spatial injustices in an especially sour way. South Africa’s history of racially based land dispossession demands that the use of feeder zones based purely on geographical proximity by HWS be done away with and that a more just alternative be introduced.

7.3 BASIC EDUCATION AS A CONCURRENT FUNCTION

The Constitution states that ‘government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated’.¹¹⁶⁴ The Constitution also sets out certain areas of which both Parliament and the provincial legislatures enjoy concurrent legislative competence.¹¹⁶⁵ One such area is basic education. Consequently, both national and provincial government have the authority to legislate on issues regarding basic education. This would include school admission related issues such as feeder zones. The South African Schools Act (Schools Act),¹¹⁶⁶ reflects basic education as a concurrent legislative area. Such reflection can be seen in, amongst others, section 5(5) of the Act. This section makes a SGB’s power to determine admission policy subject to the Schools Act as well as relevant provincial law. Such provincial law would, by example, include the 2019 Gauteng admission regulations,¹¹⁶⁷

¹¹⁶² Samuel M and Sayed Y ‘Inside and outside the school gates: Exploring marginalisation in KwaZulu-Natal schools in South Africa’ (2003) 34:1 *IDS Bulletin* 91.

¹¹⁶³ Schensul D and Heller P ‘Legacies, change and transformation in the post-apartheid city: Towards an urban sociological cartography’ (2010) *International Journal of Urban and Regional Research* 22.

¹¹⁶⁴ Section 40(1) of the Constitution.

¹¹⁶⁵ Schedule 4 of the Constitution.

¹¹⁶⁶ The South African Schools Act 84 of 1996.

¹¹⁶⁷ Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

introduced by the Gauteng MEC acting under the Gauteng School Education Act.¹¹⁶⁸ These regulations concern, amongst others, the establishment and use of feeder zones in Gauteng.

Under the Constitution's conflict resolution scheme, where a conflict arises between national legislation (such as the Schools Act) and provincial legislation (such as the 2019 Gauteng admission regulations) the latter, as provincial law, will prevail subject to specified exceptions.¹¹⁶⁹ Section 146(2) of the Constitution sets out these exceptions. In *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another*,¹¹⁷⁰ Justice Moseneke considered a seeming conflict between certain provisions of the 2012 Gauteng admission regulations (the predecessor to the Gauteng 2019 regulations) and sections 5(1) to 5(5) of the Schools Act. The Justice found that that none of the exceptions contained in section 146(2) applied.¹¹⁷¹ The Justice reasoned that no conflict arose because, amongst other, section 5(5) explicitly renders a SGB's admission policy making powers subject to provincial law. Consequently, no conflict can be said to exist between provincial regulations compelling HoDs to establish transformative feeder zones and SGB's power to establish admission policy under section 5(5) of the Schools Act. MECs therefore possess the power to establish or amend provincial school admission regulations to require HoD's to establish transformative feeder zones. Nevertheless, none of the provinces, outside of Gauteng, have chosen to regulate the use of feeder zones via provincial law. The sections that follow examine the manner in which the KZNDoe, the WCED and the GDoE have chosen to regulate the establishment and implementation of feeder zones.

7.4 PROVINCIAL INTERVENTIONS

Generally, feeder zones are addressed through provincial executive circulars concerning the administration of learner admissions in a given province.¹¹⁷² These circulars are usually issued

¹¹⁶⁸ Section 11(1) of the Gauteng School Education Act 6 of 1995.

¹¹⁶⁹ Section 146(5) of the Constitution.

¹¹⁷⁰ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 27.

¹¹⁷¹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 27.

¹¹⁷² KwaZulu-Natal Provincial Education Department 'Administration of learner admissions in public schools for 2019' Circular 6 of 2018 (2 February 2018). Management of Learner Admissions to Public schools in the Free State province for 2018 Circular MG 13/2017 (30 May 2017) para 10. Limpopo Provincial Education Department 'Admission in Public Schools for 2018' Circular 43 of 2017 (22 February 2017). Northern Cape Provincial Education Department 'Management of learner admission to public schools in the Northern Cape for 2017' Circular 58 of 2016 (5 September 2016) section 7.1.

annually by HoDs and communicate their PED's official position on feeder zones.¹¹⁷³ KZN, the Western Cape and Gauteng are unique in that they have all adopted or attempted to adopt distinctive models on how to approach school zoning. The KZNDoE endeavoured to abolish feeder zones altogether.¹¹⁷⁴ However, the department retracted following threat of legal action.¹¹⁷⁵ In contrast the WCED has, since 2010, officially deferred decision-making on the establishment and implementation of feeder zones to SGBs. Finally, the GDoE has been the most innovative of the provinces. Gauteng is the only province that regulates the establishment and implementation of feeder zones via both law and dedicated policy.

7.4.1 KwaZulu-Natal Department of Education

In June 2012 the then HoD of the KZNDoE, Nkosinathi Sishi, in an effort to eliminate the effect of spatial inequalities in the school admissions process in the province, made the abrupt decision to do away with feeder zones altogether.¹¹⁷⁶ The KZNDoE reasoned that the system of school zoning was an obstacle to the comingling of learners of difference races and that HWS were employing feeder zones to deny black children access to these schools.¹¹⁷⁷ The KZNDoE's spokesperson asserted that the purpose of the ban on feeder zones was to 'speed up transformation' and 'promote access'.¹¹⁷⁸ The discussions that follow cover the events that unfolded after the KZN HoD's decision regarding the elimination of feeder zones, until the

¹¹⁷³ Justice Mhlantla AJ has characterised a GDoE circular concerning the management of learner admissions in as constituting 'the Department's own policy or guidelines'. *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) fn 61.

¹¹⁷⁴ Admission of Learners in Public Schools in KwaZulu-Natal for 2013 Circular 58 of 2012 (28 June 2012). The circular reads in part: 'The Head of Department (KZN Education) has not determined feeder zones for public schools in KZN, hence schools may not determine an order of preference for learner admission based on feeder zones.'

¹¹⁷⁵ Wills M 'Feeding frenzy – high school admissions and the 2019 election' 1 April 2019 *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2019-04-01-feeding-frenzy-high-school-admissions-and-the-2019-election/> (accessed 9 December 2021).

¹¹⁷⁶ Jansen L 'KZN School Admission under Review' *The Mercury* 3 August 2012 available at http://www.kzneducation.gov.za/Portals/0/media_clips/2012/Newsclippings_August_2012.pdf (accessed 6 August 2018). Mbuyazi N 'Policy on school admission stays: head' IOL 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018). Makhaye C 'Calls to Accept Pupils Fairly' *New Age* 21 August 2012. available at http://www.kzneducation.gov.za/Portals/0/media_clips/2012/Newsclippings_August_2012.pdf (accessed 6 August 2018).

¹¹⁷⁷ Jansen L 'Integration at Schools to be Forced' *The Mercury – IOL* 13 July 2021 available at <https://www.iol.co.za/news/politics/integration-at-schools-to-be-forced-1340633> (accessed 9 December 2021). Hunter M 'Circuits of schooling and the production of space: The household, education, and symbolic struggles after apartheid' (2012) 43 *International Journal of Educational Development* 25.

¹¹⁷⁸ Jansen L 'Integration at Schools to be Forced' *The Mercury – IOL* 13 July 2021 available at <https://www.iol.co.za/news/politics/integration-at-schools-to-be-forced-1340633> (accessed 9 December 2021).

eventual abandonment of this position. The HoD's approach of prohibiting the use of feeder zones altogether is examined and critiqued.

7.4.1.1 The banning of feeder zones in KZN

The KZN HoD's 2012 decision to bar school zoning practices, made without consulting principals and SGBs,¹¹⁷⁹ was communicated via circular to schools.¹¹⁸⁰ Shortly thereafter, the KZN MEC for Education, Senzo Mchunu, stressed in an official statement that the HoD had not determined feeder zones under the National Admission Policy and, absent this determination, the preferential system relating to feeder zones in section 34 of this policy remained inoperable. Principals were informed that it was incumbent upon them to ensure that school policies did not create an admissions hierarchy based on feeder zones.¹¹⁸¹ It was reported in the media that principals could face charges of misconduct for failing to conform.¹¹⁸² The media also informed of an imminent audit to be conducted at schools who had already finalised their admissions. The purpose of the audit was to establish whether the circular's directives were being applied, and that learners were being admitted under the first-come, first-served criterion.¹¹⁸³ District admission committees had also already been formed at school district level to co-ordinate learner placements and monitor whether the circular's directives were being implemented. These committees were steered by education district managers and were composed of circuit managers, departmental officials and SGB members.¹¹⁸⁴ The department

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¹¹⁷⁹ Mbuyazi N 'Policy on school admission stays: head' *IOL* 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018).

¹¹⁸⁰ Admission of Learners in Public Schools in KwaZulu-Natal for 2013 Circular 58 of 2012 (28 June 2012). The circular reads in part: 'The [HoD] (KZN Education) has not determined feeder zones for public schools in KZN, hence schools may not determine an order of preference for learner admission based on feeder zones.'

¹¹⁸¹ Kwa-Zulu Natal Department of Basic Education 'Official Media Statement from the KZN MEC for Education, Senzo Mchunu (11 July 2012) which reads in part: 'Principals of schools must therefore ensure that admission policies of public schools do not determine an order of preference for learner admission based on feeder zones.'

¹¹⁸² Mbuyazi N 'Policy on school admission stays: head' *IOL* 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018). Govendor S & Pillay T 'KZN schools told to drop "apartheid"' *Sunday Times* 19 August 2021 available at <https://www.timeslive.co.za/sunday-times/lifestyle/2012-08-19-kzn-schools-told-to-drop-apartheid/> (accessed 9 December 2021).

¹¹⁸³ Govendor S & Pillay T 'KZN schools told to drop "apartheid"' *Sunday Times* 19 August 2021 available at <https://www.timeslive.co.za/sunday-times/lifestyle/2012-08-19-kzn-schools-told-to-drop-apartheid/> (accessed 9 December 2021).

¹¹⁸⁴ Mbuyazi N 'Policy on school admission stays: head' *IOL* 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018).

revealed that it would soon investigate complaints lodged by disgruntled parents who allege their children had been denied access to a school due to the use of a feeder zone.¹¹⁸⁵

The elimination of feeder zones by the HoD appeared to have been met with much resistance by some stakeholders such as FEDSAS, the Governing Body Federation (GBF is a governing body umbrella organisation with 700 members), the KZN Parent's association (KZNPA),¹¹⁸⁶ as well as one political party.¹¹⁸⁷ FEDSAS claimed that HWS in KZN were already 'fully integrated' and that feeder zones were being used by many schools to halt overcrowding.¹¹⁸⁸ Whist the GBF and the KZNPA were concerned that children nearby would be blocked from accessing their neighbourhood schools.¹¹⁸⁹ Opponents of the circular asserted that dismantling feeder zones would be unlawful. They reasoned that it would lead to an increase in the number of township learners enrolling in HWS thus forcing these schools into bankruptcy.¹¹⁹⁰ This strong resistance to the abandoning of feeder zones nearly resulted in court action.¹¹⁹¹ Subsequent to this pushback, MEC Mchunu appeared to backtrack.¹¹⁹² In August 2012, the MEC explained before the KZN Legislature's Portfolio Committee on Education that the circular did not constitute policy and proceeded to distance himself from the circular.¹¹⁹³ The

¹¹⁸⁵ Govendor S & Pillay T 'KZN schools told to drop "apartheid"' *Sunday Times* 19 August 2021 available at <https://www.timeslive.co.za/sunday-times/lifestyle/2012-08-19-kzn-schools-told-to-drop-apartheid/> (accessed 9 December 2021).

¹¹⁸⁶ Jansen L 'Integration at schools to be forced' *The Mercury – IOL* 13 July 2021 available at <https://www.iol.co.za/news/politics/integration-at-schools-to-be-forced-1340633> (accessed 9 December 2021). The move was welcomed by the KZN Governing Body Association who felt strongly that feeder zones had been used as a 'gatekeeping' technique to mask racism.

¹¹⁸⁷ Jansen L 'Schools holding on to privilege' *The Mercury - IOL* 20 19 July 2012 available at <https://www.iol.co.za/news/politics/schools-holding-on-to-privilege-1344738> (accessed 9 December 2021). Mbuyazi N 'Policy on school admission stays: head' *IOL* 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018).

¹¹⁸⁸ Jansen L 'Integration at Schools to be Forced' *The Mercury – IOL* 13 July 2021 available at <https://www.iol.co.za/news/politics/integration-at-schools-to-be-forced-1340633> (accessed 9 December 2021).

¹¹⁸⁹ Jansen L 'Integration at schools to be forced' *The Mercury – IOL* 13 July 2021 available at <https://www.iol.co.za/news/politics/integration-at-schools-to-be-forced-1340633> (accessed 9 December 2021).

¹¹⁹⁰ Hunter M 'Circuits of schooling and the production of space: The household, education, and symbolic struggles after apartheid' (2012) 43 *International Journal of Educational Development* 25.

¹¹⁹¹ Jansen L 'KZN School admission under review' *The Mercury* 3 August 2012 available at http://www.kzneducation.gov.za/Portals/0/media_clips/2012/Newsclippings_August_2012.pdf (accessed 6 August 2018). Jansen confirms having attended the portfolio committee meeting she refers to in her articles in the Mercury. Wills M 'Feeding frenzy – high school admissions and the 2019 election' 1 April 2019 *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2019-04-01-feeding-frenzy-high-school-admissions-and-the-2019-election/> (accessed 9 December 2021).

¹¹⁹² Wills M 'Feeding frenzy – high school admissions and the 2019 election' 1 April 2019 *Daily Maverick* available at <https://www.dailymaverick.co.za/opinionista/2019-04-01-feeding-frenzy-high-school-admissions-and-the-2019-election/> (accessed 9 December 2021).

¹¹⁹³ Jansen L 'School admission to remain as is' *The Mercury – IOL* 20 August 2012 available at <https://www.iol.co.za/news/politics/school-admission-to-remain-as-is-1365758> (accessed 6 August 2018). Jansen L 'Man with a Schools Plan' *The Mercury* 4 September 2012 available at <https://www.pressreader.com/south-africa/the-mercury/20120904/282686159404753> (accessed 6 August 2018). Jansen confirms having attended the

MEC claimed that he had not contributed to the circular nor had even caught sight of it.¹¹⁹⁴ Rather, his intention was that feeder zones should not serve as the *exclusive* admission criteria to schools.¹¹⁹⁵ The MEC explained that most learners attended the ‘school next door’ and the KZNDoE should permit this.¹¹⁹⁶

In an interview with a journalist, the MEC adopted the position that admission policy should be established within a framework of three criteria. First, a parent’s place of residence and the fact that the majority of parents would ordinarily prefer ‘the school next door to them’. Secondly, a ‘parents right to enrol their children wherever they choose’,¹¹⁹⁷ and thirdly, South Africa’s racially unjust spatial legacy.¹¹⁹⁸ The MEC explained that a SGB’s admission policy should not refuse entry to learners living nearby, nor should it infringe on a parent’s right to choose which school they wish to enrol their child in. The MEC did not elaborate on how such a balancing act is to occur. During the interview, the MEC took the stance that relying exclusively on the ‘first come, first served’ principle is unacceptable.¹¹⁹⁹ Notably, the MEC provided no indication of any further attempts to deal with the issue of school zoning. The HoD also backpedalled from the circular. The HoD was quoted in the media as confessing that in hindsight the circular ought to have also encompassed the rights of children who ‘live next door to schools’.¹²⁰⁰

In September 2012, the Minister of Basic Education (Minister) was, via written question, quizzed by a Member of Parliament on KZN’s position on feeder zones as follows:

‘Whether the proposed change in admission policy to do away with feeder zones, especially in [KZN], is in line with the ... Schools Act . . .; if not, what is the position in this regard; if so, what is her department’s view on feeder-schemes practices?’¹²⁰¹

portfolio committee meeting she refers to in her articles in the Mercury. Jansen also confirms that her article of 4 September 2012 is based on an in-person interview which she conducted with MEC Mchunu.

¹¹⁹⁴ Jansen L ‘School admission to remain as is’ *The Mercury – IOL* 20 August 2012 available at <https://www.iol.co.za/news/politics/school-admission-to-remain-as-is-1365758> (accessed 6 August 2018).

¹¹⁹⁵ Jansen L ‘Man with a schools plan’ *The Mercury* 4 September 2012 available at <https://www.pressreader.com/south-africa/the-mercury/20120904/282686159404753> (accessed 6 August 2018).

¹¹⁹⁶ Jansen L ‘School admission to remain as is’ *The Mercury – IOL* 20 August 2012 available at <https://www.iol.co.za/news/politics/school-admission-to-remain-as-is-1365758> (accessed 6 August 2018).

¹¹⁹⁷ A mistaken interpretation of the legal position.

¹¹⁹⁸ Jansen L ‘Man with a schools plan’ *The Mercury* 4 September 2012 available at <https://www.pressreader.com/south-africa/the-mercury/20120904/282686159404753> (accessed 6 August 2018)..

¹¹⁹⁹ Jansen L ‘Man with a schools plan’ *The Mercury* 4 September 2012 available at <https://www.pressreader.com/south-africa/the-mercury/20120904/282686159404753> (accessed 6 August 2018).

¹²⁰⁰ Maluleka S ‘Education MEC Calls on Schools’ *IOL* 5 September 2012 available at <https://www.iol.co.za/dailynews/news/education-mec-calls-on-schools-1376320> (accessed 6 August 2018).

¹²⁰¹ Parliamentary Question 2518 to the Minister of Basic Education ‘Internal Question Paper 30/2012’ (14 September 2012).

In a written reply, the Minister explained that the controversial circular

‘does not propose a change in admission policy to do away with feeder zones. The [PED] has never created feeder zones. The Circular is meant to remind schools of the very fact that the [HoD] has not declared feeder zones in [KZN]. This is in terms of Section 33 of the National Admission Policy. . . . In the absence of feeder zones, Section 34 of the same policy document does not apply to public schools in [KZN]. This means that principals of public schools in [KZN] must ensure that admission policies of public schools do not determine an order of preference for learner admission based on feeder zones.

The decision of the [KZN HoD] is in line with Section 3 of the . . . Schools Act . . . which places the responsibility on the [HoD] to ensure that all learners of compulsory school going age are enrolled at and attend school. The province has put systems in place in terms of the Circular to ensure that learners are not discriminated against by schools during the admission period.

The position of the Minister is in accordance with Section 33 and 34 of the National Admission Policy for Ordinary Public Schools, which leaves the creation of feeder zones to the discretion the Provincial [HoDs].¹²⁰²

It appears that what the Minister may have been attempting to say is that schools do not have the authority to establish and implement their own feeder zones and that zoning as an admissions criterion could therefore only apply where HoDs had established these zones under the National Admission Policy. However, as discussed under Chapters 5 and 6, such a position is incorrect in law. The Minister’s reply to Parliament is perhaps deliberately vague and confusing and may have been an attempt by her to avoid facing head on what was clearly a politically contentious issue. In the Minister’s response, she evaded her own duty—as national policy maker and head of basic education—to discuss the controversial issue of school zoning. Instead, she simply took the position that the matter of school zoning was the concern of PEDs under the National Admission Policy.

According to Hunter, the KZNDoe’s attempt to eradicate feeder zones and rely purely on the ‘first come, first served’ principle in school admissions is an illustration of the significant power wielded by a segment of the black middle class in KZN. This group, he argues, have placed much effort into securing their children’s admission to the best schools in the province.¹²⁰³ Hunter records learning from a departmental official that the political pressure behind the contentious 2012 circular emanated from black middle class parents whose attempts

¹²⁰² Parliamentary Question 2518 to the Minister of Basic Education ‘Internal Question Paper 30/2012’ (14 September 2012). The response is dated October 2012.

¹²⁰³ Hunter M ‘The race for education: Class, white tone, and desegregated schooling in South Africa’ (2015) 29 *Journal of Historical Sociology* 345.

at enrolling their children in KZN's prestigious schools had failed.¹²⁰⁴ Hunter argues that the KZNDoE's effort to eradicate the feeder zone system was ultimately unsuccessful due to a combination of two factors. First, education officials' hesitancy to undermine top performing schools who were very vocal and vigorous in justifying their use of feeder zones. Secondly, the political clout of those KZN black parents whose children are enrolled in these prestigious schools.¹²⁰⁵ Overlaying these factors must have been the ever-looming threat of the department being hauled to court by the powerful opponents of the controversial circular.

7.4.1.2 Uninhibited choice as a vehicle for inequality

The doing away with feeder zones in one broad sweep without putting in place an alternative model to regulate access to education in KZN was an arbitrary and blunt approach by MEC Mchunu and one that would have been unlikely, had the MEC persisted in his stance, to result in more equitable access or, for that matter any real transformative change on the ground. Pure reliance on the 'first-come, first-served' principle (which it seems the 2012 circular intended to accomplish but which is not apparent from its contents) effectively creates a free-market system characterised by uninhibited school choice. Those who oppose school choice worry about the potential impact that this approach would have on social inequality. They insist that this model creates segregation and elitism and engrains inequality between the classes.¹²⁰⁶ The criticism goes, since unencumbered school choice creates an upsurge in the prospective students from which schools can select, it facilitates the clandestine sorting of students along the lines of socio-economic levels, ability and ethnicity. This is likely to be the case regardless of the date upon which a given learner applied. Consequently, the gap in the quality of education provisioning between schools is exacerbated and the better off learners are better advantaged by this.¹²⁰⁷ The 'first-come, first-served' principle that the KZNDoE sought to introduce, would have served to benefit the more affluent KZN schools who would have enjoyed a larger pool from which to select their learners. Such an approach allows these schools more manoeuvring space to grant access to only those learners whose parents are most likely

¹²⁰⁴ Hunter M 'The race for education: Class, white tone, and desegregated schooling in South Africa' (2015) 29 *Journal of Historical Sociology* 345.

¹²⁰⁵ Hunter M 'The race for education: Class, white tone, and desegregated schooling in South Africa' (2015) 29 *Journal of Historical Sociology* 345.

¹²⁰⁶ Hoadley UK 'For better or worse: School choice in a South African working-class context' in Chisholm L (ed) *Critical perspectives in South African education: Reconstituting the educational realm* (1999) 2. Musset P *School Choice and Equity: Current Policies in OECD Countries and a Literature Review* (2012) OECD Education Working Papers No. 66 OECD Publishing 4.

¹²⁰⁷ Musset P *School Choice and Equity: Current Policies in OECD Countries and a Literature Review* (2012) OECD Education Working Papers No. 66 OECD Publishing 4.

to fork out the exorbitant fees charged. As a result, these schools would then be better positioned to dodge any fee waiver obligations that may otherwise have befallen them. These schools would also then have more resources at their disposal to further feed their historical advantages.

It is also not hard to envisage how white KZN families (who have historical roots in the province's HWS) would be more likely to possess the knowledge of which schools are most desirable or be linked to social networks that have information regarding the quality of schools. These families are also more likely to be conversant in how to navigate more sought after schools' application processes so as to ensure their children's applications are first in line. A 'first-come, first-served' system therefore provides these more privileged KZN families with a foot in the door even before enrolment officially opens. Such a free-market model is more likely to further stratify the quality of education provisioning within the public education system rather than contribute towards advancing racially equitable access to education. Proponents of school choice frequently contend that opening up the way for market mechanisms within schooling permits equal access to excellent education for everyone. It is claimed that extending school choice provides all students, including the underprivileged and those in low scoring schools, with the opportunity to shift to better schools. The reasoning is that since more affluent families already enjoy school choice (as a consequence of residential mobility and access to private schools) increasing school choice will increase equity within the system.¹²⁰⁸ The argument goes, since the well-off families of KZN can afford to move house so as to fall within the catchment area of the province's higher quality schools or, to enrol their children in KZN's more prestigious private schools, eradicating feeder zones will work to the benefit of KZN's more impoverished black families. However, a crucial fact not to be overlooked is that quality schools both in KZN and across the country are in desperate short supply.¹²⁰⁹ Also significant, is that the inequality gap between good schools and poor ones are exceedingly high.¹²¹⁰ Any model for regulating access to schooling would therefore fall drastically short if based purely on a 'first come, first served' principle. Merely eliminating feeder zones would simply see more well-off families flock, undeterred by geographical zones, to the meagre number of more well-off schools. These schools will inevitably welcome these

¹²⁰⁸ Musset P *School Choice and Equity: Current Policies in OECD Countries and a Literature Review* (2012) OECD Education Working Papers No. 66 OECD Publishing 4.

¹²⁰⁹ Spaull N 'Education in SA: A tale of two systems' *Politicsweb* 31 August 2012.

¹²¹⁰ Lemon A & Battersby-Lennard J 'Studying together, living apart: Emerging geographies of school attendance in post-apartheid Cape Town' (2011) 120.

more privileged families (and their larger pockets) with open arms and will be incentivised to manipulate the admission process to ensure that such a welcome is possible. Such an understanding ties well with claims that revisions to KZN's feeder zone system were merely targeted at assuaging and assisting a segment of the black middle class in KZN.¹²¹¹ It also amplifies the need for a delicate balancing of interests in the sphere of school admissions. Such balancing is necessary to ensure, one, that schools do not suffer an excessive loss of finances that compromises the quality of education provisioning and, two, that admission policies (including feeder zones) do not serve as a screening mechanism to exclude impoverished black learners.

7.4.1.3 The KZNDoe's current position on feeder zones

As for the KZNDoe's attempt to scrap feeder zones, in the end the department was unable to suggest a feasible substitute to school zoning and ultimately dropped its plans.¹²¹² However, the KZNDoe never made any formal announcement to this effect. The latest KZNDoe circular on the management of learner admissions is silent on feeder zones.¹²¹³ In fact, no circular on the learner admissions process emanating from the department since the contentious circular of June 2012 speaks to the use of feeder zones by KZN schools.¹²¹⁴ It thus appears that KZN schools can continue to make legitimate use of feeder zones in their admissions policies. It seems that at least some of KZN's best schools still to do so.¹²¹⁵

¹²¹¹ Hunter M 'The race for education: Class, white tone, and desegregated schooling in South Africa' (2015) 29 *Journal of Historical Sociology* 345.

¹²¹² Hunter M *Race for Education: Gender, White Tone, and Schooling in South Africa* (2019) 141.

¹²¹³ KwaZulu-Natal Provincial Education Department 'Administration of learner admissions in public schools for 2022' Circular 21 of 2021 (19 April 2021).

¹²¹⁴ KwaZulu-Natal Provincial Education Department 'Administration of learner admissions in public schools for 2019' Circular 6 of 2018 (2 February 2018). KwaZulu-Natal Provincial Education Department 'Administration of learner admissions in public schools for 2018' Circular 21 of 2017 (7 March 2017). KwaZulu-Natal Provincial Education Department 'Administration of learner admissions in public schools in 2017' 38 of 2016* (10 June 2016). KwaZulu-Natal Provincial Education Department 'Administration of learner admissions in public schools for 2016' 39 of 2015 (17 June 2015). KwaZulu-Natal Provincial Education Department 'Administration of 2015 learner admissions in public schools' Circular 38 of 2014 (4 November 2014). KwaZulu-Natal Provincial Education Department 'Admission of learners in public schools in KwaZulu-Natal for 2014' Circular 52 of 2013 (20 June 2013).

¹²¹⁵ Some of KwaZulu-Natal's best schools continue to use feeder zones clauses in their admission policies. For instance, section 8 of Durban Girls' High School (DGHS) admission policy reads '[a]ll learners whose parents' residential address confirms that [DGHS] is the nearest state high school to their place of residence will be considered for positions at this school. ("Nearest state high school" is defined as the state high school as measured from gate of residence to gate of this school.' Section 15 of DGHS's admission policy makes clear that geographical proximity serves as a selection criterion. The admission policy of Westville Boys' High School [WBHS] states that '[t]hose who reside with their parents or legal guardian and whose closest state high school is [WBHS] will be considered first.' Berea West Preparatory School's admission policy states that '[p]rimary preference will be given to those applicants who live with their parent(s) in closer proximity to this school than any other public school.' Notably all three of these schools do not use parent's place of work as forming part of

What seems to be the only public reference by the KZNDoE to feeder zones since the 2012 feeder zone saga can be traced to three KZNDoE annual reports spanning the financial years starting 2016 and ending 2019. In these annual reports the KZNDoE recognises the importance of the Constitutional Court's *FEDSAS* judgment,¹²¹⁶ in so far as it relates to feeder zones, and the capacity of the Gauteng MEC to establish them. *FEDSAS* is mentioned under the heading '[k]ey policy developments and legislative changes' and is briefly noted as having potential implications for the 'revisions to certain legislative or other mandates.'¹²¹⁷ However, the KZNDoE's annual reports covering the financial periods commencing 2020 and ending 2022 do not mention feeder zones.¹²¹⁸ It seems that addressing feeder zones and the perpetuation of the apartheid injustices they cause may have fallen off the KZNDoE's agenda.

7.4.2 The Western Cape Department of Basic Education

This section commences with a discussion on the evolution of the WCED's policy position on the use of feeder zones by the province's schools. Thereafter, focus turns to the political ideology of the Western Cape's ruling party and the impact that this has had on the province's approach to school zoning. The various justifications which the WCED has proffered for its current stance on feeder zones are interrogated. Lastly, this section concentrates on how the MEC of Basic Education in the Western Cape has, despite the department's official position on feeder zones, adopted geographical proximity as the gold star for dismissing or upholding parents' appeals against admission decisions.

7.4.2.1 The evolution of the WCED's stance on feeder zones

The management of school admissions in the Western Cape was previously addressed via a WCED 2003 circular titled 'Procedures for the Admission of Learners to Public Ordinary

their feeder area making it even harder for those poor and black families living outside these more affluent areas from accessing these schools. Durban North Primary School's admission policy states that 'admission will be granted according to the following criteria. a. In Area Applications - The school closest to the learner's residence and/or closest to the parents' place of employment is deemed to be "In Area." a. If a learner makes application to the school closest to his/her residence and/or place of parents' employment, then the learner should be placed in a school of his/her choice. b. Should the learner reside in the area of influence served by two schools, and both schools decline the learner, then the school first chosen and visited by the parents should accommodate the learner should space be available'. Durban North Primary therefore includes parent's work address.

¹²¹⁶ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC).

¹²¹⁷ Kwa-Zulu Natal Department of Education 'Annual Report 2016-2017' (2017) KZNDoE, KZN 55. Kwa-Zulu Natal Department of Education 'Annual Report 2017-2018' (2018) KZNDoE, KZN 49. Kwa-Zulu Natal Department of Education 'Annual Report 2018-2019' (2019) KZNDoE, KZN 60.

¹²¹⁸ Kwa-Zulu Natal Department of Education 'Annual Report 2021-2022' (2022) KZNDoE, KZN. Kwa-Zulu Natal Department of Education 'Annual Report 2020-2021' (2021) KZNDoE, KZN. Kwa-Zulu Natal Department of Education 'Annual Report 2019-2020' (2020) KZNDoE, KZN.

Schools'.¹²¹⁹ Departmental circulars emanating from the WCED reflect official departmental policy.¹²²⁰ Section 2 of the 2003 circular stated the following in respect of feeder zones:

'In terms of the National Admission Policy for Public Ordinary Schools, feeder zones may only be determined after the Provincial [HoD] has consulted with representatives of [SGBs]. This is a discretionary responsibility of the province. School principals need to note that the WCED has not determined school feeder zones for public ordinary schools. Therefore, no child is precluded from seeking admission to whichever school he or she chooses to attend. However, parents and learners should be encouraged to seek admission to the school closest to their residence.'

The 2003 circular paid credence to the school zoning provisions in the National Admission Policy which bestows the power to determine feeder zones on HoDs after consultation with SGBs. It emphasised that the WCED had not established feeder zones under this policy and interpreted the power to do so as a discretionary one which rested on 'the province'. The 2003 circular can be interpreted in one of two ways. Either, it simply reasserted the prevailing legal position that a learner can apply to whichever school of their choosing. Alternatively, it can be viewed as stating that in the absence of departmental zoning a child cannot be turned away for reasons related to their geographical location. Although the WCED had not engaged in zoning, the 2003 circular nevertheless stated that parents and learners be urged to apply to the school nearest to where they reside. The 'nearest school' criterion was therefore touted via official departmental policy. However, the 2003 circular did not render this a firm requirement for those seeking out a school.

The 2003 circular was subject to an assessment, consultation and review process and was eventually amended by a 2004 circular.¹²²¹ This latter circular was termed the 'Western Cape Education Department policy and procedures for the admission of learners to ordinary public schools'. Section 4.5.1 of the 2004 circular stated that:

'Every learner shall be entitled to ordinary education at his or her nearest ordinary public school, in so far as reasonably practicable.'

Learners were thus entitled to attend the school closest to their doorstep subject to their enrolment being 'reasonably practicable'. Consequently, departmental policy was that a learner

¹²¹⁹ Western Cape Provincial Education Department 'Procedures for the admission of learners to public ordinary schools' Circular 0140 of 2003 (18 June 2003).

¹²²⁰ The WCED has branded its previous circulars on learner admissions 'previous policies'. WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools para 1.

¹²²¹ The Western Cape Education Department 'Policies and procedures for the admission of learners to public ordinary schools' Circular 0040/2004 (3 August 2004).

was entitled to preferential treatment when applying to a school nearest to where they stayed. The 2004 circular had essentially established feeder zones for all the province's schools. A school's feeder zone was a relative one, to be determined with reference to the particular applicant's residential address. Provided the address was closer to the school than any other school, the learner fell within the school's default feeder zone.

The 2004 circular echoed language found in section 3(1)(a) of the Western Cape Provincial School Education Act.¹²²² Section 3 of the Act empowers the Western Cape MEC to determine educational policy for the province in line with certain principles.¹²²³ Section 3(1)(a) states:

‘Determination of provincial education policy

3. (1) Subject to the provisions of the South African Schools Act . . . and the Constitution, the [MEC] may, where necessary, from time to time determine the policy which is to be pursued in respect of education in schools in the province, within the framework of the following principles, namely that—

(a) every learner shall be entitled to ordinary education at his or her nearest ordinary public school, insofar as it is reasonably practicable;’

Section 3(1)(a) therefore requires that the nearest school criterion as a principle be followed when the Western Cape MEC establishes education policy. Although the 2004 circular was issued by the HoD (and not the MEC as contemplated in the section) it nevertheless aligns with the language of section 3(1)(a). Ironically, section 3(1)(b) of the Western Cape Provincial School Education Act states that a further principle which must shape MEC established policy is ‘that every learner shall be entitled to equal access to public schools.’ Sections 3(1)(a) and (b) are inherently contradictory given the strong legacy of apartheid geography in the Western Cape. This legacy of spatial injustice meant that the nearest school criterion in the 2004 circular was extremely harsh towards the province's impoverished black learners.

The WCED's 2004 circular remained in place for about six years until eventually replaced by the 2010 WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools.¹²²⁴ It is not apparent from the document itself whether this policy was set by the MEC acting under section 3 of the Western Cape Provincial School Education Act (and thus directly subject to the requirements of section 3(1)(a) and (b)). Nevertheless, the WCED's 2010 admission policy did away with the nearest school criterion. Instead, section 5

¹²²² Western Cape Provincial School Education Act 12 of 1997.

¹²²³ Section 3(1)(b) of the Western Cape Provincial School Education Act 12 of 1997.

¹²²⁴ WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools.

of the WCED's admission policy sets out certain prescribed legal principles which SGBs must imbed in their admission policies. Under the heading 'feeder zones' the policy states:

'The WCED has not determined any feeder zones for public schools in the Western Cape. Admission of learners to all public schools should be within the prescripts of the law.'¹²²⁵

The WCED's admission policy does not state that the province's position is to refrain from establishing feeder zones but merely asserts that none exist. Section 5 further states a legal obvious in that admission of learners to all public schools should occur in a lawful manner. Presumably, section 5 is to be read as stating that SGBs may determine their own feeder zones, provided such zones are established and implemented in a lawful way. However, given the apartheid spatial legacy, feeder zone policies of HWS which are based purely on geographical proximity will inevitably perpetuate racially discriminatory access to basic education. Such a school zoning policy would be contrary to both the Schools Act,¹²²⁶ and the Constitution. Consequently, this type of policy would be inherently outside the 'prescripts of the law'. In these instances, feeder zones would in any event fall foul of the WCED's own education policy.

WCED's former MEC, Debbie Schafer, has herself acknowledged that feeder zones premised on geographical proximity can 'in many cases' result in indirect discrimination based on race and, thus, further racial disadvantage.¹²²⁷ Yet, according to the former MEC, it is common practice for Western Cape schools to make use of feeder zones based on geographical proximity.¹²²⁸ Jansen and Kriger have done extensive field research on how certain highly desired historically white Western Cape schools go about school zoning. Based on their research, the authors describe how school zoning works in the province. SGBs, they explain, simply approve a radius around the school from within which prospective learners are chosen.¹²²⁹ This, the authors state, provides the province's HWS with significant decision-making power regarding 'who gets in and who is kept out'.¹²³⁰ As discussed in Chapter 2, some Western Cape schools have utilised their zoning powers to exclude impoverished black

¹²²⁵ WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools.

¹²²⁶ South African Schools Act 84 of 1996.

¹²²⁷ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 21.

¹²²⁸ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 21.

¹²²⁹ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 53.

¹²³⁰ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 53.

learners.¹²³¹ Despite this alarming reality, the WCED's admission policy has remained unchanged for more than a decade.

7.4.2.2 How political ideology influences feeder zone policy in the Western Cape

The use of feeder zones as a mechanism for achieving social transformation is restricted by the political desire of the provincial executive.¹²³² The WCED's current position on feeder zones must therefore be understood in view of the political ideology of the ruling party in the Western Cape. The Western Cape is the only province not governed by South Africa's ruling party. Instead, the Democratic Alliance (DA) runs the province.¹²³³ In 2009, the DA obtained full control of the Western Cape and has held this position ever since.¹²³⁴ The WCED's current admission policy was introduced some months after the party first obtained exclusive control over provincial governance.

The DA runs the Western Cape province on a pro-free market platform.¹²³⁵ This involves a less regulatory approach by central government.¹²³⁶ In the context of education, the party's pro-free market ideology plays itself out through the WCED's emphasis on autonomous schools functioning within a logical and well implemented regulatory structure.¹²³⁷ This emphasis on self-governed schools is reflected in the DA's policy document on education, titled 'Learning for Success'. This policy explains that the DA 'believes that schools should be given as much freedom as possible to manage themselves, within a clear and well-managed regulatory framework provided by government.'¹²³⁸

The DA's policy further records the party's belief that educational outcomes can be enhanced through '[m]inimising political interference and maximising the management prerogative of those entrusted with education governance.'¹²³⁹ In addition, the DA's policy states that excellent schools, especially, should enjoy a greater degree of autonomy over the functioning

¹²³¹ See sections 2.2 to 2.5 above.

¹²³² Muller S *The tyranny of timespace* (unpublished doctorate thesis, University of Cape Town, 2020) 206.

¹²³³ Democratic Alliance 'Where We Govern' available at <https://www.da.org.za/where-we-govern> (accessed 6 February 2022).

¹²³⁴ Democratic Alliance 'History' <https://www.da.org.za/why-the-da/history> (accessed 10 February 2022).

¹²³⁵ Muller S *The tyranny of timespace* (unpublished doctorate thesis, University of Cape Town, 2020) 206.

¹²³⁶ International Monetary Fund 'Finance and Development: Back to Basics – Economic Concepts Explained' (2017) IMF 2.

¹²³⁷ Learning for Success DA Policy on Basic Education December (2013).

¹²³⁸ Learning for Success DA Policy on Basic Education December (2013) 6.

¹²³⁹ Learning for Success DA Policy on Basic Education December (2013) 34.

of their schools.¹²⁴⁰ In light of this policy position, it makes sense that the WCED would defer to schools and, all the more so, to well-performing elite schools on feeder zones. However, it is precisely these elite schools (whose autonomy the Western Cape ruling party deems most worthy of protection) that are guilty of using ‘tough’ zoning policies, to maintain their elite status.¹²⁴¹

The DA’s deferential stance on feeder zones appears to lie in the fact that parents of fee-paying schools contribute towards the cost of their children’s education.¹²⁴² The party’s stance on the KZN HoD’s decision to abolish feeder zones in pursuit of more racially equitable access to schooling in KZN is telling. In response to these events, the party’s provincial education spokesperson came out in strong defence of the right of KZN SGBs to determine their own feeder zones.¹²⁴³ The spokesperson emphasised the ‘trade-off’ in which fee-paying public schools carry the financial and administrative obligations in the running of the school in exchange for more autonomy over admission policies.¹²⁴⁴ To this extent, the WCED’s position on feeder zones appears motivated specifically by its desire to protect the autonomy of fee-paying schools to determine their own feeder areas. This presents a certain market-based mentality in the provision of education in which parents are characterised as consumers of education and the market should be uninhibited by provincially set feeder zones.

Woolman and Fleisch explain the limitations of adopting a free market model of education provisioning in South Africa. These scholars state that although South Africa’s legal framework on education permits in theory for the entire South Africa to comprise the market

¹²⁴⁰ Learning for Success DA Policy on Basic Education December (2013) 18. Section 3.2 provides that ‘the greater the degree of excellence achieved by a public school, both in terms of learner outcomes and of evidence of good governance, the greater the degree of autonomy a public school should enjoy.’

¹²⁴¹ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 2.

¹²⁴² Democratic Alliance ‘Statement issued by Tom Stokes MPP, DA KwaZulu-Natal spokesperson on education’ 15 July 2012 available at <https://www.politicsweb.co.za/politics/kzn-govt-in-push-to-rationally-transform-model-c-sch> (accessed 13 January 2021). Mbuyazi N ‘Policy on school admission stays: head’ *IOL* 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018). Jansen L ‘School Admission to Remain as is’ *The Mercury - IOL* 20 August 2012 available at <https://www.iol.co.za/news/politics/school-admission-to-remain-as-is-1365758> (accessed 6 August 2018).

¹²⁴³ Democratic Alliance ‘Statement issued by Tom Stokes MPP, DA KwaZulu-Natal spokesperson on education’ 15 July 2012 available at <https://www.politicsweb.co.za/politics/kzn-govt-in-push-to-rationally-transform-model-c-sch> (accessed 13 January 2021). Mbuyazi N ‘Policy on school admission stays: head’ *IOL* 16 July 2012 available at <https://www.iol.co.za/dailynews/news/policy-on-school-admission-stays-head-1342319> (accessed 6 August 2018). Jansen L ‘School Admission to Remain as is’ *The Mercury - IOL* 20 August 2012 available at <https://www.iol.co.za/news/politics/school-admission-to-remain-as-is-1365758> (accessed 6 August 2018).

¹²⁴⁴ Democratic Alliance ‘Statement issued by Tom Stokes MPP, DA KwaZulu-Natal spokesperson on education’ 15 July 2012 available at <https://www.politicsweb.co.za/politics/kzn-govt-in-push-to-rationally-transform-model-c-sch> (accessed 13 January 2021).

for educational goods, in reality not everyone is able to access this 'market'.¹²⁴⁵ They argue that most South African families do not enjoy choice over the educational products available in the South African 'market' due to the excessively high transaction costs related to entry into the market. From a demand perspective, these scholars argue, the majority of South African learners are already locked out of the 'market' by virtue of factors such as poverty, spatial inequality, and soaring levels of structural unemployment.¹²⁴⁶ Deference to schools on the question of feeder zones therefore benefits more privileged schools. It positions these schools as 'suppliers' of education, capable of designing their own schooling market. More well-off schools will invariably delineate their 'market' in a manner that is most desirous to them. The more desirous end of the market would invariably be those learners who are white and/or wealthy and can afford to pay the more expensive school fees charged by these schools. Through their power to determine feeder zones, privileged schools are therefore able to further frustrate the limited ability of impoverished black learners to access these schools.

However, quality education is not a commodity to be openly traded on the market, but a public good which should be accessible to all. Understandably, these privileged schools sustain the quality of their education provisioning by monies generated through school fees. It would therefore be counter-productive to alienate fee-paying parents lest they remove their children from the school and, possibly the public education system in waves. Such a result would be destructive given the human and financial resources that will exit the system along with them. Fee-paying parents can legitimately expect a certain level of agency over how the school they pay fees to is governed. However, these more well-off schools remain a public resource within the public education system. Thus, they have an important role to play in assisting with achieving equitable access to schooling and no parent can buy these schools out of this responsibility. However, these schools' role must be fulfilled in a manner that does not compromise the quality of their education provisioning lest the entire public education system collapse. What is needed is a carefully calibrated approach that will guarantee that the children of fee-paying parents can continue to enjoy the advantages of the monies their parents pour into the school whilst the SGBs of these schools ensure that at least some impoverished black

¹²⁴⁵ Fleisch B & Woolman S 'South Africa's unintended experiment in school choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act create the enabling conditions for quasi-markets in schools' (2006) 18:1 *Education and the Law* 17.

¹²⁴⁶ Fleisch B & Woolman S 'South Africa's unintended experiment in school choice: How the National Education Policy Act, the South Africa Schools Act and the Employment of Educators Act create the enabling conditions for quasi-markets in schools' (2006) 18:1 *Education and the Law* 17.

children can enjoy a quality education. This is in line with SGBs' responsibility to, as Justice Moseneke has put it, 'help achieve universal and non-discriminatory access to education.'¹²⁴⁷

7.4.2.3 The WCED's justifications for its position on feeder zones

The WCED has justified its deferential stance on feeder zones on four bases: (a) 'maximising choice',¹²⁴⁸ (b) avoiding further exclusion,¹²⁴⁹ and furthering racial transformation,¹²⁵⁰ (c) averting 'cherry picking',¹²⁵¹ and (d) a lack of legislative authority to determine feeder zones.¹²⁵² Each of these justifications are interrogated below.

7.4.2.3.1 Maximising choice

The WCED has stated that its position on feeder zones serves to 'maximise choice'.¹²⁵³ However, the department has not explained what it means by this comment. Presumably, the choice being referred to is that of parents. In South Africa all parents are able to apply to any school regardless of whether a feeder zone exists. Although a parent cannot lay claim to a specific school.¹²⁵⁴ All Western Cape parents are therefore, at least in theory, open to apply to any Western Cape school. The WCED's argument appears to be that by deferring to SGBs on feeder zones the department is optimising the level of choice that Western Cape parents have over which schools would most likely positively receive their child's admission application.

¹²⁴⁷ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 44. See section 6.3.4 above.

¹²⁴⁸ Villette F 'Gauteng school feeder zones not applicable in the Cape' *Cape Times* 15 December 2016 available at <https://www.pressreader.com/south-africa/cape-times/20161215/281663959648567> (accessed 13 November 2021). Jacobs S 'Battle to get into school' *Tabletalk* 30 August 2017 available at <https://www.tabletalk.co.za/news/battle-to-get-into-school> (accessed 14 January 2021). Both articles refer to statements made by the then WCED spokesperson for education.

¹²⁴⁹ Maythem J 'Western Cape Public Schools Make Their Own Rules on Feeder Zones' *Cape Talk* 19 November 2018 available at <http://www.capetalk.co.za/articles/327719/wc-public-schools-make-their-own-rules-on-feeder-zones-explains-education-mec> (accessed 20 November 2018). Comment made by former MEC Schafer in the course of a radio interview.

¹²⁵⁰ Villette F 'Gauteng school feeder zones not applicable in the Cape' *Cape Times* 15 December 2016 available at <https://www.pressreader.com/south-africa/cape-times/20161215/281663959648567> (accessed 13 November 2021). Statement made by the then WCED spokesperson.

¹²⁵¹ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 21.

¹²⁵² Kammies K 'Western Cape Education Department Urges Late Parents to Register Their Kids for 2013' *Cape Talk* 19 July 2016 available at <http://www.capetalk.co.za/articles/15133/wc-education-dept-urges-late-parents-to-register-their-kids-for-2017> (accessed 23 August 2018). See also Tembo T 'Parents challenge 'racist' school feeder zone system' *Cape Argus* 2 March 2017 available at <https://www.pressreader.com/south-africa/cape-argus/20170302/281569470511238> (accessed 13 November 2021).

¹²⁵³ Villette F 'Gauteng school feeder zones not applicable in the Cape' *Cape Times* 15 December 2016 available at <https://www.pressreader.com/south-africa/cape-times/20161215/281663959648567> (accessed 13 November 2021). Jacobs S 'Battle to get into school' *Tabletalk* 30 August 2017 available at <https://www.tabletalk.co.za/news/battle-to-get-into-school> (accessed 14 January 2021).

¹²⁵⁴ Section 34(d)(iii) of the 'Admission Policy for Ordinary Public Schools' in GN 2432 GG 19377 of 19 October 1998.

However, Yusuf and Motala explain how South Africa's education policy creates a mere 'semblance of choice' by permitting parents to apply to any school of their liking whereas in truth, parental choice is in general constrained by competition to obtain a place in HWS. The authors explain how it is evident that it is mostly the middle class who enjoy adequate choice in light of entrenched apartheid geography.¹²⁵⁵ Parental choice over schooling is therefore largely an illusion for most South African parents. The choice which the WCED speaks of optimising is, in any event, not a choice available to most black and poor parents within the province.

What the WCED's deferential position does accomplish, is to empower more privileged schools to even further limit whatever little parental choice impoverished black families have to ensure their children receive an adequate education. This is because it is SGBs who are empowered to establish feeder zones in a manner that will either further parental choice or undermine it. As discussed in Chapter 2, Western Cape's more well-off schools often design their feeder zones to the detriment of black and poor families. The WCED's approach therefore undermines whatever meagre parental choice impoverished black parents have as regards opportunities to successfully enroll their children in one of the province's few quality schools.

7.4.2.3.2 Furthering racial transformation and avoiding exclusion

The WCED has argued that its position on feeder zones serves 'to redress the legacy of apartheid spatial planning.'¹²⁵⁶ However, this appears as a mere throw-away line by the department's spokesperson in a local newspaper. The department has not elaborated on how its position serves to redress apartheid spatial ills within the Western Cape basic education system. The WCED has also justified its stance on the basis that if the province were to determine feeder zones this would be more 'exclusionary' than the current position.¹²⁵⁷ It appears that the WCED here refers to racial exclusion. The argument seems to go that provincially set feeder zones would constitute a retrogressive measure in so far as achieving

¹²⁵⁵ Sayed Y and Motala S 'Getting in and staying there: Exclusion and inclusion in South African schools (2012) 112. See also Sayed Y 'Discourses of the policy of educational decentralisation in south africa since 1994: an examination of the South African Schools Act' (1999) 29:2 *Compare: A Journal of Comparative and International Education* 147.

¹²⁵⁶ Villette F 'Gauteng school feeder zones not applicable in the Cape' *Cape Times* 15 December 2016 available at <https://www.pressreader.com/south-africa/cape-times/20161215/281663959648567> (accessed 13 November 2021).

¹²⁵⁷ Maythem J 'Western Cape Public Schools Make Their Own Rules on Feeder Zones' *Cape Talk* 19 November 2018 available at <http://www.capetalk.co.za/articles/327719/wc-public-schools-make-their-own-rules-on-feeder-zones-explains-education-mec> (accessed 20 November 2018).

racially equitable access to education is concerned. In this regard, former WCED MEC Schafer has stated on local radio that

‘[t]he national policy gives HoDs, well departments, the right to declare feeder zones like they do in Gauteng, but it doesn’t oblige us too. But in that case the admission policy is agreed to by the [SGB]. But it is a difficult issue because there are a lot of issues you need to take into account in trying to ensure that policies are not exclusionary while also not trying not to exclude people who live near the school. We know what the areas are like around Rondebosch and so on. I mean if we were to have feeder zones there, I think it would be more exclusionary if we had provincial ones which is why we haven’t legislated . . . there are schools that are all black, and no one is asking us to make those feeder zones different’.¹²⁵⁸

From this statement, it appears that the former MEC is arguing that provincially established feeder zones will exacerbate existing racial inequality within the province’s education system. This is presumably because provincially set zones would necessarily favour those learners within close proximity of good schools. However, Cape Town schools are in any event renowned for prioritising those learners in the immediate surrounds.¹²⁵⁹ The schools who do rely on geographical proximity are frequently based in more affluent areas such as Rondebosch’s ‘Golden Mile’, a historically white area in the southern suburbs. The area is so named because entry prices for small homes start at about four million.¹²⁶⁰ A figure far beyond the grasp of the large majority of Cape Town’s black households. On the former MEC’s reasoning the department would be required to create feeder zones for Rondebosch schools which fall within the historically white area of Rondebosch. However, there exists no national or provincial legislation or policy that mandates as much. In fact, the National Admission Policy clearly stipulates that HoDs can determine non-contiguous feeder zones. This means that the HoD can establish feeder zones for Rondebosch schools that encompass non-adjacent areas with a higher black school-going demographic of lower socio-economic circumstances. Incidentally, former MEC Schafer seems to say that any provincially determined feeder zones would need to be ‘agreed to by the [SGB].’ However, the National Admission Policy merely requires consultation with SGBs in this regard. As discussed in Chapter 2, the WCED’s deferential position on school zoning has allowed for schools in the province (including some in Rondebosch) to manipulate their boundaries along the lines of race. The WCED’s position

¹²⁵⁸ Maythem J ‘Western Cape Public Schools Make Their Own Rules on Feeder Zones’ *Cape Talk* 19 November 2018 available at <http://www.capetalk.co.za/articles/327719/wc-public-schools-make-their-own-rules-on-feeder-zones-explains-education-mec> (accessed 20 November 2018).

¹²⁵⁹ E-Learning News South Africa ‘Online education: Relieving the high levels of “unplaced children” in schools’ 24 November 2021 *E-Learning News South Africa* (accessed 6 February 2021).

¹²⁶⁰ E-Learning News South Africa ‘Online education: Relieving the high levels of “unplaced children” in schools’ 24 November 2021 *E-Learning News South Africa* (accessed 6 February 2021).

on feeder zones therefore does precisely the opposite of what it claims to do, it exacerbates racial exclusion within the province's education system.

The WCED's spokesperson was asked on local radio about the department's approach to the use of feeder zones by Western Cape schools to preserve their privilege. In response, the spokesperson asserted that claims of discrimination in the admissions process should be raised by parents on formal appeal. The department would then investigate on an ad hoc basis.¹²⁶¹ The spokesperson's comments relate to section 5(9) of the Schools Act. This section confers a right on any learner denied admission by a school, or the parent of that learner to lodge an appeal against that decision, in this instance, to the Western Cape MEC of Education. This includes a parent who alleges that a particular school has unfairly discriminated against their child on the basis of race (contrary to section 9(3) of the Constitution) by using geographical proximity as a criterion for preferential admission. However, addressing potential unfair discrimination arising from the use of feeder zones at the appeal stage is a reactive, ad-hoc, arbitrary and non-cohesive approach to tackling such abusive practices. It thus falls short of the department's constitutional obligation to protect all impoverished black learners (and not only those whose parents undertake the arduous appeal route) from unfair discrimination in the admissions process. Such an approach also 'creates space privileged schools can use and manipulate . . . to fortify rather than dismantle existing inequalities'.¹²⁶²

The WCED's approach also assumes that parents from impoverished communities are empowered with the knowledge of the existence of the section 5(9) appeal process, the know-how of how to navigate this process, and the skills to articulate a formal appeal. This would, most often, not be the case. Furthermore, compelling Western Cape parents to fully shoulder the burden of addressing discriminatory feeder zone practices is unacceptable given the amount of 'resources and stamina' needed to pursue an individual appeal against an admission decision.¹²⁶³ In addition, the internal appeal process is often a lengthy one that may drag on for months, robbing parents of the certainty needed regarding their child's educational fate. For instance, over the period January 2019 to 27 July 2022, the MEC's average response time in

¹²⁶¹ Kammies K 'Western Cape Education Department Urges Late Parents to Register Their Kids for 2013' *Cape Talk* 19 July 2016 available at <http://www.capetalk.co.za/articles/15133/wc-education-dept-urges-late-parents-to-register-their-kids-for-2017> (accessed 23 August 2018).

¹²⁶² *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* 2012 (5) BCLR 537 (GSJ) 73. Here, this same observation on the danger of over reliance on the section 5(9) appeal process was made in the context of admission policies and school capacity determinations.

¹²⁶³ Hoadley UK 'For better or worse: school choice in a South African working-class context' in Chisholm L (ed) *Critical perspectives in South African education: Reconstituting the educational realm* (1990) 30.

respect of 51 appeals lodged was about 88 days (approximately three months).¹²⁶⁴ It is intolerable to expect parents to withstand such an extensive delay where they have fallen victim to unfair race-based discrimination.

In addition, the WCED does not seem to adhere to its own alleged approach of considering the potential of unfair discrimination associated with the use of feeder zones at the point of internal appeal. One example concerns the ‘brand school’ of Wynberg Girls Junior (WGJS). The school is labelled as such because attending there ‘ensures a more or less smooth passage to a good high school and the elite University of Cape Town’.¹²⁶⁵ The extract below is from a parent appealing the decision of WGJS to reject her child’s admission application for the 2022 academic year:

‘Lastly and perhaps the main issue for us as parents is the go-to response of ‘apply at schools closer to your home as you do not reside within the 5km catchment area’. Herein is the perpetuation of the view of systematic education exclusion. To quote an IOL article posted on the 2nd of June 2021: ‘Parents will not apply at schools in their [sic] area we live in because historically we do not have the same resources’. ...We as parents from disadvantaged communities are fighting to give our children the best opportunities we can, as so many others, so forgive us for having the audacity to aspire beyond limiting constructs’.¹²⁶⁶

The parent in question did not supply proof of address in their admission application, presumably out of fear that it would have undermined their child’s chances of being accepted. Despite the parent highlighting the exclusionary impact of feeder zones on appeal, the MEC did not ‘investigate’ this claim in the manner the department’s spokesperson speaks of.¹²⁶⁷ This much is clear from the letter sent by the MEC to the parent communicating the adverse outcome of the appeal. The letter makes no mention of the mother’s contention regarding the discriminatory impact of WGJS’s feeder zone on her daughter.¹²⁶⁸ The MEC has likewise failed

¹²⁶⁴ This statistic is sourced from information obtained through a request for information under the Promotion of Access to Information Act 2 of 2000 directed to the WCED dated 16 June 2022. The following information was requested: ‘Copies of all internal admission appeals lodged by learners or/and parents/guardians of learners . . . in relation to the academic years 2019-2022 . . . and . . . Copies of all the MEC’s letters communicating the outcome of such appeals’. The information revealed 76 appeals over this period. However, only 51 of these reflected both the date lodged and the date of the MEC’s response thereto.

¹²⁶⁵ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 55.

¹²⁶⁶ Redacted email from parent reasserting the basis of her appeal against the refusal of WGJS to admit her daughter. Western Cape Government, Education: Admission Appeal 2021/2022 of 30 August 2021 Ref No. 20210902-5460 *Wynberg Girls’ Junior School* (7 October 2021). Referring to <https://www.iol.co.za/education/wced-accused-of-designing-admission-policies-that-further-segregate-communities-7f951e83-084b-43b5-b509-9ab405fab1d1>

¹²⁶⁷ Had the MEC investigated the claim the MEC would have asked for this information to be furnished.

¹²⁶⁸ Western Cape Government, Education: Admission Appeal 2021/2022 of 30 August 2021 Ref No. 20210902-5460 *Wynberg Girls’ Junior School* (7 October 2021).

to engage with arguments of a similar nature raised or alluded to by parents who appealed against admission decisions by George Preparatory School,¹²⁶⁹ and Melkbosstrand High.¹²⁷⁰ These schools are situated in the HWA of Bo-Dorp and Melkbosstrand respectively, and both areas remain overwhelmingly white.¹²⁷¹ The MEC's letter communicating the negative outcome of the appeal to the parents in the Wynberg, George and Melkbosstrand cases, records that the parents had failed to provide any evidence concerning the alleged discrimination against their child.¹²⁷² Offering evidence of discrimination in the case of feeder zones is not a burden that should fall on parents. It is the WCED who is best placed to access information regarding the demographic composition of specific areas falling within or outside a feeder zone, the learner demographics of a school year on year over an extended period and the residential addresses of those enrolled. Some or all of this information may be significant when assessing whether a school has been engaging in abusive and/or discriminatory school zoning practices.

Finally, former MEC Schafer (whilst still in office) interpreted her section 5(9) power under the Schools Act as a limited one.¹²⁷³ According to the former MEC, her powers on appeal did not permit her to pronounce on the lawfulness of a feeder zone policy. Rather, the former MEC stated, her powers are merely limited to determining whether the implementation of a feeder zone had a discriminatory impact on the specific learner concerned and thus whether the school's decision should be overruled.¹²⁷⁴ If the former MEC's understanding is correct, then section 5(9) cannot serve as an effective mechanism to ensure that feeder zones do not produce or advance systematic racial inequality within the Western Cape education system. One manner

¹²⁶⁹ Western Cape Government, Education: Admission Appeal 2019/2020 of (undated) Ref No. 20191108-1451 *Voorbereidingskool George Preparatory* (14 February 2020).

¹²⁷⁰ Western Cape Government, Education: Admission Appeal 2020/2021 of 23 August 2021 Ref No. 20210818-5081 *Melkbosstrand High* (15 October 2021).

¹²⁷¹ The 2011 Statistics South Africa census labels Bo-Dorp as 85% white. Frith A 'Bodorp Sub Place 177006013 from Census 2011' available at <https://census2011.adrianfrith.com/place/177006013> (accessed 2 November 2022). The same data shows Melkbosstrand as 81% white. Frith A 'Melkbosstrand Main Place 199007 from Census 2011' available at <http://census2011.adrianfrith.com/place/199007> (accessed 2 November 2022).

¹²⁷² Western Cape Government, Education: Admission Appeal 2020/2021 of 23 August 2021 Ref No. 20210818-5081 *Melkbosstrand High* (15 October 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 30 August 2021 Ref No. 20210902-5460 *Wynberg Girls' Junior School* (7 October 2021). Western Cape Government, Education: Admission Appeal 2019/2020 of (undated) Ref No. 20191108-1451 *Voorbereidingskool George Preparatory* (14 February 2020).

¹²⁷³ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212, Second Respondent's (MEC for Education, Western Cape) Explanatory Affidavit 8.2.

¹²⁷⁴ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212, Second Respondent's (MEC for Education, Western Cape) Explanatory Affidavit 8.2, 30.4, 34, 35 and 36.

in which the WCED MEC can overcome any constraints under their section 5(9) powers is to establish transformative feeder zones at a provincial level.

7.4.2.3.3 Avoiding cherry picking

Former MEC Schafer has sought to justify the WCED's stance on feeder zones on the basis that deferring to SGBs guards against 'cherry picking'. The former MEC explains on affidavit that

'using a geographical area also serves as a useful objective selection criterion. This avoids the situation in which schools use vague or more subjective criteria to 'cherry pick' only the top academic, sport, or cultural achievers. Such a system may also lead to the perpetuation of systemic disadvantage'.¹²⁷⁵

However, the former MEC loses sight of the fact that schools can, in any event, design their feeder zones so as to encapsulate areas associated with higher academic performance and avoid those that have been linked to poor achievement. As discovered by Lemon and Battersby-Lennard some Cape Town schools are guilty of using their feeder zones as a mechanism to facilitate the type of cherry picking the former MEC speaks of.¹²⁷⁶ Feeder zones have therefore served not to frustrate, but rather promote such abusive practices. Ironically, the establishment of racially transformative feeder zones at the provincial level can serve to prevent cherry picking within the admission process. The former MEC's argument in this regard therefore holds no weight.

7.4.2.3.4 A lack of legislative authority

The WCED has also defended its deferential approach to feeder zones on the basis that the department does not have the necessary authority to determine these zones. For instance, the WCED spokesperson has said on local radio that the WCED has no power over school admissions as feeder zones are established by SGBs.¹²⁷⁷ The former MEC too has communicated via official statements that the department's position on feeder zones stems

¹²⁷⁵ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 21.

¹²⁷⁶ Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 532. See also Bartlett H 'Exploring the 'educational engagement' processes at a Former Model C high school in Cape Town' (unpublished Master's thesis, University of Stellenbosch, 2016) 58.

¹²⁷⁷ Kammies K 'Western Cape Education Department Urges Late Parents to Register Their Kids for 2013' *Cape Talk* 19 July 2016 available at <http://www.capetalk.co.za/articles/15133/wc-education-dept-urges-late-parents-to-register-their-kids-for-2017> (accessed 23 August 2018).

from the fact that ‘[th]e SGB of the school is responsible for the admissions policy of that particular school, not the WCED.’¹²⁷⁸

The department’s claims regarding lack of authority over the determination of feeder zones rests on section 5(5) of the Schools Act. This section empowers SGBs to determine a school’s admission policy subject to the Schools Act and any relevant provincial law. However, as explained in Chapter 5, the Minister is empowered to enact national admission policy constraining the manner in which SGBs exercise their statutorily conferred power to determine admission policy. Setting the broad regulatory framework within which PEDs and SGBs must perform their roles is precisely the Minister’s primary function imposed by the Schools Act, as the Constitutional Court has explained. The Schools Act interlocks tightly with NEPA to ensure that the Minister is capable of doing so. This can be seen from the repeated references to NEPA under the Schools Act. As such, these two legislative instruments must be read together as forming a single regulatory scheme. A SGBs power to determine admission policy under section 5(5) is therefore also subject to any national policy which the Minister has enacted under NEPA.¹²⁷⁹ Section 3(4)(i) of NEPA empowers the Minister to create national policy on school admissions. Acting under this provision, the Minister has established the National Admission Policy. Section 33 of the National Admission Policy empowers HoDs to establish feeder zones for schools. Consequently, the Western Cape HoD possesses the authority to establish feeder zones for the province under the National Admission Policy. The WCED’s claims to the contrary are both wrong and disingenuous given that the then MEC herself stated in the media that ‘national policy gives HoD’s, well departments, the right to declare feeder zones like they do in Gauteng.’¹²⁸⁰ Section 2 of the WCED’s 2003 circular on the procedures for the admission of learners too recognises the power of the Western Cape HoD to establish feeder zones under the National Admission Policy following consultation with SGBs.¹²⁸¹

¹²⁷⁸ Western Cape Department of Basic Education ‘Media release by Minister of Education Debbie Schafer, WCED appeals for patience while schools finalise registration process’ (13 June 2016). This same wording is used in a 2019 WCED media statement by then MEC Schafer.

¹²⁷⁹ See section 5.3.2 above.

¹²⁸⁰ Maythem J ‘Western Cape Public Schools Make Their Own Rules on Feeder Zones’ *Cape Talk* 19 November 2018 available at <http://www.capetalk.co.za/articles/327719/wc-public-schools-make-their-own-rules-on-feeder-zones-explains-education-mec> (accessed 20 November 2018).

¹²⁸¹ Western Cape Provincial Education Department ‘Procedures for the admission of learners to public ordinary schools’ Circular 0140 of 2003 (18 June 2003).

7.4.2.3.5 The WCED's double standard on proximity to schools

Under the WCED's 2010 admission policy the department claims that it 'has not determined any feeder zones for public schools in the Western Cape'.¹²⁸² The WCED therefore creates the impression that it is entirely up to Western Cape schools whether to have feeder zones as an admission criterion, provided they act within legal boundaries. However, the WCED, as will be established below, nevertheless views geographical proximity as a key criterion in the admissions process and is even prepared to impose this standard on schools if needs be. The Western Cape High Court's decision in *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another*,¹²⁸³ provides some insight into the WCED's true approach to the use of geographical proximity as an admission criterion. This matter was brought by the parents of a child who was denied admission to Sunningdale Primary, a school situated in the affluent suburb of Sunningdale. One of the school's reasons for rejecting the learner was that the learner did not live in Sunningdale. This decision was in accordance with the school's policy of preferencing learners whose parent's/guardians residential address was classified as Sunningdale by the City of Cape Town and who resided within a 0-3 km radius from the school and/or whose siblings were enrolled at the school. The learner stayed in the adjoining area of West Beach about 2km from the school. The parents brought proceedings against both the school and the department. The parents sought, amongst others, an order declaring Sunningdale's admission policy 'invalid, unlawful and inconsistent with the Constitution'.¹²⁸⁴ This challenge was aimed at that part of the admission policy that favoured only those learners residing in an officially zoned Sunningdale area and/or with siblings at the school.¹²⁸⁵

The parents claimed that Sunningdale was populated largely by wealthy and white people. The parents also explained that the school's feeder zone excluded learners from the adjacent suburb of Parklands which was largely inhabited by black people and those of lower income.¹²⁸⁶ Judge Binns-Ward inferred from the applicants' evidence that the applicants were arguing that the

¹²⁸² Section 5 of the WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools.

¹²⁸³ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212.

¹²⁸⁴ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 1.

¹²⁸⁵ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 1.

¹²⁸⁶ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 27.

school's decision to reject their daughter's application was a manifestation of indirect racial discrimination stemming from a feeder zone that aligned with municipal boundaries.¹²⁸⁷ Judge Binns-Ward dismissed the parents' application.¹²⁸⁸ Part of the judge's logic was that there was no objective evidence to determine that there was a material (or in fact any) deviation in the socio-economic status or racial composition of people who lived in Sunningdale versus those who lived in the adjoining area in which the learner actually stayed. Judge Binns-Ward reasoned

'None of the parties has provided empirical evidence concerning the demographics of Sunningdale or West Beach. As mentioned, the various areas mentioned adjoin, or are in close proximity to, one another, and there is no objective evidence to establish that there is a material, or indeed any, difference in the socio-economic status or ethnic mix of the people who live in them.'¹²⁸⁹

Outside of this missing evidence, other information the judge deemed relevant to a determination of indirect racial discrimination arising from the use of a feeder area included the number of entrants to the sought-after school broken down in accordance with their place of residence and race,¹²⁹⁰ as well as the date upon which an admission application was submitted.¹²⁹¹ The latter factor the judge considered relevant due to it being stipulated in the National Admission Policy. Judge Binns-Ward explains:

'But the admissions statistics show that the majority of entrants to Grade R came from outside Sunningdale, and that 41.5% of them were not white learners, a significant proportion of which came from Parklands. There is simply no objectively verifiable evidence to support an allegation of racially based exclusion or unfair discrimination.'¹²⁹²

...

The evidence points ineluctably to the fact that the applicants' application for their daughter's admission failed because it was submitted comparatively late relative to the competing applications. For that reason it would have met with a similar fate in any application system in which a feeder zone determined by a [HoD] in terms of the national policy in respect of admission to ordinary public schools was applicable. This is so because the order of preference fixed under first respondent's admissions policy mirrors in all

¹²⁸⁷ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 27.

¹²⁸⁸ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 46.

¹²⁸⁹ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 30.

¹²⁹⁰ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 33.

¹²⁹¹ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 34.

¹²⁹² *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 33.

material respects that applicable in admissions policies to which paragraph 34 of the national policy pertains (i.e. those determined by [HoDs], rather than by [SGBs]). The only difference is the absence in the national policy of any provision in respect of sibling admissions.’¹²⁹³

Judge Binns-Ward’s reasoning suggests that a learner could potentially succeed with an argument on indirect racial discrimination arising from the application of a feeder zone where, (a) that learner lived nearby the zoned area, (b) had applied early, (c) there exists sufficient evidence that the demographics of the area in which the learner stayed deviated materially from the desired school’s feeder area along the lines of race and/or socio-economic status, (d) the enrolment statistics of the desired school reveals racial bias or is significantly racially skewed in favour of white children and, (e) only a small number of enrolled children reside outside of the feeder zone.

Prior to approaching the court, the parents, had lodged an appeal with the MEC under section 5(9) of the Schools Act. In their appeal the parents argued, amongst others, that the school had unfairly discriminated and prejudiced their daughter through the application of an ‘irrational, unreasonably applied and unjustifiable’ admission policy.¹²⁹⁴ The MEC rejected the parents appeal on the basis of, amongst others, that ‘Sunningdale Primary is not the closest school to your place of residence.’¹²⁹⁵ Notably, Sunningdale Primary’s feeder zone did not speak of preferential admission by virtue of the school being the closest one to which a learner resides. Rather, this was an independent standard regarding preferential admission which the MEC sought fit to impose.

The WCED had elected to abide the court’s decision in *Hesewu*. Nevertheless, former MEC Schafer filed an explanatory affidavit. The MEC’s affidavit contains, as an annexure, an email directed at the applicants and dated 22 July 2020. This email was sent by a WCED official responsible for receiving and processing all admissions appeals.¹²⁹⁶ The e-mail is quite telling in terms of the WCED’s true approach to proximity as a criterion for preferential admission. This is because it appears to contain a standard communication addressed to parents seeking to appeal their child’s unsuccessful admission application to the MEC. The email spells out that

¹²⁹³ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 34.

¹²⁹⁴ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212, Second Respondent’s (MEC for Education, Western Cape) Explanatory Affidavit. Annexure ‘DS3’ 179.

¹²⁹⁵ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 Applicants’ Founding affidavit. Annexure ‘MH5’ 32.

¹²⁹⁶ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 Applicants’ Founding Affidavit. Annexure ‘DS5’ 182 and 183.

parents ‘MUST clearly state the grounds of appeal’ and explains that one such legitimate ground is ‘that you live closer to the school than other successful applicants – give specific details’.¹²⁹⁷ This email reveals that, despite the WCED’s claim that it does not establish feeder zones, the WCED nevertheless applies its own feeder zone through the nearest school criterion. This standard is imposed by default on those parents who rely on the section 5(9) appeal process. Given this approach, it is unsurprising that the MEC thought it necessary in *Hesewu* to draw the judge’s attention to the fact that the school to which the learner sought access was not the nearest one to which she stayed.¹²⁹⁸ Incidentally, Judge Binns-Ward even mentioned that there is a ‘slightly more proximate school’ in his ruling:

‘However, there is a primary school in another area adjacent to West Beach that does offer such facilities, and where a place was available for the applicants’ daughter when their application to enrol her at Sunningdale was unsuccessful. The other school, Bloubergrant Pre-Primary School, which is 1 km from the applicants’ home, is actually slightly more proximate than the Sunningdale Primary School. There is no evidence to suggest that there is a material difference in the quality of the education available at these two public schools, nor is there any evidence that the demographic composition of the learners enrolled at the two schools differs materially.’¹²⁹⁹

The judge’s statement here suggests that a claim of indirect racial discrimination arising from feeder zones that complies with the earlier mentioned requirements could still potentially be unsuccessful. This would be the case where a closer school, offering a substantially similar standard of education to that of the desired one, can accommodate the learner and there is no substantial difference in the demographic makeup between the two schools. It therefore seems likely that the applicants would have failed in their case even if the other evidence the judge thought necessary to substantiate their claim was available given that the ‘slightly more proximate’ school met these two criteria. However, the availability of other educational options no matter how good cannot serve to justify the implementation of a racially discriminatory feeder zone where one exists. A feeder zone that operates to unfairly exclude along the lines of race and socio economic circumstance operates in this manner regardless of whether viable educational alternatives are in place. Also, of grave concern was the judge’s willingness to buy

¹²⁹⁷ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 Applicants’ Founding Affidavit. Annexure ‘DS5’ 183.

¹²⁹⁸ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 21. *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212, Second Respondent’s (MEC for Education, Western Cape) Explanatory Affidavit 45, 64, 72, 73 and 92. This includes an explanation of the department’s use of the nearest school criterion as a basis for rejecting the parent’s internal appeal.

¹²⁹⁹ *Hesewu and Another v School Governing Body, Sunningdale Primary School and Another* (2021) ZAWCHC 212 at 10.

into the WCED's nearest school notion. This can perhaps be attributed to the fact that the applicants failed to proffer any evidence of racial discrimination. The 22 July email annexed to the Minister's affidavit in *Hesewu* also advised the applicants that the WCED would only assist with placement if the applicants had already attempted to secure a place for their child at a school or early childhood development site 'closest to home'. This serves as further proof that the WCED is pursuing a policy whereby unplaced learners or learners who appeal an admission decision must seek access to schools nearby their residence. An article in the media concerning a child living in Khayelitsha seeking access to schooling further away is also evidence of this. In this article the child's guardian explains how he had applied to at least ten schools in the Western Cape, but all of these applications were unsuccessful. The guardian states:

'When you call these schools the first thing you are asked is your residence and then once you say Khayelitsha they tell you they are oversubscribed and can after appeal put your child's name on the waiting list.'¹³⁰⁰

The parent had appealed one of his unsuccessful admission applications to the MEC. However, he was subsequently advised that the WCED had rejected his appeal and that he had to apply to a school near to where he stayed.¹³⁰¹ The WCED's duplicitousness as regards school zoning is made clear when one considers the outcome of an admission appeal to the MEC where a father relied on proximity as grounds to overturn Stellenbosch High's decision to deny his child admission based on capacity. The family resided in Idas Valley, an area which served under apartheid as a dumping ground for coloured and Indian families evicted from Stellenbosch.¹³⁰² Idas Valley is situated about 3km from Stellenbosch High.¹³⁰³ The MEC found that the reasons of the appeal were 'inconsistent' given that the parents had failed to apply to another high school (Luckhoff High) situated a mere 750km from the family's home.¹³⁰⁴ The Department's

¹³⁰⁰ Dano Z 'School admission policies run contrary to transformation – experts' *IOL* 10 November 2021 available at <https://www.iol.co.za/education/schools-admission-policies-run-contrary-to-transformation-experts-19f8a3f7-8dad-47a1-997b-502257dba1c7> (accessed 30 December 2021).

¹³⁰¹ Dano Z 'School admission policies run contrary to transformation – experts' *IOL* 10 November 2021 available at <https://www.iol.co.za/education/schools-admission-policies-run-contrary-to-transformation-experts-19f8a3f7-8dad-47a1-997b-502257dba1c7> (accessed 30 December 2021).

¹³⁰²
¹³⁰³ Human L 'The WCED struggling with increased learner admissions for 2021- A Stellenbosch parent has been battling to find place for his son' *GroundUp* 20 November 2020 available at <https://www.groundup.org.za/article/wced-battling-increase-learner-admissions-2021/> (accessed 13 January 2021).

¹³⁰⁴ Western Cape Government, Education: Admission Appeal 2020/2021 of 24 June 2020 Ref No. 20201009-8667 *Stellenbosch High School* (16 October 2020). See Human L 'The WCED struggling with increased learner admissions for 2021- A Stellenbosch parent has been battling to find place for his son' *GroundUp* 20 November 2020 available at <https://www.groundup.org.za/article/wced-battling-increase-learner-admissions-2021/> (accessed 13 January 2021).

willingness to entertain an appeal based on proximity where feeder zones were not in issue, indicates that the department does consider proximity as bestowing some type of advantage in the admission process. Moreover, the department's response regarding the parent's failure to apply to the nearest school shows that not only does the WCED consider proximity advantageous, but it also considers closest proximity as conferring an even greater advantage in the admissions process.

The department's position is vivid when examining the standard forms which the WCED requires a school to complete where the school's decision to reject a learner had been taken on appeal. The questionnaire asks:

'Is this the closest school to the residence or place of work of the parent. Please ensure that you have verified and have supporting documents. It's advisable to use "Google Maps" to verify proximity to the school.'¹³⁰⁵

Over the course of the period 2019 to 27 July 2022, the MEC upheld at least eight admission appeals on the basis that the desired school was the closest one to where the family stayed.¹³⁰⁶ Similarly, no less than five appeals succeeded because the sought-after school was *one* of the closest to the family's residence,¹³⁰⁷ and at least 42 appeals were dismissed partly because the school to which the learner had applied was not the closest one to where they lived.¹³⁰⁸ In the

¹³⁰⁵ These forms were disclosed following a promotion of access to information request to the WCED dated 16 June 2022.

¹³⁰⁶ This statistic is sourced from information obtained through a request for information under the Promotion of Access to Information Act 2 of 2000 directed to the WCED dated 16 June 2022. The eight appeals mentioned are Western Cape Government, Education: Admission Appeal 2021/2022 of 23 February 2022 Ref No. 20220315-669 *Courtrai Primary School* (undated). Western Cape Government, Education: Admission Appeal 2020/2021 of 22 September 2021 Ref No. 20211014-6723 *Apex High School* (25 November 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 26 July 2021 Ref No. 20210831-5383 *Table View High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (undated) Ref No. 20210818-5086 *Labiance Primary School* (7 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 21 October 2020 Ref No. 20201022-8960 *Hermanus Primary School* (12 December 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 2 October 2020 Ref No. 20201013-8752 *Vredendal High School* (22 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 17 July 2020 Ref No. (not indicated) *Table View High School* (undated). Western Cape Government, Education: Admission Appeal 2020/2021 of (undated) Ref No. 20210809-4788 *Belpark Primary School* (undated).

¹³⁰⁷ Western Cape Government, Education: Admission Appeal 2021/2022 of 30 November 2021 Ref No. 20211116-7830 *Bellpark Primary School* (16 February 2022). Western Cape Government, Education: Admission Appeal 2020/2021 of 27 May 2021 Ref No. 20211021 *Stellenberg High School* (30 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 13 October 2021 Ref No. 20211013-6700 *Pinehurst Primary School* (28 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 3 September 2021 Ref No. 20210817-5038 *Parow High School* (7 October 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 9 February 2021 Ref No. 20210316-1656 *Table View High School* (6 May 2021).

¹³⁰⁸ Western Cape Government, Education: Admission Appeal 2021/2022 of 9 June 2021 Ref No. 20220204-9566 *The Settlers High School* (16 February 2022). Western Cape Government, Education: Admission Appeal 2021/2022 of 3 February 2022 Ref No. 20220204-9566 of *De Kuilen High School* (16 February 2022). Western Cape Government, Education: Admission Appeal 2021/2022 of 21 June 2021 Ref No. 20220124 *Brackenfell High*

School (16 February 2022). Western Cape Government, Education: Admission Appeal 2021/2022 of 7 June 2021 Ref No. 20220127-9358 *Fairbairn College* (15 February 2022). Western Cape Government, Education: Admission Appeal 2021/2022 of 3 November 2021 Ref No. 20220118-9087 *Parel Vallie High School* (31 January 2022). Western Cape Government, Education: Admission Appeal 2021/2022 of 11 November 2021 Ref No. 20211154-7704 *De Hoop Primary School* (30 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 3 June 2021 Ref No. 20211118-7943 *Fairmont High School* (30 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 27 May 2021 Ref No. 20211119-8003 *De Kuilen High School* (30 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 14 October 2021 Ref No. 20211020-6856 *Gene Louw Primary School* (16 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 24 May 2021 Ref No. 20211104-7329 *Milnerton High* (16 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 19 October 2021 Ref No. 20211019-6815 *Parel Vallie High School* (3 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 12 October 2021 Ref No. 20210921-6051 *Milnerton High* (21 October 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 22 September 2021 Ref No. 20211007 *Bergvliet High School* (21 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 2 September 2021 Ref No. 20210902-5464 *Parow High School* (21 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 2 June 2021 Ref No. 20210817-5024 *Sunningdale Primary School* (21 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (undated) Ref No. 20210903-5389 *Parel Vallie High School* (21 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 23 August 2021 Ref No. 20210818-5081 *Melkbosstrand High* (15 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (not provided) Ref No. 20210817-5022 *Stellenbosch High School* (7 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (not provided) Ref No. 20210817-5023 *Tygerberg High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 5 August 2021 Ref No. 20210903-5492 *Rocklands High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 19 July 2021 Ref No. 20210817-5052 *Parel Vallie High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (not provided) Ref No. 20210902-5473 *Westerford High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 26 May 2021 Ref No. 20210831-5379 *Wynberg Boys High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (not provided) Ref No. 20210902-5473 *Rustenburg Girls High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 20 September 2021 Ref No. 20210920-6010 *Fish Hoek High School* (5 October 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of (not provided) File No. 3/3/6-1 *De Hoop Primary School* (3 August 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 30 July 2021 Ref No. 20210802-4757 *Parel Vallie High School* (2 August 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 21 June 2021 Ref No. 20211014-6739 *Rocklands High School* (undated). Western Cape Government, Education: Admission Appeal 2021/2022 of 11 May 2021 Ref No. (not provided) *Laerskool Bellpark Primary* (not provided). Western Cape Government, Education: Admission Appeal 2020/2021 of 5 November 2020 Ref No. 20201116-9561 *Worcester Primary School* (8 December 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 11 June 2020 Ref No. 20201014-8796 *Overberg Primary School* (8 December 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 4 August 2020 Ref No. 20201016-8853 *Koos Sadie Primary School* (22 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 4 August 2020 Ref No. 20200907-7890 *De Vrije Zee Primary School* (22 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 23 August 2020 Ref No. 20201007-8549 *Tableview High School* (16 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 24 June 2020 Ref No. 20201009-8667 *Stellenbosch High School* (16 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 (not provided) Ref No. 20210902-5473 *Pinelands High School* (6 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 11 August 2020 Ref No. 20200901-7805 *Milnerton High* (28 September 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 16 September 2020 Ref No. 2020100-8371 *Bergvliet High School* (2 October 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 21 August 2020 Ref No. 20200909-7951 *Parow High School* (22 September 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 17 August 2020 Ref No. 20200907-7890 *Parow West Primary School* (22 September 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of 25 June 2020 Ref No. 20200901-7801 *Milnerton High* (3 September 2020). Western Cape Government, Education: Admission Appeal 2019/2020 of (undated) Ref No. 20191108-1451 *Vorbereidingskool George Preparatory* (14 February 2020).

overwhelming majority of admission appeals over this period, proximity of the applicant to the school was cited as at least one of the factors upon which the MEC's decision had turned.

The MEC, in deciding appeals, has also considered the distance that successful entrants stayed from the school at times juxtaposing this detail with the unsuccessful applicant's place of residence. Thus, appeals have been upheld partly on the basis that 'a sizeable number of learners' enrolled in the particular entry grade were 'from areas further and beyond' the area in which the school is based,¹³⁰⁹ or that some learners are 'from areas further and beyond' the address of the unsuccessful applicant.¹³¹⁰ For instance, the MEC upheld an appeal by a parent living in the HWA of Pinelands whose child failed to obtain a space in Pinehurst Primary School (one of three primary schools based in Pinelands). The MEC reasoned that public schools have a duty to accept an application for those learners who stayed nearest to the school. The MEC's letter reads:

'Public Ordinary Schools however do have the responsibility to admit applicants closest. In this instance, your school admitted many applicants for 2022 from areas further and beyond your immediate school vicinity in comparison to the ... application.'¹³¹¹

It is clear from this letter that despite the department's official position on feeder areas, the MEC does consider schools duty bound to favour applicants who live in closest proximity to the school. This is further evidenced by a common refrain in the MEC's letters communicating the outcome of appeals:

'We acknowledge that all schools would like to attract the best learners, but this cannot be done at the expense of eligible learners living in closer proximity to the school.'¹³¹²

¹³⁰⁹ Western Cape Government, Education: Admission Appeal 2020/2021 of 3 September 2021 Ref No. 20210817-5038 *Parow High School* (7 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 26 July 2021 Ref No. 20210831-5383 *Table View High School* (6 October 2021).

Western Cape Government, Education: Admission Appeal 2021/2022 of 9 February 2021 Ref No. 20210316-1656 *Table View High School* (6 May 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 21 October 2020 Ref No. 20201022-8960 *Hermanus Primary School* (12 December 2020).

¹³¹⁰ Western Cape Government, Education: Admission Appeal 2020/2021 of 22 September 2021 Ref No. 20211014-6723 *Apex High School* (25 November 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 27 May 2021 Ref No. 20211021 *Stellenberg High School* (30 November 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 13 October 2021 Ref No. 20211013-6700 *Pinehurst Primary School* (28 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of (undated) Ref No. 20210809-4788 *Belpark Primary School* (undated). Western Cape Government, Education: Admission Appeal 2021/2022 of 7 February 2022 Ref No. 20220007-9587 *Vredeloof Primary School* (undated).

¹³¹¹ Western Cape Government, Education: Admission Appeal 2021/2022 of 13 October 2021 Ref No. 20211013-6700 *Pinehurst Primary School* (28 October 2021).

¹³¹² Western Cape Government, Education: Admission Appeal 2020/2021 of 27 May 2021 Ref No. 20211021 *Stellenberg High School* (30 November 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 22 September 2021 Ref No. 20211014-6723 *Apex High School* (25 November 2021). Western Cape

The WCED has therefore adopted the blanket approach that it is unfair to deny learners living closer to a school admission whilst granting entrance to learners who stay further away. It seems that proximity of residence is all that matters to the department regardless of the race or socio-economic circumstances of the learner concerned. This directly contradicts the WCED's claimed approach of investigating the potential discriminatory impact of feeder zones on appeal.

7.4.3 The Gauteng Department of Education

The use of feeder zones by Gauteng schools was first controlled by provincial regulations introduced in 1998 and titled Regulations Relating to the Admission of Learners to Public Schools (1998 admission regulations).¹³¹³ Under these regulations a learner fell within the feeder zone of a school where that school was the nearest to where they lived or their parents were employed.¹³¹⁴ These regulations were replaced in 2001.¹³¹⁵ The 2001 admission regulations placed the power to determine feeder zones in the hands of the HoD subject to consultation with SGBs.¹³¹⁶ The 2001 admission regulations were subsequently amended in 2012 (2012 admission regulations).¹³¹⁷ Under the 2012 amendments, the power to establish feeder zones now fell to the MEC who was to consult with relevant stakeholders before doing so.¹³¹⁸ Until such time as this power was exercised deemed feeder zones would operate. Under the deemed zones a child was based within a feeder zone where their home or parent's place of employment was closest to that particular school than any other (akin to the 1998 admission

Government, Education: Admission Appeal 2020/2021 of 3 September 2021 Ref No. 20210817-5038 *Parow High School* (7 October 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 26 July 2021 Ref No. 20210831-5383 *Table View High School* (6 October 2021). Western Cape Government, Education: Admission Appeal 2021/2022 of 9 February 2021 Ref No. 20210316-1656 *Table View High School* (6 May 2021). Western Cape Government, Education: Admission Appeal 2020/2021 of 21 October 2020 Ref No. 20201022-8960 *Hermanus Primary School* (12 December 2020). Western Cape Government, Education: Admission Appeal 2020/2021 of (undated) Ref No. 20210809-4788 *Belpark Primary School* (undated).

¹³¹³ Regulations Relating to the Admission of Learners to Public Schools in Provincial Gazette Extraordinary 439 GN 61 of 7 January 1998. Section 11(1) read 'subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools.'

¹³¹⁴ Sections 1 and 6 of the Regulations Relating to the Admission of Learners to Public Schools in Provincial Gazette Extraordinary 439 General Notice 61 of 7 January 1998.

¹³¹⁵ Regulations Relating to the Admission of Learners to Public Schools GN 4138 in *Provincial Gazette* 129 of 13 July 2001.

¹³¹⁶ Section 7 of the Regulations Relating to the Admission of Learners to Public Schools GN 4138 in *Provincial Gazette* 129 of 13 July 2001.

¹³¹⁷ Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

¹³¹⁸ Regulation 4 of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

regulations design).¹³¹⁹ Alternatively, a child was considered as being within a school's feeder zone where they lived, or their parent was employed within a 5km radius of that school.¹³²⁰

In 2018, and pursuant to litigation on the 2012 amendments,¹³²¹ the GDoE released the GDE Policy for the Delimitation of Feeder Zones for Schools (GDoE feeder zone policy).¹³²² This policy is intended to serve as a framework on how feeder zones are to be established for Gauteng schools.¹³²³ The following year, the MEC published amendments to the 2012 admission regulations (the 2019 admission regulations). These amendments require the HoD to determine feeder zones in accordance with the GDoE's feeder zone policy.¹³²⁴ The sections that follow focus on how the GDoE's position on feeder zones has altered over the years.

7.4.3.1 The 1998 Gauteng admission regulations

Section 11(1) of the Gauteng School Education Act, empowers the Gauteng Education MEC to publish regulations concerning learner admissions to public schools.¹³²⁵ In 1998 the MEC, acting under section 11(1), published the 1998 admission regulations.¹³²⁶ These regulations preceded the National Admission Policy by just over nine months and, as such, was not informed by this national policy. The 1998 admission regulations included the use of feeder areas to regulate the admissions process. These regulations defined a feeder area as 'that area which is closer to that school by any public route than to any other school'.¹³²⁷ Regulation 6 of the 1998 admission regulations set up an order of preferential admission to schools. This provision stated:

¹³¹⁹ Regulation 4(2)(a) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

¹³²⁰ Section 4(2)(b) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

¹³²¹ *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* 2012 (5) BCLR 537 (GSJ) 109.

¹³²² Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³²³ Section 6 of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³²⁴ Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

¹³²⁵ The Gauteng School Education Act 6 of 1995.

¹³²⁶ Regulations Relating to the Admission of Learners to Public Schools in Provincial Gazette Extraordinary 439 GN 61 of 7 January 1998. Section 11(1) read 'subject to this Act, the Member of the Executive Council may make regulations as to the admission of learners to public schools.'

¹³²⁷ Section 1 of the Regulations Relating to the Admission of Learners to Public Schools in Provincial Gazette Extraordinary 439 General Notice 61 of 7 January 1998.

‘(1) Persons whose residential address, or whose parents’ or care-givers’ work address, is located within the feeder area of a school must be given preference for admission purposes over other applicants.

(2) Persons whose residential address, or whose parents’ or care-givers’ work address, is not located within the feeder area of a school may seek admission to that school.’

Under regulation 6, a learner could lay claim to being in the feeder area of a school in two instances. First, where that learner’s place of residence was nearer to that school than any other school when measured via public route. Secondly, where their parent/care-giver’s work address was nearer to that school than any other by any public route. No consideration was given to the implications of these provisions as they relate to language of learning and teaching. For instance, it is unclear whether a child who sought tuition in Afrikaans would have fallen within the feeder zone of an English-only medium school or the nearest one offering tuition in Afrikaans. Geographical proximity was the sole basis upon which feeder areas were constructed. The 1998 admission regulations were therefore highly discriminatory against most black learners at the time who, by apartheid design, would have lived much lengthier distances from HWS.

Notably though, under the 1998 admission regulations, applicants who lived within the feeder area enjoyed equal preference to their ‘nearest school’ as those applicants whose parent’s work was located within the feeder area. A white child living in an HWA would therefore, by law, have had equal claim to falling within the feeder area of their ‘nearest school’ as that of a black child whose mother worked as a domestic in that white child’s home but who resided with her family much further away. To this extent the 1998 admission regulations provided impoverished black children, at least in theory, with an avenue for preferential entry into HWS through feeder areas.

7.4.3.2 The 2001 Gauteng admission regulations

The province’s 2001 admission regulations, which replaced the 1998 admission regulations, were introduced almost three years after the National Admission Policy came into effect.¹³²⁸

The 2001 admission regulations no longer provided a definition of a feeder area. However, feeder areas were addressed in regulation 7 which read:

¹³²⁸ Regulations Relating to the Admission of Learners to Public Schools GN 4138 in *Provincial Gazette* 129 of 13 July 2001.

‘(1) The [HoD], after consultation with representatives of [SGBs], may determine feeder zones for schools, in order to control the learner numbers of schools and co-ordinate parental preferences. Such feeder zones need not be geographically adjacent to the school or each other.

(2) If a feeder zone is created -

(a) preference must be given to a learner who lives in the feeder zone of a school, or whose parents work address is in the feeder zone;

(b) a learner who lives outside the feeder zone is not precluded from seeking admission at whichever school he or she chooses. However, access to a chosen school cannot be guaranteed;

(c) a learner who lives within the feeder zone of a school A must be referred to the neighbouring school B, if school A is oversubscribed. If school B is oversubscribed, the [HoD] must find an alternative school within a reasonable distance. If that is not possible, school A must admit the learner;

(d) the preference order of admission is: -

(i) learners whose parents live in the feeder zones, in their own domicile or their employer’s domicile; then

(ii) learners whose parents work address is in the feeder zone; and then

(iii) other learners: first come first served.

(3) A school with a specific field of study e.g. a technical school, schools of the arts must have much larger feeder zones to accommodate learners with specific aptitudes, interests or needs.’

Regulation 7 is largely a cut and paste of sections 33 to 35 of the National Admission Policy. The 2001 admission regulations therefore appear to have been an attempt to align Gauteng’s regulations on feeder zones with national policy. The 2001 admission regulations did away with the nearest school principle. Instead, HoDs were now empowered to create feeder zones. Like the National Admission Policy, the 2001 admission regulations explicitly provided for the possibility of non-contiguous zones. Therefore, the Gauteng HoD, as early as 2001, possessed the clear ability under provincial legislation to establish feeder zones with a transformative agenda in mind. This is significant given that section 5(5) of the Schools Act states that a SGBs power to determine their admission policy is subject to provincial legislation. The power of SGBs in Gauteng to determine their own feeder zones under section 5(5) was therefore subject to these 2001 admission regulations as provincial law. Consequently, the Gauteng HoD was legally empowered by the 2001 admission regulations to establish non-contiguous feeder zones at a provincial level which could oust any SGB determined zones.

Under the 2001 admission regulations, a learner whose parents lived within the feeder area would receive preferential admission over those whose parents work was located in the feeder

area. Thus, these criteria no longer carried equal weight in terms of preferential admission as was the case under the 1998 admission regulations. The Constitutional Court commented on regulation 7 of the 2001 admission regulations in *Rivonia*. The court explained that regulation 7 was to be interpreted as permissive. The HoD was therefore not compelled by the 2001 admission regulations to establish feeder zones.¹³²⁹

The 2001 admission regulations also addressed the question of how to accommodate a learner who fell within the feeder zone of a school but was rejected by their desired school as a result of capacity issues. Such a learner was to be referred to the ‘neighbouring school’ where the school to which they had initially applied lacked capacity (no definition was given as to what would constitute a neighbouring school). Where the ‘neighbouring school’ also lacked capacity, the responsibility fell on the HoD to find another school ‘within a reasonable distance’. Where this was not possible, the school to which the learner had initially applied was required to make provision for that learner.

7.4.3.3 The 2012 Gauteng admission regulations

In 2012 the MEC amended the 2001 admission regulations (2012 admission regulations).¹³³⁰ These amendments appeared to have been spurred on somewhat by the decision of the South Gauteng High Court in *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others*.¹³³¹ The Rivonia Primary matter emerged from a standoff between the Gauteng HoD and a prestigious HWS. Judge Mbha, had to engage with the question of whether the Gauteng HoD had the power to admit a learner who lived within the feeder zone of Rivonia Primary despite the school having exceeded its capacity for grade one. Judge Mbha ruled that SGB’s powers to determine their own admission policy is not impervious.¹³³² Rather, the MEC was the ultimate decision maker on whether a learner should

¹³²⁹ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) fn 46.

¹³³⁰ Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

¹³³¹ *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* 2012 (5) BCLR 537 (GSJ). The matter was decided on 7 December 2011 and the 2012 amended regulations took effect just short of nine months later (9 May 2012).

¹³³² *Governing Body of the Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others* 2012 (5) BCLR 537 (GSJ) 109.

be enrolled at a school.¹³³³ In reaching his decision, Judge Mbha noted the inextricable link between race and geography and its impact on access to schooling:

‘Although all schools are now open to children of all races, the consequences of apartheid forced removals and racially exclusive zoning mean that the majority of formerly white schools remain disproportionately white, while the majority of black schools continue to serve almost solely black children. As Langa DP noted in *City Council of Pretoria v Walker* . . . “The effect of apartheid laws was that race and geography were inextricably linked.” [Rivonia Primary School] is no exception to this pattern of continued racial disparity. It operates in a predominantly white area and continues to serve a predominantly white group of children while maintaining the lowest learner to class ratio in the area.’¹³³⁴

The 2012 admission regulations fell far short of addressing how geography and race overlap in a manner that perpetuates racial disadvantage within Gauteng’s basic education system. The 2012 admission regulations defined a feeder zone as ‘an area that a school should prioritise when admitting learners and taking into consideration learners who live close or whose parents work close to that school’.¹³³⁵ The definition thus suggested feeder zones determined with geographical proximity in mind. Regulation 4 of the 2012 admission regulations dealt extensively with feeder zones as they relate to the admission applications of ‘entry phase learners’, (those learners who sought admission at the lowest grade on offer at a school, ordinarily grades R, one or eight).¹³³⁶ Regulation 4 stated

‘Feeder Zones for Admission of Entry Phase Learners

4. (1) Subject to the National Education Policy Act . . . and other applicable laws the MEC may, by notice in the Provincial Gazette, determine the feeder zone for any school in the Province, after consultation with the relevant stakeholders have been conducted.
- (2) Until such time as the MEC has determined a feeder zone for a particular school, in relation to a learner applying for admission to that school, the feeder zone for that school

¹³³³ *Governing Body of the Rivonia Primary School and Another v Mec for Education: Gauteng Province and Others* 2012 (5) BCLR 537 (GSJ) 109.

¹³³⁴ *Governing Body of the Rivonia Primary School and Another v Mec for Education: Gauteng Province and Others* 2012 (5) BCLR 537 (GSJ) 71-72.

¹³³⁵ Regulation 1 of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

¹³³⁶ Entry phase learners are defined as

- (i) learners seeking to be admitted to Grade ‘R’;
- (ii) learners seeking to be admitted to Grade 1 (irrespective of whether or not the school at which they seek admission offers teaching and learning at a level below Grade 1);
- (iii) learners seeking to be admitted to Grade 8;
- (iv) in the case of schools, which do not commence at Grade ‘R’, Grade 1, or Grade 8, learners seeking to be admitted to such schools in the lowest grade in the school;

Regulation 1 of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

will be deemed to have been determined so that a place of residence or work falls within the feeder zone, if:

a) relative to that place of residence or place of work, the school is the closest school which the learner is eligible to attend, or

b) that place of residence or place of work for that parent is within a 5 km radius of the school.

(3) The MEC may, by notice in the Provincial Gazette, designate one or more primary schools as feeder primary schools for a particular high school.

(4) Until such time as the MEC has designated one or more primary schools as feeder primary schools for a particular high school, in relation to a learner applying for admission to that high school, any primary school to which that high school is the closest high school which the learner is eligible to attend shall be deemed to have been designated as a feeder primary school for that high school.

(5) Subregulations (2) and (4) shall not apply to specialist schools, technical schools, agricultural schools or industrial schools.

Regulation 4(1) of the 2012 admission regulations shifted the power to determine feeder zones from the HoD to the MEC. In so doing, the regulations departed from the National Admission Policy which empowers HoDs to establish these zones. Whereas the HoD had been required to consult with SGBs before establishing feeder zones, the MEC's obligation to consult was much broader and included other 'relevant stakeholders'. The 2012 admission regulations made no mention of non-adjacent feeder zones. Instead, the regulations introduced the concept of a default feeder zone regime. This regime was to operate until the MEC determined feeder zones. Under regulation 4(2)(a) of the 2012 admission regulations, a child would be considered to be within a deemed feeder zone where their home or parent's work was located nearer to the specific school than any other school the child was able to attend. No mention was made as to how this distance was to be gauged. Sub-regulation 4(2)(b) introduced the 5km rule. Under this rule, any child who resided or whose parent worked within a 5km radius of the school was considered as falling within the deemed feeder zone. Consequently, the only criteria used in the establishment of interim feeder zones was the geographical nearness of that learner's place of residence or their parents' place of work in relation to the school. Whereas specialist or technical schools were previously required to have larger feeder zones, under the 2012 amended regulations these schools would have no feeder zones at all.

Regulation 4 was required to be read with regulation 7. The latter regulation concerned the level of preference to be afforded to entry phase learners who fell within the feeder zone of their prospective school. Regulation 7 stated:

(1) For the purposes of entry phase admissions to a primary school, the school must keep a waiting list A and a waiting list B.

(a) Applicants for admission to a primary school will be entered on the waiting list A if-

- (i) their place of residence is within the feeder zone of the school;
- (ii) at least one of their parent's place of employment is within the feeder zone of the school; or
- (iii) they have a sibling attending the school.

(b) All applicants for admission to a primary school who do not qualify for the waiting list A-

- (i) must be entered on the waiting list B; and
- (ii) must be advised in writing by the school that they should seek admission at a school for whose waiting list A they qualify.

(1) For the purposes of entry phase admissions to a high school, the school must keep a waiting list A and a waiting list B.

(a) Applicants for admission to a high school will be entered on the waiting list A if-

- (i) their place of residence is within the feeder zone of the school;
- (ii) at least one of their parent's place of employment is within the feeder zone of the school; or
- (iii) they have a sibling attending the school.

(b) Applicants for admission to a high school who do not qualify for the waiting list A will be entered on the waiting list B.

(2) All applicants for admission to a school must be entered on the waiting list for which they are eligible, in the order in which their applications were received by the school.

(3) All available places at the school must be filled:

- (a) from waiting list A, in the order of the position of the applicant on waiting list A; or
- (b) if places remain after all applicants on waiting list A have been offered places, from waiting list B, in the order of the position of the applicant on waiting list B.

(4) Learners who do not apply within the admission period have no right to the preferential placement as contemplated in subregulations (1) and (2).'

Regulation 7 required that primary schools and high schools keep two lists of learners awaiting entry phase admission, waiting list A and B. A school was required to place a learner on waiting list A where that learner stayed or at least one of their parent's worked within the feeder zone or where they had a sibling already enrolled there. The 2012 admission regulations therefore introduced a new criterion for preferential admission (the sibling rule). All learners who did not qualify for preferential admission were to be placed on waiting list B. The applications of those learners who stayed within the feeder zone, had a parent who worked within the zone or a sibling already in attendance were weighted equally. The deciding factor was the order in

which the applications were received, with earlier applicants favoured over later ones. A learner who failed to apply during the admissions period lost their right to preferential admission. Only once all learners on waiting list A were accommodated, would those on waiting list B be considered on a first come first serve basis. The 2001 admission regulations had made provision for what was to occur where a learner lived within the feeder zone but was denied admission due to capacity. However, the 2012 amended regulations made no mention of this.

Regulation 4(4) of the 2012 amended regulations also introduced the notion of a feeder primary school. A feeder primary school was defined as a ‘feeder primary school designated for a high school in accordance with regulation 4(3) or deemed to have been so designated by the MEC’. Essentially, a school was a feeder primary school because the MEC classified it as such or, in the absence of such classification, because the high school concerned was the nearest one to that primary school which a particular learner was eligible to attend. However, the regulations failed to explain the significance to be attached to the feeder primary school label when processing admissions applications.¹³³⁷ Presumably any learner attending a feeder primary school of a particular high school would be afforded some level of preference when applying to that high school.

Regulation 4 formed part of the subject matter of a legal attack brought by FEDSAS against several provisions of the 2012 admission regulations. This litigation ultimately culminated in a Constitutional Court decision.¹³³⁸ FEDSAS requested that the Constitutional Court order the MEC to establish feeder zones under regulation 4(1). This regulation stated that the ‘MEC may. . . determine the feeder zone for any school in the [p]rovince’. EE, as amicus, argued that the MEC be compelled to create feeder zones in a manner that furthers societal transformation.¹³³⁹ The court adopted a textual approach in finding that regulation 4(1) imposed an obligation on the MEC to establish feeder zones. The court explained that the text itself had conceived of the existing zoning arrangement as only temporary.¹³⁴⁰ An alternative interpretation, the court

¹³³⁷ The Collins Dictionary defines a ‘feeder primary school’ as ‘a junior school whose pupils go to a specific secondary school’. Collins [Feeder school definition and meaning | Collins English Dictionary \(collinsdictionary.com\)](https://www.collinsdictionary.com) (Accessed 3 January 2022).

¹³³⁸ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC). See section 6.3.4 above.

¹³³⁹ *Equal Education, Heads of Argument in Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* (14 April 2016) 32.

¹³⁴⁰ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 37.

explained, could forever deny stakeholders a chance to participate in school zoning.¹³⁴¹ This is because of the possibility of the MEC choosing never to use section 4(1).

Subsequent to the FEDSAS judgment, the GDoE assembled a task team comprising of department officials and external stakeholders (the GDoE's feeder zone task team). These stakeholders were the spatial planning division of the Premier's Office, trade unions, governing body associations,¹³⁴² the Municipal Demarcation Board, Statistics South Africa, EE and the Gauteng City-Region Observatory (GCRO). The GCRO is a collaboration involving the University of Witwatersrand, the University of Johannesburg, the Gauteng provincial government and organised local government in the province (SALGA-Gauteng).¹³⁴³ The GDoE's feeder zone task team was tasked with advising the department in the drawing up of a new feeder zone policy in compliance with the court order.¹³⁴⁴ On 30 July 2018, the GDoE released the draft amendments to the 2012 admission regulations.¹³⁴⁵ In September of that same year, the GDoE released a feeder zone policy which presents a framework for the process of determining feeder zones for Gauteng schools.¹³⁴⁶ The preamble to the policy explains that its purpose is to provide 'for how the Department will utilise all the data collected during the technical work process to inform the delimitation of Feeder Zones'. About two months after the publication of the feeder zone policy, the Gauteng HoD, through provincial notice, established feeder zones for 2067 Gauteng schools.¹³⁴⁷ In early 2019, the GDoE introduced amendments to its admission regulations.¹³⁴⁸ The 2019 admission regulations contain extensive

¹³⁴¹ *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* 2016 (8) BCLR 1050 (CC) 36 and 37.

¹³⁴² FEDSAS, the National Association of School Governing Bodies (NASGB) and the Governing Body Foundation (GBF).

¹³⁴³ Gauteng Department of Education *Annexure A – A process report* 1.

¹³⁴⁴ Gauteng Province Department of Basic Education 'Media statement, MEC Lesufi media briefing on the status of Online Learner Applications' (13 July 2016). Gauteng Province Department of Basic Education 'Media Statement, MEC Lesufi announcement on feeder zones' (14 November 2018).

¹³⁴⁵ Draft Amendments to regulations relating to the admission of learners to public schools in Provincial Gazette Extraordinary, 791 GN 209 of 30 July 2018.

¹³⁴⁶ Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. The department was first granted an extension from the Constitutional Court of 18 months, after it requested this on the basis that it had not realised the '*complexity of the task*'. Gauteng Province Department of Basic Education 'Media Statement, MEC Lesufi announcement on feeder zones' (14 November 2018). Deployment of a Web-based Feeder Zone solution to all Gauteng Public Ordinary Schools, Circular 10 of 2017 (4 December 2017).

¹³⁴⁷ Determination of Final Feeder Zones by the Head of Department of Education, Provincial Notice 1232 in *Provincial Gazette* 339 of 15 November 2018 (Gauteng).

¹³⁴⁸ Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

changes to the provisions relating to feeder zones. These regulations require that feeder zones be determined in line with the GDoE's feeder zone policy.¹³⁴⁹

7.4.3.4 The GDoE's feeder zone policy

The GDoE's feeder zone policy is intended to, amongst others, explain what principles the GDoE will employ when establishing feeder zones.¹³⁵⁰ Notably, the policy does not espouse transformation and redress within public education as a particular objective or driving force behind its introduction.

7.4.3.4.1 Principles for the determination of feeder zones

The GDoE's feeder zone policy sets out seven principles which the department must consider when determining the most appropriate policy options to implement when designating feeder zones.¹³⁵¹ The first principle to guide the zoning process is listed as 'community ownership of schools' and focuses on how vested a community is in the local school.¹³⁵² That is, how well rooted a school is in the community where it is physically based. Presumably, where a school is strongly rooted in the local community this principle would favour a feeder zone that encompasses that local community. Consequently, where residents of HWS largely enrol their children in the local school and are closely involved with the school this principle, it appears, would benefit those residents. This is because it would encourage zoning within close proximity to a school to avoid local community ownership. This policy option, if pursued, would largely sustain spatial injustices in access to education as those 'outside' of the local community are more likely to remain outside of the feeder zone.

The second and third principles which the GDoE must consider are closely related. The first concerns 'accessibility to schools', and the second 'learner safety'. The second and third principles, like the first, favour communities within closer proximity of schools. Fortunately, the standard of education on offer is a fourth principle which must inform the establishment of feeder zones.¹³⁵³ Quality of education provisioning is measured on the basis of learner output.

¹³⁴⁹ Regulation 4(4) of the Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

¹³⁵⁰ Section 6.1(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁵¹ Sections 10.1 and 10.2 of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁵² Section 10.1.1(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018 states.

¹³⁵³ Section 10.1.1(d) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

In particular, learner assessment results on standardised testing. However, the fourth principle does not speak to racially equitable access to a quality basic education. This, however, appears to be the intention of the fifth principle. The fifth principle is titled ‘transformation issues’ and purports to focus on issues of transformation as they relate to the establishment of feeder zones. This principle reads:

‘d) Transformation issues

(i) Access

This principle ensures that learners will have access to quality education.

(ii) Redress

This principle is based on addressing injustices of the past.

(iii) Equity

This principle is based on ensuring fairness by treating all learners in the same way and striving towards affording the same learning opportunities.¹³⁵⁴

The fifth principle is made up of three sub-principles. The first of these speaks of ‘access to quality education’ for learners. The second is titled ‘redress’. The reader is told that the principle has its origins in the need to address past injustices. Disappointingly though, no substantive details are given as to what this principle entails. In particular, what factors ought to inform considerations around the use of feeder zones as a mechanism for transformation. This is contrary to the policy’s aim to ‘explain’ the principles which are employed when undertaking school zoning.¹³⁵⁵ This silence on a matter concerning the advancement of racially equitable access to schooling is deafening in the context of a province in which residence and race lines still largely align.¹³⁵⁶

The third sub-principle is labelled ‘equity’ but reads more like a vision statement than a practical principle. This is especially when compared with the other six principles. The sixth principle is named, ‘cost to parents and/or guardians’.¹³⁵⁷ This principle relates to the extent of expenses parents/guardians must incur by virtue of enrolling their children in schools further afield from where the family resides. The costs principle runs in the same vein as principles

¹³⁵⁴ Section 10.1.1(d)* of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁵⁵ Section 6.1(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁵⁶ McClinton Griffith F ‘Intercensal changes in measures of residential segregation among population groups in Gauteng, South Africa, 1996-2001’ (2013) 14:1 *The Southern African Journal of Demography* 47, 48 and 52.

¹³⁵⁷ Section 10.1.1(e)* of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. This section states that the costs to parents and/or guardian(s) principle ‘considers whether schools are located close to learners, thereby minimising travelling time to school and reducing travel costs for parents.’

two ('accessibility') and three ('learner safety',) in that it focuses on the adversities which arise when learners stay lengthy distances from their schools. Whilst principles two and three consider how these distances impact on learners' education and safety, principle six examines the impact on parents. This includes the length of time parents may expend when taking and fetching their children from school and the amount of money (be it through public transport or otherwise) parents would have to exhaust on their child's travel expenses. Presumably lengthy commutes and high travel costs favour feeder zones within closer proximity to schools. Is it a reality that travel costs to schools further afield would be too much for many black families to afford. Principle six is therefore highly relevant to the school zoning process. However, some parents living in Gauteng's black townships willingly shoulder the expense of costly school commutes so that their children can access what they perceive to be a better education in areas further away.¹³⁵⁸ Gauteng's feeder zone policy fails to recognise the great sacrifices that these impoverished black families are prepared to endure to ensure their children can access a quality education. It would therefore be greatly unfair to have the costly burden of school commute be motivation for placing their children beyond the feeder zones of better off schools.

The seventh and final principle concerns 'efficiency' and speaks to 'the optimal utilisation of physical and human resources to serve the best interest of the learner in support of broader access, equity and transformation.'¹³⁵⁹ 'Efficiency' is therefore geared directly towards achieving racially equitable access to education.

The GDoE's feeder zone policy also discusses a 'feeder zone decision matrix' that the GDoE will construct when designating feeder zones and provides an annexure (replicated below) illustrating what such a matrix should look like.

¹³⁵⁸ Machard D and McKay TM 'School choice, school costs: the case of inner city Johannesburg private schools (2015) 47:2 *Acta Academica* 139 and 143.

¹³⁵⁹ Section 10.1.1(f)* of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

ANNEXURE A: THE FEEDER ZONE DECISION MATRIX

The table below rates the policy options against the principles with a view to selecting the best possible option. Ratings are from 1 to 3 as follows:

3 = Good	2 = Average	1 = Poor
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No	Policy Option	Community Ownership of Schools	Accessibility to schools	Learner Safety	Quality of Education	Transformation Issues	Economical	Efficiency	Total 21
1.	Option One: Township Establishment								
2.	Option Two: Residential Areas around the School								
3.	Option Three: Clusters								
4.	Option Four: Free for All								
5.	Option Five: 30 km radius								

Figure 14

Although the ‘decision matrix’ refers to five potential policy options that the department can pursue when zoning, the feeder zone policy itself only fully explains and endorses two.¹³⁶⁰ These are ‘Residential Areas around the School’ (option two),¹³⁶¹ and, ‘Clusters’ (option three).¹³⁶² Both are discussed in more detail shortly.

Part of this ‘decision matrix’ will require that each of the seven principles discussed above receives a rating from one to three.¹³⁶³ The policy options that tally the highest cumulative score are the ones that the department must deliberate on for implementation. Notably, the fifth (transformation) and seventh (efficiency) principles are the only that speak to school zoning as a transformative measure. Whereas principles two (accessibility), three (learner safety) and six (costs to parents/guardians) directly favour feeder zones within close proximity of a school. The demand for transformation is therefore less likely to find itself on the final agenda when

¹³⁶⁰ Section 10.3 of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. The decision of which option to follow will be grounded in the criteria as well as how close together the schools are situated.

¹³⁶¹ Section 10.3(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁶² Section 10.3(b) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁶³ Rating 1 is where ‘the zone promotes the principle poorly or not at all’, rating 2 is where ‘the zone promotes the principle moderately’, and rating 3 indicates that ‘the zone promotes the principle strongly.’

the GDoE must deliberate on which feeder zone policy choices to ultimately implement when revising feeder zones.

Policy option two concerns feeder zones in respect of individual schools. Such zones are based on the specific school, the total size of the school going population per sub-place and the residential areas in the school’s immediate surrounds.¹³⁶⁴ These zones need not necessarily be adjacent to the school or each other.¹³⁶⁵ This policy option seems to entail a feeder zone which would ordinarily only encompass certain neighbourhoods within the immediate surrounds of the school. Option two appears to favour those learners who live within close proximity to the school. Simply following such an approach would perpetuate racial inequalities as it will continue to frustrate impoverished black learners’ opportunities to access HWS in Gauteng. Below is a depiction (extracted from the GDoE’s feeder zone policy) of how a policy option two feeder zone would appear.

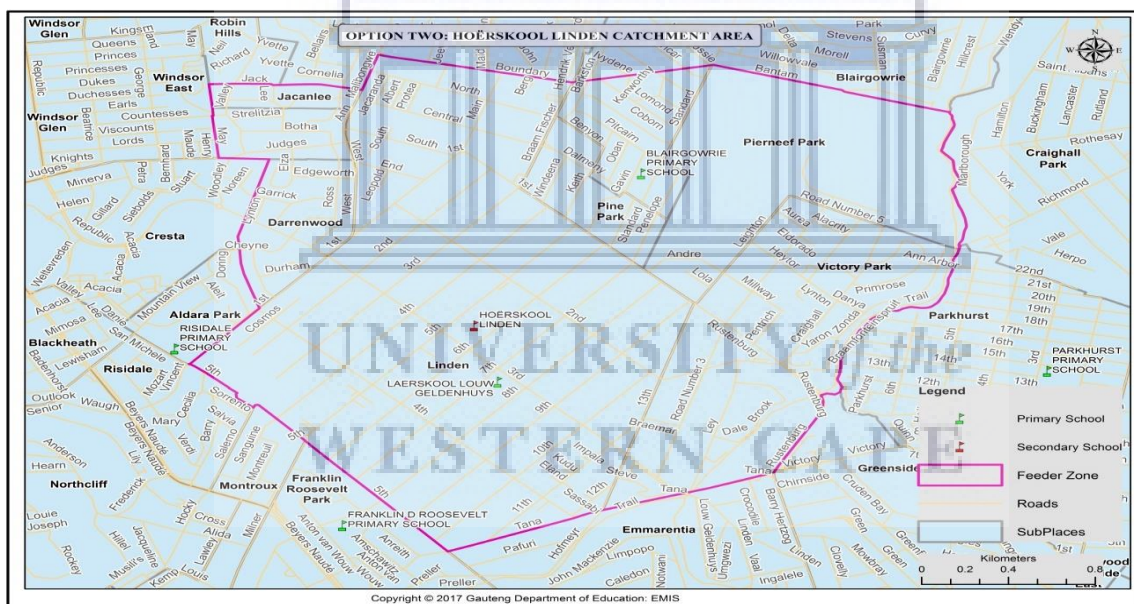


Figure 15

Option three (‘clustered’ feeder areas) is to be pursued where schools are located close to each other, and a larger zone is drawn to capture a greater geographical space which then forms the

¹³⁶⁴ Section 10.3(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. This section states ‘[i]ndividual School’s Feeder Zone – Residential Areas around the School – this feeder zone is based on the school and the sum of the school going population by sub-place and the residential areas around the school. This option could also be non-contiguous (two or more separate geographic areas that are not connected).’

¹³⁶⁵ Section 10.3(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

feeder zone for all of the schools based within it.¹³⁶⁶ Below is a depiction (extracted from the GDoE’s feeder zone policy) of how a clustered feeder zone would appear.

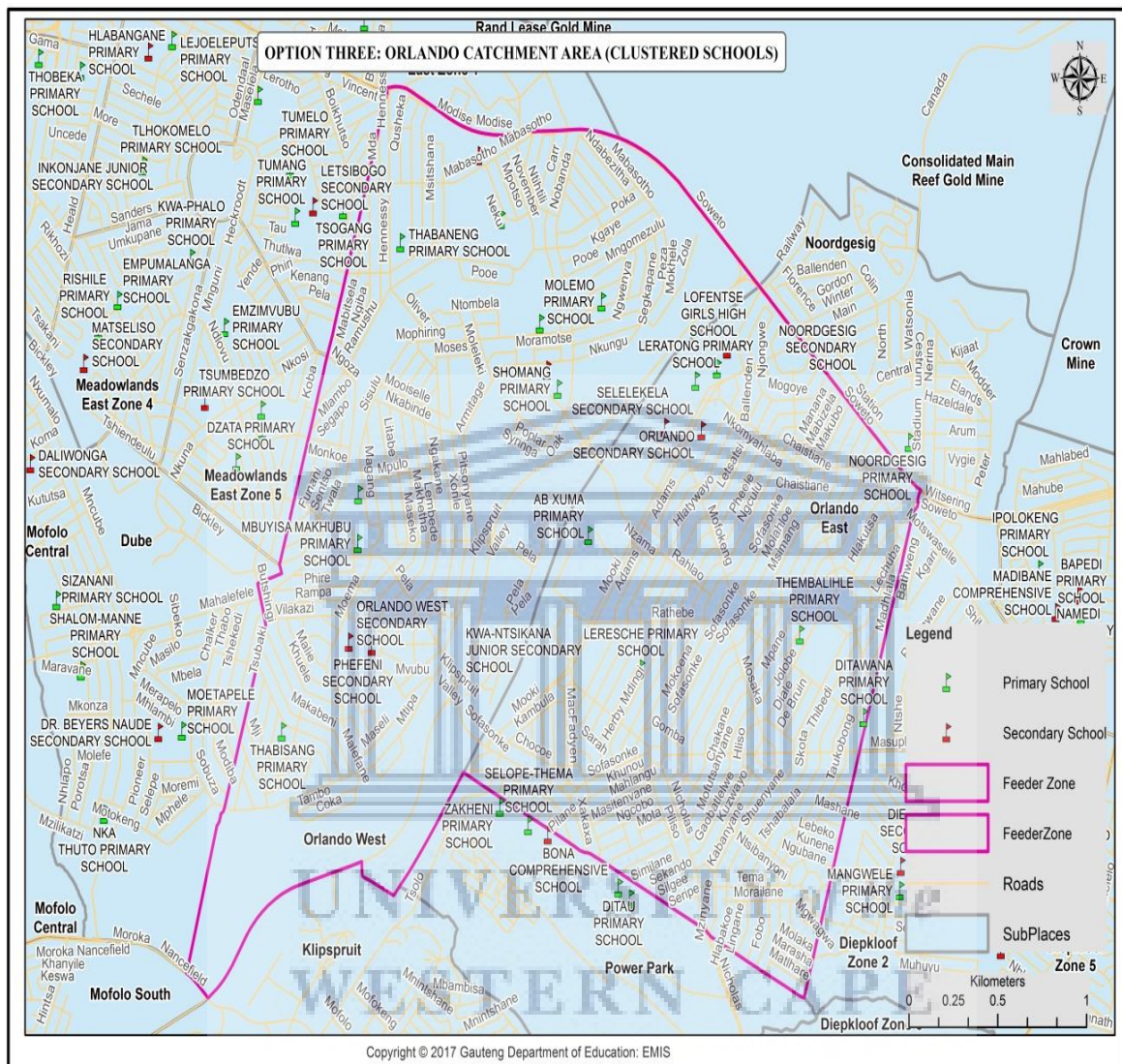


Figure 16

Option three involves contiguous zoning. It therefore favours learners living within the immediate surrounds of the schools which form part of the cluster.

¹³⁶⁶ Section 10.3(b) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. This section explains that these ‘feeder zones is based on a number of schools being clustered together to service a large geographic area. This approach will be adopted when schools are in close proximity to each other, and it is difficult to determine individual feeder zones due to e.g. the Language of Learning and Teaching.’

7.4.3.4.2 Criteria for designating feeder zones

The GDoE's feeder zone policy further sets out certain objective criteria (affiliated with the seven principles discussed earlier) which the GDoE must also use when designating feeder zones. The first is labelled 'geographical and spatial transformation' and states:

- (i) In terms of the National Admission Policy, feeder zones should be geographically determined but need not be geographically adjacent to the school or each other. This will take into consideration the proximity of the learner's place of residence to the school or the parent's place of work. Consideration will also be given to the sub-place populations dynamics of the area.
- (ii) Spatial transformation also needs to be considered in the process of delimiting a feeder zone, this entails considering Township/Suburban Establishment (Current and new), as well as informal settlements.'

The first criterion seems to suggest the potential of achieving 'geographical and spatial transformation' through the use of non-adjacent feeder zones. However, it is made clear that the proximity of a learner's place of residence or parent's place of work remains relevant to determining the shape of a feeder zone. The first criterion states that spatial transformation must be factored into school zoning. However, only one line is provided in elaboration of how this must take place: 'this entails considering Township/Suburban Establishment (Current and new), as well as informal settlements.' The specific mention of townships and informal settlements might be an acknowledgement that 'geographical and spatial transformation' would require incorporating historically black areas and low-income underdeveloped areas in general when establishing feeder zones for HWS. Overall, however, the GDoE's feeder zone policy provides very little guidance on what 'geographical and spatial transformation' as a zoning criterion would, in substance, entail and one can therefore only broadly speculate. Other criterion listed include the 'capacity of the school' and, 'language and curriculum offerings'.

A further criterion is simply named 'non-contiguous', and concerns instances where the learner population surrounding a school is insufficient to ensure full use of that school. In these circumstances the 'rule will apply' that two or more non-adjacent geographical areas be designated as a feeder area.¹³⁶⁷ This is clearly an attempt to ensure the maximum use of resources. However, it is highly concerning that the GDoE's feeder zone policy may be

¹³⁶⁷ Section 10.2(e) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. This section states '[t]his rule will apply in cases where the learner population around the school is not sufficient to ensure a maximum utilisation of the school, then two or more separate geographic areas which are not connected may be identified as a feeder zone.'

interpreted to mean that it is only under these conditions where such non-contiguous zoning may occur. Interestingly, a further criterion was flighted in the GDoE's Task Team Framework for the Determination of Feeder Zones (GDoE task team framework).¹³⁶⁸ This framework informed the drafting of the GDoE's feeder zone policy and the province's 2019 admission regulations. The additional criterion concerned the use of quotas to ensure enrolment opportunities for out of zone learners.¹³⁶⁹ The GDoE's task team framework reads:

'Consideration will also be given to the introduction of annual quotas for admission in relation to "in feeder zone" applications and "out of feeder zone" applications. The [HoD] will determine these quotas after considering the demand from local areas and ensuring that learners from local areas are not disadvantaged.'¹³⁷⁰

The use of quotas for out of zone learners, had it materialised in the policy, could have provided a meaningful avenue for impoverished black learners to access the province's HWS. Quotas would have, by their very nature and out of necessity, disadvantaged some 'learners from the local areas.' It therefore seems likely that certain forces within the GDoE's feeder zone task team would have opposed such an inclusion. This may be the reason why it was ultimately omitted.

The GDoE's feeder zone policy further lists information which must provide the foundation upon which a model for fixing school boundaries is designed. These include existing feeder zones, school infrastructure, population dynamics, enrolment trends and learner performance information. Again, it is unclear how learner performance is intended to influence school zoning. Notably, no criteria are included that considers the socio-economic circumstances of the schools to be zoned. Examples that come to mind would be, which quintile (socio-economic ranking) the school falls into, whether it is fee or no-fee charging and the historical status of the school. These factors would have been relevant for purposes of engaging in transformative zoning as it allows for the identification of more privileged schools. It is the feeder zones of these better off schools that require more deliberate and inclusive school zoning to accommodate some impoverished black children.

¹³⁶⁸ The purpose of the Task Team Framework was to lay out a consultation process which was to be conducted by relevant stakeholders before making any decisions regarding the establishment of feeder zones in the province. Section 1.10 of the Gauteng Department of Education Task Team Framework for the Determination of Feeder Zones.

¹³⁶⁹ Section 7.3 of the Gauteng Department of Education Task Team Framework for the Determination of Feeder Zones.

¹³⁷⁰ Section 7.3 of the Gauteng Department of Education Task Team Framework for the Determination of Feeder Zones.

7.4.3.4.3 Practicalities of the process

The GDoE's feeder zone policy explains that once a school zoning model has been selected there will be a mapping of feeder zones for each school.¹³⁷¹ Schools will learn about their feeder zones via notice from the GDoE.¹³⁷² These zones will be made available through the department's website.¹³⁷³ Such transparency and accessibility is to be applauded given how difficult obtaining information on SGB determined feeder zones in the province was prior to this policy.¹³⁷⁴ Under the policy, School districts must arrange meetings with principals to talk about procedures regarding feeder areas and the spread of tentative zones.¹³⁷⁵ At school level, SGBs are tasked with co-ordinating consultation with the school.¹³⁷⁶ Schools are given 30 days to provide input on suggested feeder areas.¹³⁷⁷ This input must be considered before feeder zones are finalised.¹³⁷⁸ Unfortunately, the GDoE's feeder zone policy does not provide for broader public involvement in the delineation of zones. As discussed in the previous chapter, the parent body and SGB of fee-paying schools have a vested interest in utilising resources to further the educational rights of those learners already enrolled. This would be so even where it comes at the expense of 'outside' learners. Limiting public involvement to the directly affected school alone allows for an extremely skewed perspective on how an individual school's feeder zone ought to be designed. Further, it is contrary to South Africa's spirit of participatory democracy.¹³⁷⁹ The policy should therefore have included other stakeholders so that the zoning process can be better informed and more effective. Interestingly, the possibility of requiring public hearings before establishing feeder zones was raised during the GDoE's

¹³⁷¹ Section 10.5(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁷² Section 10.5(c) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁷³ Section 10.5(b) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018. Feeder zone maps can be retrieved from [Gauteng.gov.za](https://education.gauteng.gov.za/pages/feeder-zone-maps.aspx) 'feeder zone maps' available at <https://education.gauteng.gov.za/pages/feeder-zone-maps.aspx> (accessed 9 November 2022).

¹³⁷⁴ Joubert R 'Policy-making by public school governing bodies: Law and practice in Gauteng' (2009) 41:2 *Acta Academica* 240 read with 241 and 242. Reasons provided by schools for not sharing this information included that these were 'private documents'.

¹³⁷⁵ Section 10.6(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁷⁶ Section 10.6(b) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁷⁷ Section 10.6(c) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁷⁸ Section 10.6(d) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁷⁹ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) 101-145.

task team process.¹³⁸⁰ Such hearings (although necessary) would have been a resource intense, timeous and arduous exercise and this may be why it was ultimately left out as a requirement.

Under the GDoE's feeder zone policy, feeder zones must be published one year before their scheduled implementation.¹³⁸¹ The policy also provides the responsible GDoE officials with detailed guidance around planning and timeframes,¹³⁸² and explains that appeals must take place in accordance with the 2019 admission regulations.¹³⁸³ The policy further provides for a regular review process. This is to happen every three years, but earlier review is to occur where 'learner and population demographics' within the feeder area have undergone changes.¹³⁸⁴ The existing feeder zones were declared by the HoD in 2018 but were first applied in relation to the 2020 academic year. According to the mandatory review timeline, these feeder zones should come under review this year.

7.4.3.4.4 Distinguishing between the published feeder zones and the 30km application radius

On the 15 November 2018, the Gauteng MEC for Education (acting under section 105 of the Gauteng School's Act) delegated the function to establish feeder zones to the Gauteng HoD.¹³⁸⁵ This delegation is recorded in a provincial notice.¹³⁸⁶ The HoD, acting under this same notice, published feeder zone determinations for 2067 schools,¹³⁸⁷ and gave dissatisfied SGBs 30 days to appeal to the MEC challenging their assigned zone.¹³⁸⁸ Commenting on these developments, then MEC Panyaza Lesufi tweeted '[t]oday we are officially releasing the first post-apartheid education feeder zones that will finally bury apartheid spatial (urban) planning in our education

¹³⁸⁰ Gauteng Department of Education Draft Consultation Guideline on Determining Feeder Zones.

¹³⁸¹ Section 10.7(a) of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁸² Annexure B to the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁸³ Section 10.8 of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁸⁴ Section 10.9 of the Gauteng Department of Education Policy for the Delimitation of Feeder Zones for Schools of 18 September 2018.

¹³⁸⁵ Mabasa N 'Wider net to be cast for access to public schools' 15 November 2018 *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2018-11-15-wider-net-to-be-cast-for-access-to-public-schools/> (accessed 12 December 2018).

¹³⁸⁶ Determination of Final Feeder Zones by the Head of Department of Education in Provincial Notice 1232 *Provincial Gazette* 339 of 15 November 2018 (Gauteng).

¹³⁸⁷ Determination of Final Feeder Zones by the Head of Department of Education in Provincial Notice 1232 *Provincial Gazette* 339 of 15 November 2018 (Gauteng).

¹³⁸⁸ Section 4.1 of the Determination of Final Feeder Zones by the Head of Department of Education in Provincial Notice 1232 *Provincial Gazette* 339 of 15 November 2018 (Gauteng).

system.’¹³⁸⁹ Of the 2067 schools, 334 contested their zones and about 90% were successful. For those who succeeded adjustments were recommended and implemented accordingly.¹³⁹⁰ Speaking at a press briefing on 10 March 2019, MEC Lesufi explained that

‘[t]he remaining 10% of schools unfortunately misinterpreted their feeder zones, confusing the 30km application radius with the feeder zone determination, which was not provided for in terms of the criteria for determining feeder zone. The confusion was swiftly resolved’.¹³⁹¹

However, the MEC failed to explain what he meant by the ‘30km application radius’ and how this was to be distinguished from the feeder zone determination. The GDoE task team framework (which formed the basis upon which the GDoE’s feeder zone policy was shaped) differentiates between a feeder zone and an application zone for purposes of facilitating ‘the placement of learners in a fair and transparent manner.’¹³⁹² The framework explains that the application zone will stretch for 30km in every direction from a school and is inclusive of the feeder zone. All learners living within this 30km radius will be considered as falling within the application zone and will be eligible for preferential admission on that basis. However, first their applications must yield to those learners living within the feeder zone, next to those who have a sibling at the school and, finally to learners whose parents work within the feeder zone. Only where space remains after these other three categories have been accommodated, will their applications take preference over those living beyond the 30km application radius.¹³⁹³ As will be discussed shortly, the 2019 admissions regulations concretised the preferential hierarchy conceived of in the GDoE’s task team framework.

There seems to be widespread confusion regarding the implementation of the 30km application radius emanating from various quarters. Some in the media, reporting on the publication of the 2018 provincial notice, incorrectly claimed that the Gauteng MEC had expanded the province’s

¹³⁸⁹ Gous N ‘Panyaza Lesufi proclaims end to apartheid’s education urban planning’ *Times Live* 15 November 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-11-15-panyaza-lesufi-proclaims-end-to-apartheids-education-urban-planning/> (accessed 11 November 2021).

¹³⁹⁰ Gous N ‘Panyaza Lesufi proclaims end to apartheid’s education urban planning’ *Times Live* 15 November 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-11-15-panyaza-lesufi-proclaims-end-to-apartheids-education-urban-planning/> (accessed 23 August 2018).

¹³⁹¹ News24Wire ‘New Gauteng school feeder zones ensure transformation and fairness – Lesufi’ 11 March 2019 *Polity* available at <https://www.polity.org.za/article/new-gauteng-school-feeder-zones-ensure-transformation-and-fairness--lesufi-2019-03-11> (accessed 30 December 2021). ENCA ‘Watch: Gauteng education MEC sheds light on school zoning policies’ *ENCA* 10 March 2019 available at <https://www.enca.com/news/live-video-gauteng-mec-clarifies-school-zoning-policies> (accessed 8 November 2022).

¹³⁹² Section 8.4 (b) of the Gauteng Department of Education Task Team Framework for the Determination of Feeder Zones.

¹³⁹³ Section 8.4(c) of the Gauteng Department of Education Task Team Framework for the Determination of Feeder Zones.

existing 5km radius feeder zone (under its 2012 admission regulations),¹³⁹⁴ to a 30km one.¹³⁹⁵ However, at no point had the MEC or HoD made any formal determination to this effect. The GDoE's feeder zone policy also does not provide as much. This incorrect understanding of the existence of a 30km radius feeder zone for Gauteng schools was subsequently taken up by some in civil society, academia and even government.¹³⁹⁶

The then MEC Lesufi, speaking on talk radio a few days after the HoD had published the 2067 feeder zones stated:

'The feeder zone system . . . will allow schools also to recruit from all sections of society. Take Waterkloof here in Pretoria it's just a stone's throw away from Mamelodi, but children from Mamelodi don't have access to that school and vice versa, children of Waterkloof don't have access to Mamelodi. We need to create a society where our children can be free to choose which school they want to.'¹³⁹⁷

The radio journalist then questioned the MEC on 'what happens to that 5km radius because that was used as a criterion to determine which zones should be feeder zones for schools?' In response, the MEC explained:

'Well even though we are proposing that we broaden it . . . the reality is that those who are closest to the school will get first access, but it's better, it's better that you don't get access on the basis that the school is full rather than not get access on the basis that you are born in the wrong area. And that's what we want to discourage. If a school is full it is full, but don't say I can't take you because you are supposed to be in this school not in this school. . .'¹³⁹⁸

¹³⁹⁴ Regulation 4(2)(b) Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012. Under this rule any child who resided or whose parent worked within a 5km radius of the school was considered as falling within the feeder zone.

¹³⁹⁵ Richie G 'Gauteng school feeder zones expanded to 30km' *Mail & Guardian* 16 November 2018 available at <https://mg.co.za/article/2018-11-16-00-gauteng-school-feeder-zones-expanded-to-30km/> (accessed 2 January 2021). Mabasa N 'Wider net to be cast for access to public schools' 15 November 2018 *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2018-11-15-wider-net-to-be-cast-for-access-to-public-schools/> (accessed 12 December 2018).

¹³⁹⁶ Cooper-Bell T & Stuurman C 'Learner admissions' in Veriava F and Kathrada T *Basic Education Rights Handbook: Education Rights in South Africa* 2 ed (2022) 114. Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 200 and 2001. Arendse L Inequality in the public education system: The role of the South African courts in effecting radical transformation (unpublished LLD thesis, University of Pretoria, 2020) 225. Statistics South Africa *Gender Series Volume VI: Education and Gender, 2009-2018* (2020) StatsSA. AfriForum statement 'Newly-published feeder zones for Gauteng schools will cause major discomfort in 2020 school year' *Polity* 16th November 2018 available at <https://www.polity.org.za/article/afriforum-newly-published-feeder-zones-for-gauteng-schools-will-cause-major-discomfort-in-2020-school-year-2018-11-16> (accessed 18 December 2018).

¹³⁹⁷ Zama Z 'We need to have one education system' – Panyaza Lesufi on school feeder zones' *Cape Talk* 19 November 2018 available at <https://www.capetalk.co.za/articles/327709/we-need-to-have-one-education-system-panyaza-lesufi> (accessed 8 November 2022).

¹³⁹⁸ Zama Z 'We need to have one education system' – Panyaza Lesufi on school feeder zones' *Cape Talk* 19 November available at <https://www.capetalk.co.za/articles/327709/we-need-to-have-one-education-system-panyaza-lesufi> (accessed 8 November 2022). See also MEC Lesufi interviewed by ENCA journalist who

The MEC's response is inaccurate in that it has always been the case under national and provincial law that children can apply to whichever school of their choosing. Schools were never allowed to reject a learner on the basis of place of residence where all other criteria in their admission policy had been applied and space was still available. If capacity remained, these learners had to be accommodated on a first come first serve basis. The implementation of feeder zones which centre exclusively on geographic proximity has the effect that those living nearby a desired school crowd out opportunities for learners living further away to enrol there. Impoverished black children who live outside of the feeder zone but within the 30km application radius of the school cannot be accommodated in any event as there is no space to accommodate them. A school zoning system which centres on favouring learners who live closer to good schools or those whose parents work closer to such schools fails to address the racially disparate impact of feeder zones. Apartheid urban spatial planning and its impact on Gauteng's public education system is, contrary to the then MEC's claims, still very much alive and kicking.

Even if the GDoE had pursued a policy in which all schools had a 30km radius feeder zone, it is doubtful that such a technique would have had any meaningful impact on facilitating more racially equitable access to schooling in the province. A blanket 30km zoning policy is tantamount to having no feeder zones at all. Such an approach comes up against the same difficulties, discussed earlier in this chapter, faced by the KZNDoE's proposal of eliminating feeder zones altogether. Simply expanding feeder zones so drastically would in reality allow for a first-come, first-served approach to dictate Gauteng's public education system. However, the province suffers from a significant gap not only in the number of good schools versus poorly performing ones available, but also in the degree of deviation in the standard of education they provide. First-come, first-served, in reality serves to provide the privilege with a greater opportunity for entry to desirable schools. In a 30km zoning radius scenario, Gauteng's privileged schools will have a significantly broader pool from which to choose its learners and may engage in selection practices and the type of cherry picking that favours more privileged learners. Moreover, the province's white and wealthy families would often already have strong affiliations with these more privileged schools given previous generations having attended

questioned 'what happens if the schools come out and say actually we are full already with people from our immediate zone?' In response the MEC expressed that this 'is good, you rather be denied access on the basis of capacity rather than be denied access on the basis that you are born in the wrong area.' ENCA 'Gauteng education department publishes new feeder zones for schools' ENCA 16 November 2018 available at <https://www.youtube.com/watch?v=XeWd3wPTT10> (accessed 16 November 2022).

there. Gauteng's white and affluent families are thus significantly more likely to be equipped with the knowledge of how best to negotiate the application processes of these more well-off schools. This would allow them to enjoy a head start in an admissions application process that in essence favours the fastest.

7.4.3.5 The 2019 Gauteng Admission Regulations

According to then MEC Lesufi, the finalisation of the 2019 admission regulations indicate that Gauteng schools will now be 'easily transformed' and, as a consequence, all Gauteng learners will have access to quality education and enjoy equal opportunities and equal treatment.¹³⁹⁹ Commenting on the feeder zone provisions in particular, the then MEC explained that these provisions are intended to 'overcome apartheid geography,'¹⁴⁰⁰ and guarantee 'fair access to schools'.¹⁴⁰¹ It means that 'children will not be discriminated against based on where they live.'¹⁴⁰² However, the former MEC's claims regarding the transformative impact of the feeder zone provisions in the 2019 admission regulations are overinflated, as the below analysis of these regulations reveal.

The 2019 admission regulations define a feeder zone as 'an area from which a school accepts its core intake'. Notably, unlike the 2012 admission regulations, the definition does not mention 'learners who live close or whose parents work close to that school'. The definition of a feeder zone under the 2019 admission regulations is therefore not embedded in geographical proximity. The 2019 admission regulations do away with the provisions regarding feeder primary schools. Instead, regulation 4 focuses purely on feeder zones and reads:

'4. Feeder Zones for admission of learners. -

¹³⁹⁹ News24Wire 'New Gauteng school feeder zones ensure transformation and fairness – Lesufi' 11 March 2019 *Polity* available at <https://www.polity.org.za/article/new-gauteng-school-feeder-zones-ensure-transformation-and-fairness---lesufi-2019-03-11> (accessed 30 December 2021).

¹⁴⁰⁰ Dube L 'Schools online application opens with new regulations' 5 May 2019 *Midrand Reporter* available at <https://midrandreporter.co.za/212783/schools-online-application-opens-with-new-regulations/> (accessed 30 December 2021). Kempton Express 'Online applications for school entries open on Monday: what you should know' 7 May 2019 *Kempton Express Thembisan* available at <https://kemptonexpress.co.za/198689/online-applications-for-school-entries-open/> (accessed 30 December 2021).

¹⁴⁰¹ SAnews.gov.za 'New school feeder zone regulations to ensure fair access' available at <https://www.skillsportal.co.za/content/new-school-feeder-zone-regulations-ensure-fair-access> (accessed 30 December 2021).

¹⁴⁰² SAnews.gov.za 'New school feeder zone regulations to ensure fair access' available at <https://www.skillsportal.co.za/content/new-school-feeder-zone-regulations-ensure-fair-access> (accessed 30 December 2021).

- (1) Subject to the National Education Policy Act . . . and any other applicable laws, the [HoD] must, by notice in the Provincial Gazette, determine feeder zones for schools in the Province.
- (2) For the purposes of this regulation, a school does not include a focus school or a school for learners with special education needs.
- (3) In determining a feeder zone, the HoD must consider all relevant information, including-
 - (a) the capacity of the school and schools in the vicinity to accommodate learners;
 - (b) the language and curricula offered at the school and the schools in the vicinity;
 - (c) information and projections regarding area population density, learner population density and learner enrolment; and
 - (d) the need for geographical and spatial transformation.
- (4) The [HoD] must determine the feeder zone for schools in terms of the Department's policy for the delimitation of feeder zones for schools.
- (5) The [HoD] may not act under subregulation (1) unless he or she has-
 - (a) published in the Provincial Gazette-
 - (i) the proposed feeder zones for schools in the Province; or
 - (ii) a notice stating where the schedule of proposed feeder zones may be obtained;
 - (b) granted the [SGBs] of affected schools and any parent of a learner at an affected school to make written representations within 30 days regarding the proposed feeder zones; and
 - (c) seriously considered the representations so received.'

Regulation 4 shifts the power to determine feeder zones from the MEC (under the 2012 admission regulations) back to the HoD.¹⁴⁰³ This is understandable given that the Schools Act imposes the obligation to administer the admissions process on HoDs.¹⁴⁰⁴ This amendment also aligns with the National Admission Policy which too vests the power to establish feeder zones with HoDs.¹⁴⁰⁵ The HoD's obligation to establish feeder zones extends to all schools, with the exception of focus and special needs schools. The HoD must ensure that school zoning occurs in line with the GDoE's feeder zone policy. A HoD must take account of 'all relevant information' when establishing feeder zones. Relevant factors specified include the learner capacity of the school concerned and that of surrounding schools as well as projections and other information relating to 'population density, learner population density and learner enrolment'. These factors make eminent sense since feeder zones, by nature, must be designed

¹⁴⁰³ This power was initially conferred on the HoD under the 2001 regulations. Regulation 7(1) of the Regulations Relating to the Admission of Learners to Public Schools GN 4138 in *Provincial Gazette* 129 of 13 July 2001.

¹⁴⁰⁴ Section 5(7) of the Schools Act 84 of 1996.

¹⁴⁰⁵ Section 33 of the Admission Policy for Ordinary Public Schools GN 2432 GG 19377 of 19 October 1998.

to ensure that all learners falling within a particular zone can be absorbed by schools in that zone if the system is to function effectively. Moreover, this consideration aligns with the GDoE's responsibility to prevent overcrowding within the province's public education system. Another factor to be considered is 'the language and curricula offered at the school and the schools in the vicinity'. The need to consider language policies is grounded in the GDoE's constitutional responsibility to ensure that all learners in the province are able to learn in an official language of their choosing where this is reasonably practicable.¹⁴⁰⁶ Zoning must therefore be done in a manner that in so far as reasonably practicable advances this constitutional right.¹⁴⁰⁷ In addition, considerations around curricula appear to be about ensuring that feeder areas are created so that as many learners as possible have access to a wide array of subject choices as possible. Significantly, a HoD is compelled to consider the 'need for geographical and spatial transformation' when zoning.¹⁴⁰⁸ The new regulations therefore constitute the first statutory recognition of the potential of school feeder areas to serve as a mechanism for advancing societal transformation.

However, the new regulations are disappointing in that they fail to elaborate on what the concept of 'geographical and spatial transformation' entails. Furthermore, no clear reference is made to educational transformation. It is noteworthy that EE and EELC made joint recommendations on the 2018 draft admission regulations that the specified considerations which a HoD must consider before zoning be expanded.¹⁴⁰⁹ These organisations suggested the insertion of the 'diversity of the school' and 'the need for equitable access to education for learners' as additional factors.¹⁴¹⁰ Specifying these factors would have helped strengthen the transformative potential of the regulations. It would have sent a clear signal on the importance of establishing feeder zones that help further racially equitable access to education and foster diversity in South African schools. It is therefore disappointing that these recommendations

¹⁴⁰⁶ Section 29(2) of the Constitution.

¹⁴⁰⁷ Under section 7(2) of the Constitution '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

¹⁴⁰⁸ Regulation 4(3)(d) of the Amendments to Regulations Relating to the Admission of Learners to Public Schools in Provincial Notice 268 *Provincial Gazette* 85 of 18 March 2019.

¹⁴⁰⁹ Equal Education and Equal Education Law Centre Joint Submission by Equal Education and Equal Education Law Centre Relating to the Draft Amendments to Regulations Relating to the Admission of Learners to Public Schools, 2018 (2018) EE and EELC 25.

¹⁴¹⁰ Equal Education and Equal Education Law Centre Joint Submission by Equal Education and Equal Education Law Centre Relating to the Draft Amendments to Regulations Relating to the Admission of Learners to Public Schools, 2018 (2018) EE and EELC 25.

did not find their way into the final product. The lack of emphasis on the role of feeder zones as a transformative measure in the 2019 admission regulations is an opportunity missed.

The 2019 admission regulations also fail to provide sufficient direction on how transformative zoning can occur in Gauteng and what this would look like. For instance, what the implications would be for the need to ensure diversity within the student body or how school quintiles should factor when identifying geographical areas that would constitute zones. An HoD seeking to use their zoning powers in a remedial way would therefore have very little direction on how to achieve this. The 2019 admission regulations, despite specifying spatial transformation as relevant to school zoning, fails to create an effective mechanism for addressing spatial injustices in the province's education system. Nevertheless, these regulations remain unparalleled in that it explicitly acknowledges the potential for feeder zones to act as a transformative measure within education and demands that this potential at least be considered before designating feeder zones.

Regulation 4(5) of the 2019 admission regulations sets out certain procedural requirements that a HoD must follow when delineating feeder areas. The HoD must ensure that suggested zones are made readily accessible to the public either by gazetting the suggested zones or a notice informing the public where the list of these zones may be retrieved. Regulation 4(5)(b) entitles SGBs of 'affected schools' as well as parents whose child attends 'an affected school' to make written representations on a proposed feeder zone within 30 days. HoDs are required to give serious consideration to any representations made. The reference to 'affected schools', on a limited construction, appears to be a reference to the current parent bodies and governing bodies of the particular school to be zoned. However, these are not the only role players that are likely to be materially impacted by the establishment of feeder areas. Limiting the right to written representations on proposed zones to these stakeholders would be detrimental to ensuring equitable access to schooling. Additional stakeholders who should be entitled to make written representations would be learners themselves (both enrolled and prospective) as well as communities and the governing bodies of other schools situated within existing feeder areas. Further examples of stakeholders who should be extended this entitlement would be, other communities whose children have traditionally been excluded from accessing the school concerned as a result of falling beyond the feeder area. These 'outsiders' may have a legitimate interest in ensuring that a proposed zone be reshaped in a more racially equitable manner. SGBs and parents of existing learners at fee charging schools pursue a very sectarian agenda. As

discussed in the previous chapter, their focus lay with the current learner body and their immediate need to enjoy an education of an excellent standard. It is the parents and SGBs of privileged schools that will seek to use their voices and clout to sway the zoning process in favour of preserving their privilege. Restricting the right of input on proposed zones provides a space for their powerful voices to closely participate in the process whilst depriving ‘outside’ interested individuals and groups the same opportunity. Civil society should also be provided with an opportunity to deliver an expert and independent view on proposed zones and the most effective way to zone specific schools to advance equality. This information would be invaluable to a school zoning exercise. Preventing these outsiders from commenting on proposed zones is counter to South Africa’s participatory form of democracy. Participatory democracy requires that all interested parties be given a meaningful opportunity to raise their objections to tentative zones and, to have those objections properly considered.¹⁴¹¹ Interestingly, EE and EELC commenting on the equivalent provision to regulation 4(5)(b) in the 2018 draft admission regulations recommended that the provision be amended to read ‘granted any interested party the opportunity to make written representations within 30 days regarding the proposed feeder zones.’ This suggestion was unfortunately not taken up.¹⁴¹² This may be because of practical concerns such as the likelihood of lengthy delays in the finalisation of feeder zones due to the department having to consider numerous representations.

Regulation 4B is a new provision which has been inserted in the 2019 admission regulations. This regulation entitles SGBs, and parents of learners impacted by a finalised feeder zone to appeal that feeder zone determination to the MEC within 30 days from date upon which the zone was finalised. Regulation 4B reads

- ‘(1) The [SGB] or a parent of a learner affected by a feeder zone determination may, within 30 days of the date of the determination contemplated in regulation 4(1), lodge an appeal to the MEC objecting to the determination.
- (2) A [SGB] or parent who lodges an appeal must do so in a form substantially similar to Annexure F to these Regulations.
- (3) Within 30 days of receiving the appeal, the MEC must determine the appeal and, if necessary, provide the [SGB] or parent with the reasons for the decision.’

¹⁴¹¹ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) 101-145. *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC) 60.

¹⁴¹² Equal Education and Equal Education Law Centre *Joint Submission by Equal Education and Equal Education Law Centre Relating to the Draft Amendments to Regulations Relating to the Admission of Learners to Public Schools, 2018* (2018) EE and EELC 27 and 28.

Notably, the right to appeal is not limited to those parents whose children attend the school whose feeder area is subject to the appeal. Rather, any parent whose child has been ‘affected by a feeder zone’ may appeal that zone. In this way, the right to appeal extends further than the right to provide input on tentative zones under regulation 4(5)(b). This serves as a further indication of the need to provide any potentially affected parents the opportunity to comment on suggested zones. It makes little sense to exclude ‘outsider’ parents at the comment stage but provide them with a right of appeal once zones are finalised.

Regulation 7 of the 2019 admission regulations sets out certain criteria to be applied by schools when processing admission applications of entry phase learners (learners seeking admission to the lowest grade on offer excluding grade R).¹⁴¹³ Regulation 7 reads:

- ‘7. Preferential rights to admission as an entry grade learner to schools whose feeder zones have been determined by the Department in terms of regulation 4.-
- (1) This regulation applies to entry phase admissions to a school whose feeder zone has been determined by the Department in terms of regulation 4.
 - (2) An applicant for an entry phase admission to a school is eligible for admission if—
 - (a) the applicant learner’s place of residence is closest to the school within the feeder zone;
 - (b) the applicant learner has a sibling attending the school;
 - (c) the place of employment of at least one of the applicant learner’s parents is within the feeder zone of the school;
 - (d) the applicant learner’s place of residence is within a 30 kilometre radius of the school; or
 - (e) the applicant learner’s place of residence is beyond a 30 kilometre radius of the school.
 - (3) The ranking of the applications for admission shall be in the order of the categories referred to in paragraphs (a) to (e) of subregulation (2) and in the order in which the applications were received.
 - (4) The [HoD] must place the applicant learners that he or she intends to admit to the school on a waiting list A in terms of categories referred to in paragraphs (a) to (d) of subregulation (2) and those who do not qualify for waiting list A on a waiting list B.
 - (5) Entry phase learners who do not apply within the application period have no right to preferential placement at schools that are full. These applicants may be placed at schools where there are spaces.’

¹⁴¹³ Regulation 1 of the 2019 admission regulations replaced the definition of ‘entry phase learners’ with ‘entry grade learners’ but the former term still appears within certain provisions. Under the new definition grade R is no longer considered an entry grade. Consequently, regulation 7 does not apply to learners who seek admission to grade R. These learners cannot claim preferential admission based on a school’s feeder zone.

Under regulation 7(2), once a feeder zone is in place a learner applicant is eligible for preferential admission if—the learner’s place of residence is nearest to the school within the feeder area; a sibling is already attending the school; at least one parent works within the feeder area; or a learner’s place of residence is within a 30km radius of the school (the 30km application zone).¹⁴¹⁴ In terms of regulation 7(3), the weight to be afforded to each of the factors decreases in descending order. Admissions applications must be ranked in accordance with this weighting hierarchy and in the sequence in which applications are received. Late applicants do not receive any preference. Under the 2012 admission regulations, applicants who lived within the feeder zone, had a parent who worked within the feeder zone or had a sibling at the school qualified for waiting list A. All other applicants were placed on waiting list B. Waiting list B would only come into play where waiting list A was exhausted. Under the 2019 amendments, it is only applicants who live beyond the 30km radius and with no sibling in attendance and no parent working within the feeder zone that are placed on waiting list B. Regulation 5(6)(a), requires a HoD to consider a school’s feeder zone when allocating any unplaced learner who has still not been accommodated 30 days post admission period.¹⁴¹⁵

The 2019 admission regulations can be distinguished from the 2012 admission regulations in that the latter set out who fell within a feeder zone but did not carve out a hierarchy in this regard. That is, the applications of those who lived within a feeder zone were given equal priority to those where a parent only worked within the feeder zone. In so far as place of residence as a zoning criterion is concerned, the 2012 regulations turned on the distance between the applicant’s place of residence and the desired school relative to any other school. An applicant fell within the feeder zone where, in relation to their place of residence the desired school was ‘the closest school which the learner is eligible to attend’.¹⁴¹⁶ Alternatively, an applicant staying within a 5km radius of the school was also considered as living within the feeder zone.¹⁴¹⁷ In comparison, the current regulation 7(2)(a) provides that an applicant receives first preference where their ‘place of residence is closest to the school within the feeder zone’. This means that a learner living just outside the desired school’s catchment area would

¹⁴¹⁴ Section 10(2) of the of the Draft Amendments to regulations relating to the admission of learners to public schools in Provincial Gazette Extraordinary, 791 GN 209 of 30 July 2018 (Gauteng).

¹⁴¹⁵ Regulation 5(6) refers to ‘subregulation 6 above’ but is an obvious reference to regulation 5(5).

¹⁴¹⁶ Regulation 4(2)(a) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

¹⁴¹⁷ Regulation 4(2)(b) of the Admission of Learners to Public Schools regulations in Provincial Gazette Extraordinary GG127, General Notice 1160 of 9 May 2012.

not receive preferential admission on the basis of zoning even where the desired school is the closest one to where the learner concerned resides.

Notably, it is not merely living within the feeder area that confers top priority on an applicant but rather living ‘closest to the school within the feeder zone’. Interestingly, the language in regulation 7(2)(a) differs from that which was proposed in the draft 2018 amendments to the 2012 Gauteng admission regulations.¹⁴¹⁸ The proposed amendment provided that an applicant would be eligible for entry phase admission where ‘the applicant learner’s place of residence is within the feeder zone of the school’. The addition of the words ‘is closest to the school’ in the finalised regulations was therefore a well-thought-through choice. The language seems to suggest that where two applicants both live within the feeder area, the applicant who lives closer to the school would be entitled to be placed higher on the admission list than their fellow applicant who lives within the feeder area but further away from the school concerned.

However, living within the feeder area (regardless of distance) bestows greater preference than having a parent who works within the feeder area or a sibling in attendance at the school. The HoD has elected to publish feeder zones which, in the main, encompass neighbourhoods within the immediate surrounds of a school.¹⁴¹⁹ Regulation 7(2)(a) must therefore be understood in the context of feeder zones which have been shaped based on geographical proximity to a school. When so viewed, the 2019 admission regulations perpetuate apartheid inherited privilege. It is only once preference is provided first, to those learners whose ‘place of residence is closest to the school within the feeder zone’, then to those with a sibling at the school, and next to those whose parents work within the feeder area, that those living within the 30km radius of the school is preferred over those outside this radius. In other words, children who live within the 30km radius and who do not qualify for the other favoured categories are ranked a mere fourth in the preferential hierarchy. This is likely to be where the bulk of impoverished black learners stand to benefit. This ranking order thus works to the advantage of white families who, for historical reasons, often live closest to good schools.

Regulation 7(2) read with regulation 7(3) functions in a highly anti-transformative way. In fact, it can be convincingly argued that these regulations, in light of the current feeder zones, operate in an even more racially inequitable manner than the 2012 admission regulations. This is

¹⁴¹⁸ Draft Amendments to regulations relating to the admission of learners to public schools in Provincial Gazette Extraordinary, 791 GN 209 of 30 July 2018.

¹⁴¹⁹ Determination of Final Feeder Zones by the Head of Department of Education in Provincial Notice 1232 *Provincial Gazette* 339 of 15 November 2018 (Gauteng).

because of its stronger emphasis on geographical proximity and, especially residential proximity as a basis for preferential admission. The hierarchy set up under these regulations ensure that it is only the children of those who can afford to live in the more affluent areas in which these schools are based who will enjoy first preference in the admission process. To illustrate in pictures, below is the HoD declared feeder zone for Rivonia Primary School. Rivonia Primary was party to the litigation which prompted the introduction of the province’s 2012 admission regulations.¹⁴²⁰

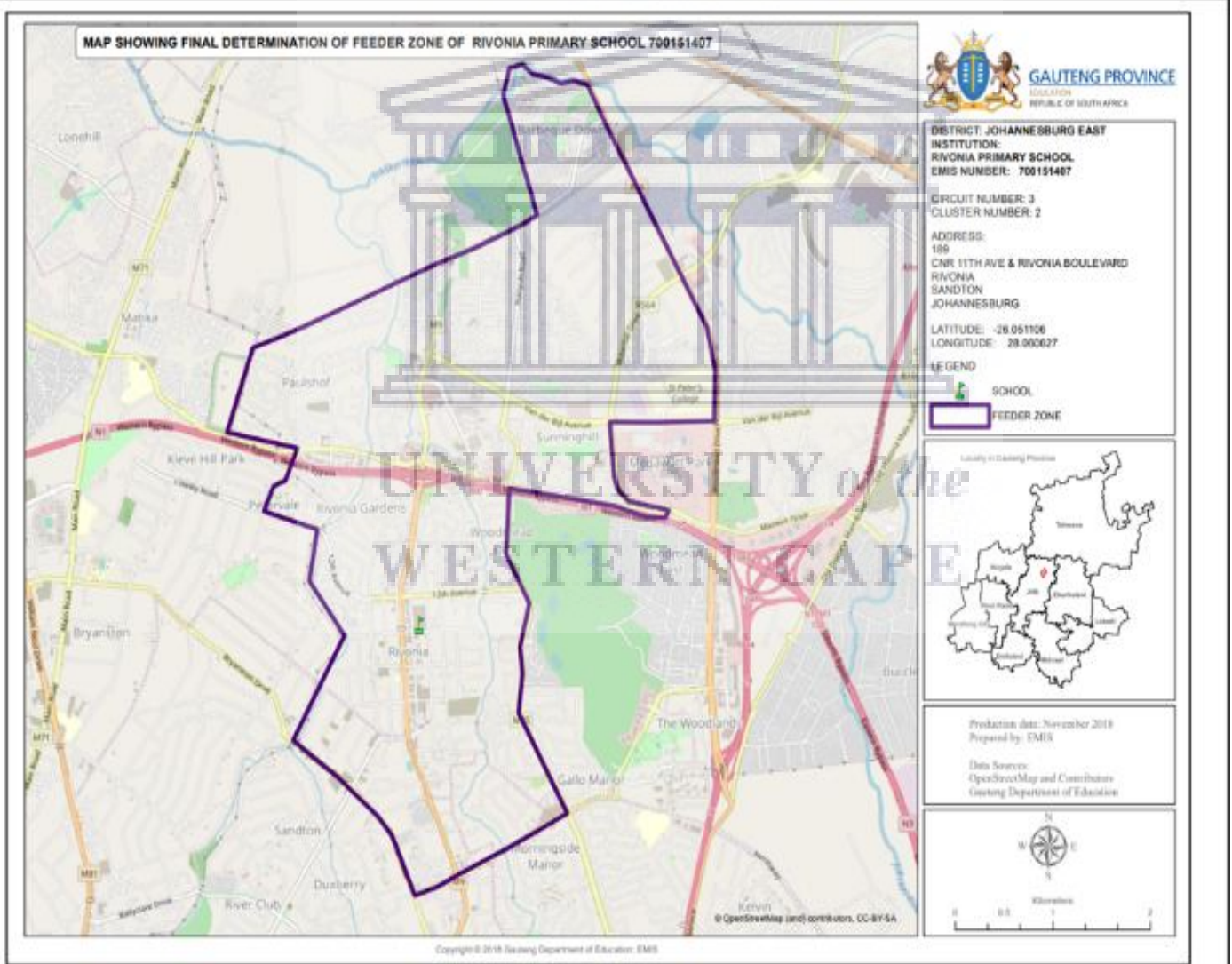


Figure 17

¹⁴²⁰ See section 7.4.3.3 above.

Rivonia primary is a highly sought-after school located in Sandton, the wealthiest area in the country and, on the continent. Rivonia Primary's declared feeder zone encompasses affluent suburbs such as Rivonia, Sunninghill and Paulshof. The furthest Rivonia Primary's feeder zone juts out from the school is about 7 km. At this 7 km mark, it encloses the area of Barbecue Downs, an exclusive neighbourhood which is about 81% white.¹⁴²¹ Alexandra township is one of the poorest areas in the country. One of Alexandra's borders sits about 9 km from Rivonia Primary. The M1 highway, in apartheid buffer style, separates Sandton from Alexandra.

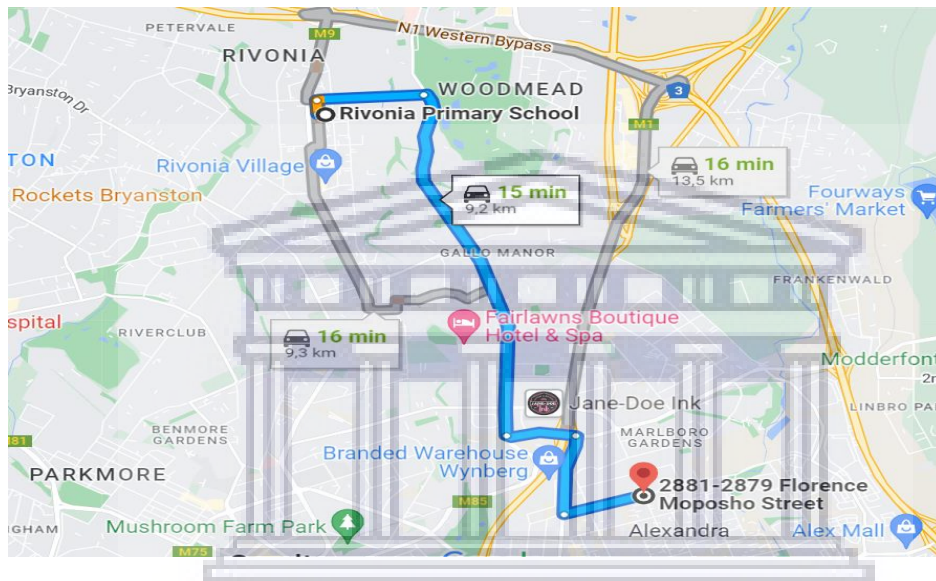


Figure 18

A black child in Alexandra who stays about 9km from Rivonia Primary would fall comfortably within the school's 30 km application radius as contemplated under regulation 7(2)(d) of the 2019 admission regulations. However, such a child's application to Rivonia Primary would have to take a back seat to learners applying from Sunninghill, Paulshof, Rivonia, Barbecue Downs and other affluent and HWA which make up the school's feeder zone. This hypothetical Alexandra learner would also be further down the list than a child whose sibling attends Rivonia primary or whose parents work in the well-off areas encompassing the school's feeder zone. Only where applications from all of these above categories have been favourably received, and where space remains, would the impoverished black child living about 9km away in Alexandra receive preferential admission over those children who live more than 30kms away from Rivonia Primary. However, the likelihood of such a scenario materialising is none. This is because of the significant capacity constraints within the province's education system

¹⁴²¹ Frith A 'Barbeque Downs Sub Place 798004031 from Census 2011 available at <https://census2011.adrianfrith.com/place/798004031> (accessed 19 November 2022).

and the fierce competition to obtain entry into a HWS such as Rivonia Primary. In light of this reality, it is an enormous overstatement to label Gauteng's feeder zones as 'revolutionary',¹⁴²² or a 'radical shift',¹⁴²³ in addressing spatial injustices in Gauteng's public education system as the former MEC and GDoE officials have.

The anti-transformative effect of the 2019 admission regulations is further compounded by the sibling rule established under regulation 7(2)(b) and read with regulation 7(3). Under this rule, second preference is to be afforded to those learners who already have a sibling enrolled in the school. Jansen and Kriger, in their work on school admission policies in the Western Cape, discuss the implications of sibling status as a basis for preferential admission. According to these scholars, sibling status offers 'the most direct and inexpensive route to the reproduction of privilege' in South African schools.¹⁴²⁴ Jansen and Kriger explain:

'The obvious downside of the sibling policy narrative is that, given the tight relationship between school and suburb, it benefits mainly white and middle-class to wealthy parents. The spatial arrangements of apartheid have hardly shifted in South Africa over two decades, and therefore sibling policy, as applied by most schools, achieves another goal, whether intended or not, and that is to keep schools predominantly white.'¹⁴²⁵

In the Gauteng context, almost a 100% of white school going learners are enrolled in HWS in the province in comparison to only 20% of African learners.¹⁴²⁶ A white family would therefore be significantly more likely to benefit from the sibling rule than an African one. This racially inequitable rule is exacerbated by the extent of favour conferred on those whose sibling already attends the desired school. Under the 2019 admission regulations, sibling status ranks above parent's place of employment. Thus, a white learner whose older sister is enrolled at Rivonia Primary because the family previously lived in Sunninghill (within the catchment area) but has since moved out, would be afforded a greater degree of preference in the admissions process than a black learner from Alexandra whose father is employed as a gardener in Sunninghill.

¹⁴²² Koko K 'Lesufi hails "revolutionary" 30km radius at launch of 2020 online admission process' *IOL* 19 May 2019 available at <https://www.iol.co.za/news/south-africa/gauteng/lesufi-hails-revolutionary-30km-radius-at-launch-of-2020-online-admission-process-23553129> (accessed 29 December 2021).

¹⁴²³ Gous N 'Panyaza Lesufi proclaims end to apartheid's education urban planning' *Times Live* 15 November 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-11-15-panyaza-lesufi-proclaims-end-to-apartheids-education-urban-planning/> (accessed 23 August 2018).

¹⁴²⁴ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* (2020) 89.

¹⁴²⁵ Jansen J & Kriger S *Who Gets In and Why?: Race, Class and Aspiration* 94 and 95.

¹⁴²⁶ Hamann C, de Kadt J & Parker A 'The Long and Short of School Commutes' *Gauteng City-Region observatory* (31 May 2018) The Gauteng City-Region Observatory is a partnership between the Universities of Johannesburg and Witwatersrand and the Gauteng Provincial government.

The 2019 admission regulations have failed to ensure the implementation of more racially equitable zoning in Gauteng.

The 2019 admission regulations together with the GDoE's feeder zone policy was first applied in 2020 in respect of learner intake for the province's 2021 academic year. The GDoE has indicated to the Gauteng Provincial Legislature that it will not yet review the regulations because

'[b]oth the intended and unintended consequences are [still] being studied in preparation for the review process. It is the view of the Department that the system has not stabilized and the review at this stage will be premature'.¹⁴²⁷

It is hoped that a review of the 2019 admission regulations will result in significant amendments that will guarantee and facilitate transformative zoning and thus ensure more racially equitable access to Gauteng's schools.

7.5 CONCLUSION

This chapter has shown why simply abolishing feeder zones, as attempted by the KZNDoe, cannot advance racially equitable access to schooling. This chapter further illustrated that simply deferring to SGBs on school zoning, as done by the WCED, will also not achieve this purpose. The GDoE is the only provincial department that regulates feeder zones through both legislation and dedicated policy. However, this chapter found that by design the GDoE's feeder zone policy significantly favours the concept of neighbourhood schools. Both the GDoE's feeder zone policy and the 2019 admission regulations list 'geographical and spatial transformation' as a criterion to be factored into the zoning process. However, both can be criticised for failing to substantiate on how this criterion is to be understood and applied. This chapter concludes that Gauteng's 2019 admission regulations (far from being radically transformative, as claimed) in fact operates to further exacerbate spatial injustices within the province's school admission process. These findings are important as they show the need to adopt an alternative strategy to those studied to effectively address racial inequalities arising from the use of feeder zones by some of South Africa's HWS.

The following chapter aims to determine if exclusionary zoning constitutes unfair discrimination against those so excluded. A finding in the affirmative will oblige the Minister

¹⁴²⁷ Gauteng Legislature Petition Standing Committee *Committee's 4th Quarter Performance Report for the 2021/2022 Financial Year* (2022).

and PEDs to intervene in school zoning to address such unfair discrimination. The following chapter also applies the test for affirmative action in section 9(2) of the Constitution to determine if transformative zoning meets the requirements of this test. Such a finding is important as any remedial measure adopted under this section cannot be successfully challenged as unfair discrimination.



CHAPTER 8

APPLICATION OF SECTION 9 OF THE CONSTITUTION:

EXCLUSIONARY ZONING AS UNFAIR DISCRIMINATION AND TRANSFORMATIVE ZONING AS AFFIRMATIVE ACTION

8.1 INTRODUCTION

In Chapter 3, the interaction between the right to equality (section 9 of the Constitution) and the right to basic education was highlighted. The chapter indicated that the right to equality prohibits unfair discrimination (section 9(3)-9(4)) and that exclusionary zoning might amount to unfair discrimination. Moreover, it showed that section 9(2) caters for measures that promote the advancement of equality and that transformative zoning might qualify as such a measure. The chapter also indicated that the Constitutional Court has set out tests for determining whether a measure amounts to unfair discrimination and whether a measure constitutes affirmative action, respectively. This chapter aims to apply these tests to the measures taken by the relevant state actors.

This is done to show, firstly, whether exclusionary zoning does indeed amount to unfair discrimination. This is crucial because it would be a violation of the right to basic education, which requires *equal* access to quality education. As seen in Chapter 3, this prohibits unfair discrimination in accessing education. A finding that exclusionary zoning amounts to unfair discrimination would require the state to take steps to prevent such. Transformative zoning could be employed by the state to prevent discriminatory school zoning practices.

Secondly, the test for affirmative action is applied to show whether transformative zoning complies with the requirements thereof. This is important because it would prove that transformative zoning can be used as a tool for the state to fulfil its duties under the right to basic education and would be immune to challenges based on it preferencing certain groups of learners.

8.2 EXCLUSIONARY ZONING AS UNFAIR DISCRIMINATION

This section investigates whether SGBs from HWS can attract liability for establishing and implementing feeder zones that rely purely on proximity to the school. In particular, this section considers whether these SGBs, in so doing, have unfairly discriminated against poor black learners on the basis of the listed ground of race under section 9(3) of the Constitution and the intersecting unlisted (arguably analogous) ground of poverty in this context.¹⁴²⁸ Thereafter, this section considers whether the Minister of Basic Education (Minister) as well as the MECs and HODs of the various provincial education departments (PEDs) have failed in their constitutional and statutory duties to protect poor and black learners against discriminatory and abusive school zoning practices.

Section 9(3) of the Constitution prohibits the state from unfairly discriminating on the basis of, amongst others, race. This means that the Minister, the MECs of the various PEDs as well as the HoDs who administer these departments are all constitutionally barred by section 9(3) from unfairly discriminating against any learner within the education system on the grounds of, amongst others, their race. The Constitutional Court has made clear that SGBs are organs of state.¹⁴²⁹ As such, SGBs are likewise prohibited under the self-same section from discriminating against any learner due to their race.

Section 9(4) of the Constitution mandates that national legislation ‘be enacted to prevent or prohibit unfair discrimination’. Pursuant to section 9(4), Parliament enacted the Promotion of Equality and Prevention of Unfair discrimination (PEPUDA).¹⁴³⁰ PEPUDA forbids the state from unfairly discriminating against anyone. Any litigant seeking vindication for a claim of unfair discrimination arising from the actions of a public official or organ of state must seek their remedy within PEPUDA.¹⁴³¹ The section that follows briefly considers whether SGBs of HWS who apply feeder zones based wholly on geographical proximity can be held liable under PEPUDA for unfair discrimination on the intersecting grounds of race and poverty. Thereafter, focus turns to whether the Minister as well as the MECs and HoDs of the various PEDs can attract liability under PEPUDA for failing to intervene in discriminatory zoning practices.

¹⁴²⁸ See section 7.4 below.

¹⁴²⁹ *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 141.

¹⁴³⁰ Promotion of Equality and Prevention of Unfair discrimination (PEPUDA) 4 of 2000.

¹⁴³¹ Boggenpoel, Draga, Gevers et al ‘South African Constitutional Law in Context’ in De Vos & Freedman (eds) (2021) 528 and 554.

8.2.1 SGBs and unfair race based discrimination

Section 6 of PEPUDA provides that '[n]either the State nor any person may unfairly discriminate against any person'. Section 7 goes on to single out racial discrimination. It forbids unfair race based discrimination including 'the denial of access to opportunities' on the basis of race.¹⁴³² This includes a prohibition against indirect discrimination.¹⁴³³ Courts are obliged to interpret the provisions of PEPUDA in light of the broad doctrine emanating from Constitutional Court jurisprudence on the right to equality under section 9 of the Constitution.¹⁴³⁴ The Constitutional Court has made clear that the prohibition against unfair discrimination under section 9(3) of the Constitution includes indirect discrimination.¹⁴³⁵ Indirect racial discrimination takes place if the differentiation seems neutral but nonetheless produces a racially disparate impact. In *City Council of Pretoria v Walker*, the Constitutional Court found that discrimination on the grounds of geography for purposes of the imposition of water and electricity costs by the Council constituted indirect discrimination on the basis of race. The Court explained:

'The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a black area and another known to be overwhelmingly a white area, on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this.'¹⁴³⁶

The Constitutional Court therefore recognised the inescapable connection between race and geography in light of South Africa's apartheid legacy and how geography can therefore serve as a proxy for race based discrimination. Feeder zones, based exclusively on geographical proximity enforced by the SGBs of HWS may seem, at first glance, racially neutral. This is, however, anything but so. HWS tend to be located in more affluent and prosperous historically

¹⁴³² Section 7(e) of PEPUDA.

¹⁴³³ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) 36.

¹⁴³⁴ Boggenpoel, Draga, Gevers et al 'South African Constitutional Law in Context' in De Vos & Freedman (eds) (2021) 555.

¹⁴³⁵ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).

¹⁴³⁶ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) 32.

white areas (HWA).¹⁴³⁷ As illustrated in the previous chapter, an overwhelming proportion of South Africa's white population continue to reside in these HWA. In contrast, many impoverished black families, for historical reasons, still reside in areas that are far from these more desirable suburban schools and thus outside of their feeder zones.¹⁴³⁸ HWS also fall within the small category of good schools in South Africa.¹⁴³⁹ Consequently, where feeder zones based exclusively on geographic proximity are applied by the SGBs of HWS, impoverished black learners are prevented from accessing these schools and the quality education on offer there. By denying these learners 'access to opportunities' in this way these SGBs render themselves guilty of inflicting unfair race based discrimination in contravention of sections 6 and 7 of PEPUDA.

Notably, it is not all black families who are vulnerable to falling victim to this unfair race based discrimination. Rather, it is destitute families who are so affected. These families cannot afford the exorbitant prices of homes in HWA.¹⁴⁴⁰ They therefore do not enjoy the option of moving house to secure a spot within the feeder zones of the good schools within these affluent neighbourhoods. In the context of feeder zones, race is intimately linked not just with geography but, also to poverty. It is for this reason that the intersectional ground of unfair discrimination on the basis of poverty is considered below.

8.2.2 SGBs and poverty based discrimination

Indirect discrimination can occur not only on those grounds specified under section 9(3) of the Constitution, but also on the basis of analogous (unlisted grounds).¹⁴⁴¹ Section 1 of PEPUDA defines analogous grounds as any other ground where discrimination based on that other ground 'causes or perpetuates systemic disadvantage;' or 'undermines human dignity;' or 'adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner

¹⁴³⁷ Fiske EB & Ladd HF *Elusive equity: education reform in post-apartheid South Africa* (2004) 53. Lemon A & Stevens L 'Reshaping Education in the New South Africa' (1999) 231.

¹⁴³⁸ Fiske E & Ladd H 'Racial equity in education: How far has South Africa come?' (2006) 24:2 *Perspectives in Education* 100.

¹⁴³⁹ Spaul N 'Poverty & Privilege: Primary School Inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 438.

¹⁴⁴⁰ See sections 7.2.1 to 7.2.3 above.

¹⁴⁴¹ In *Hoffmann v South African Airways* the Constitutional Court recognised that unfair discrimination under section 9(3) of the Constitution can also occur on the basis of unlisted grounds such as a person's HIV status. The court explained that '[t]he determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations . . . include the position of the victim . . . in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim . . . have been affected, and whether the discrimination has impaired the human dignity of the victim.' *Hoffmann v South African Airways* 2000 (11) BCLR 1211(CC) 27.

that is comparable to discrimination on a [listed ground].’

In *Social Justice Coalition and Others v Minister of Police and Others* (SJC), the Western Cape High Court was called upon to determine whether a system applied by the South African Police Service (SAPS) to determine the distribution of resources across the Western Cape had unfairly discriminated against impoverished black people on the grounds of both race and poverty.¹⁴⁴² The high court agreed with the applicants’ view that poverty constitutes an analogous ground under section 1 of PEPUDA. The high court appears to have accepted all three of the applicant’s arguments in this regard. First, that ‘poverty was a systematic problem’ rooted in South Africa’s history and economic system which condemn people to a life of poverty thus ‘rendering them vulnerable and marginalised.’¹⁴⁴³ Second, that poverty undermines human dignity. Lastly, that poverty undermines constitutionally entrenched socio-economic rights and consequently, ‘adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a [listed ground].’¹⁴⁴⁴

In reaching its decision, the court relied on expert evidence placed before the Khayelitsha Commission of Inquiry into Policing. This evidence revealed that the seemingly neutral weightings that SAPS applied tended to tilt the distribution of resources in the direction of formal areas within the Western Cape at the expense of informal areas such as Khayelitsha.¹⁴⁴⁵ The court declared that the SAPS police human resources allocation system had indirectly unfairly discriminated against the impoverished black people of the province on the basis of race and poverty. The court explained:

‘25 years into our democracy people, Black people in particular, still live under conditions which existed during the apartheid system of government. The dawn of democracy has not changed the lot of the people of Khayelitsha. They continue to live in informal settlements where the provisions of services are non-existent or at a minimum. This is more glaring where a comparison is made with the more affluent areas, mainly occupied by the privileged minority. Such a comparison brings to the fore the stark reality of abject poverty. The unfortunate reality is that the residences of Khayelitsha, who are predominantly Black, continue to receive inferior services, including services from the SAPS. The SAPS discriminates against this impoverished community [through its human resources allocation system].’¹⁴⁴⁶

¹⁴⁴² *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC).

¹⁴⁴³ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC).

¹⁴⁴⁴ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) 61-65.

¹⁴⁴⁵ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) 51.

¹⁴⁴⁶ *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (WCC) 90.

The court in *SJC* recognised how, given South Africa’s apartheid legacy, issues of race, geography and poverty can intersect in such a manner that impoverished black families fall victim to double discrimination based on both race and poverty under the guise of geography. The lack of ‘provisions of services’ to which the judge refers in *SJC* applies not only to policing but also to quality education provisioning. The use of feeder zones in a manner that denies impoverished black children the opportunity to access a quality education in HWS constitutes, like in *SJC*, unfair discrimination on grounds of both poverty and race. Such unfair discrimination is particularly cruel given that it deprives these impoverished black learners from the very key they require to escape their shackles of poverty and the indignities that accompany it.

8.2.3 The Minister, MECs, HoDs and PEPUDA

The state is obliged by section 7(2) of the Constitution to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. This includes the responsibility to advance racially equitable access to quality education under section 9(1). It also includes the obligation to protect impoverished black children from falling victim to unfair discrimination based on their race and poor socio economic status. Moreover, section 24(1) of PEPUDA imposes a general ‘duty and responsibility’ on the state ‘to promote and achieve equality.’ Thus, the Minister as well as the MECs and HoDs of the various PEDs are duty bound under this provision to advance and achieve racially equitable access to schooling within South Africa’s public education system. Section 25(1)(c) of PEPUDA provides that ‘[t]he State must, where necessary with the assistance of the relevant constitutional institutions—where necessary or appropriate enact further legislation that seeks to promote equality.’ This would include legislation where necessary to address race and poverty based discrimination arising from the school admission process including the use of feeder zones.

Section 25(4) of PEPUDA places specific obligations on Ministers to advance equality within their respective portfolios. Section 25(4)(a) provides:

‘All Ministers must implement measures within the available resources which are aimed at the achievement of equality in their areas of responsibility by

(a) eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible’.

The Minister is therefore statutorily obliged under this provision to eliminate unfair race and poverty based discrimination within the basic education system. This includes unfair race and poverty based discrimination against poor black learners arising from the use of feeder zones. The application of feeder zones shaped purely on geographical nearness by some HWS perpetuate inequality within the schooling system by preserving these historically white spaces for its historical beneficiaries and those black families elite enough to gain access. It is therefore precisely the type of practice which section 25(4)(a) demands be eliminated. One of the ways in which the Minister can discharge her responsibility under this provision is via an amendment to the National Admission Policy unequivocally requiring that HoDs establish transformative feeder zones. A further possibility open to the Minister is to establish admission regulations under section 61 of the Schools Act that regulate the establishment and implementation of feeder zones.

Section 28 of PEPUDA speaks to the special responsibility that the state bears to adopt measures to promote equality,¹⁴⁴⁷ and eliminate discrimination, in the prioritised categories of race, gender and disability.¹⁴⁴⁸ These provisions reflect the state's constitutional duty to 'respect, protect, promote and fulfil',¹⁴⁴⁹ everyone's' right to be free from unfair discrimination based on race, gender and disability. Section 28(3)(b)(ii) of PEPUDA provides that in discharging its responsibilities under section 28 the state must 'enact appropriate laws' and 'develop progressive policies' to eliminate discrimination sourced in race, gender and disability. This would include laws and policies to address racially discriminatory treatment resulting from the application of feeder zones.

Section 29 of PEPUDA places certain responsibilities on the state regarding 'unfair practices in certain sectors'. These practices are identified in a schedule to the Act and are 'intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed.'¹⁴⁵⁰ One such practice listed is '[u]nfairly excluding learners from educational institutions'.¹⁴⁵¹ It is striking that the legislator viewed practices of unfair exclusion within the schooling admission process so extensive that it found it worthy of express recognition. It is also significant that as far back as 20 years ago the legislator thought it

¹⁴⁴⁷ Section 28(3)(a)(ii) of PEPUDA.

¹⁴⁴⁸ Section 28(3)(a)(i) of PEPUDA.

¹⁴⁴⁹ Section 7(2) of the Constitution.

¹⁴⁵⁰ Section 29(1) of PEPUDA.

¹⁴⁵¹ Section 2(a) of the schedule to PEPUDA.

important enough that it imposed a statutory duty on the state (under section 29(4)(a) of the Act) to ‘address and eliminate these practices’ within education. This amplifies how deep the state’s failure to address unfair discriminatory school zoning practices run.

Section 29(2) of PEPUDA provides that ‘the [s]tate must, where appropriate, ensure that legislative and other measures are taken to address. . . [unfair] practices’. This would specifically include (given the schedule) an obligation to use legislative and other measures to address racially discriminatory practices within the school admission process. Some SGBs of HWS have used their power to determine admission policies under the Schools Act to establish their own feeder zones. They have been able to do so free of any government oversight. Although they are bound by the Constitution to establish feeder zones that are constitutionally compliant, this has not always been the case. As shown in Chapter 2, some SGBs have drafted and implemented their feeder zones in a racially exclusionary manner. These schools have been able to use the seemingly neutral criteria of geographical proximity to inflict indirect unfair race and poverty based discrimination upon impoverished black learners who, for historically related reasons, do not live near HWS.

The failure by the Minister, MECs and HoDs to intercede and modulate the issue of feeder zones whether by policy or regulation (Gauteng Department of Education not included) have allowed these racially discriminatory admission practices to breed. In the absence of government regulation, SGBs have had the space (as shown in Chapter 2) to run riot with racially discriminatory and abusive feeder zone practices. By failing to regulate the issue of school zoning, the Minister, MECs and HoDs have individually and collectively failed to discharge their obligations under PEPUDA and the Constitution. More particularly, they have failed in their duty to protect the rights of poor black children under their care to live free from unfair racial discrimination. In so doing they have opened themselves up to legal challenge.

8.3 TRANSFORMATIVE ZONING AS AFFIRMATIVE ACTION

Section 9(2) of the Constitution makes provision for the adoption of remedial legislative and other measures by the state to safeguard or advance those individuals or groups who suffer as a result of historical disadvantage. Section 9(2) states that ‘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.’ Central to transforming the deep inequalities that permeate South African education is the redress of apartheid educational

inequalities. The post-apartheid government appears to have understood as much from early on in the education policy making process. White paper 1 prescribes certain principles and values that must steer the overhaul and further the development of national policy on education.¹⁴⁵² One such principle is that there must be ‘special emphasis on the redress of educational inequalities among those sections of our people who have suffered particular disadvantages, or who are especially vulnerable’.¹⁴⁵³ White Paper 2, contains similar instruction.¹⁴⁵⁴ The Schools Act,¹⁴⁵⁵ and NEPA also emphasise schooling redress.¹⁴⁵⁶ In fact, the words ‘equity’ and ‘redress’ appear in the language of the education provision in the Constitution. South Africa is also bound under regional and international law to adopt corrective measures to advance racially equitable access to schooling.¹⁴⁵⁷ In this regard, the UN Special Rapporteur on the Right to Education has pressed firmly for remedial measures to ensure access to a quality education for the disadvantaged.¹⁴⁵⁸

The previous section established that the Minister, MECs and HoDs are duty bound by PEPUDA to address abusive school zoning practices and promote racially equitable access to schooling. This section considers whether section 9(2) of the Constitution can be leveraged as a basis upon which a transformative zoning scheme designed to discharge these statutory duties can be shaped. This question is significant because an answer in the affirmative would mean that transformative zoning would be protected against a potential unfair discrimination challenge by disgruntled parents and/or learners. Moreover, section 9(2) lays down a test for whether transformative zoning would amount to affirmative action and thereby comply with the state’s duties.

This section begins with a brief discussion on the notion of equality encapsulated by section 9(2) of the Constitution and the concept of transformative zoning. Thereafter, this section tentatively considers whether a transformative zoning scheme can constitute a section 9(2)

¹⁴⁵² White paper one, ch 4 para’s 1 and 7. *The White Paper on Education and Training* (GN 196 of 15 March 1995) Ch 4, para 1.

¹⁴⁵³ White paper one, ch 4 para’s 1 and 7. *The White Paper on Education and Training* (GN 196 of 15 March 1995) Ch, 4 para 7.

¹⁴⁵⁴ *Education White Paper 2 on the Organisation, Governance and Funding of Schools* (GN 130 in GG 16987 of 14 February 1996) para 1.1.

¹⁴⁵⁵ See section 5.3.1 above.

¹⁴⁵⁶ See section 5.3.2 above.

¹⁴⁵⁷ See section 3.5 above.

¹⁴⁵⁸ See section 3.5.4 above.

remedial measure. This is done through an application of the three step jurisprudential test laid down in this regard.¹⁴⁵⁹

8.3.1 Section 9(2) and the concept of transformative zoning

The notion of equality reflected in section 9(2) is one of substantive equality.¹⁴⁶⁰ This section enjoins the state to adopt remedial action to attain substantive equality.¹⁴⁶¹ The Constitutional Court has explained that substantive equality must be understood as ‘equality of outcomes and opportunity.’¹⁴⁶² Restitutionary measures under section 9(2) must therefore be targeted at ‘actively’ redistributing resources and providing benefits to those who historically lacked these same opportunities.¹⁴⁶³ Substantive equality, the court has explained, requires attentiveness to the ‘the structures, norms and so on which reproduce hierarchies and marginalisation and should seek to dismantle them if necessary.’¹⁴⁶⁴ The Constitutional Court has described the restitutionary measures contemplated in section 9(2) as a ‘vital component of our transformative constitutional order,’¹⁴⁶⁵ and ‘critical to realising the constitutional promise of substantive equality.’¹⁴⁶⁶ Section 9(2), the court has stated, is ‘powerful and unapologetic’ in its transformative purpose.¹⁴⁶⁷

One potential tool in the hands of the state to redress South Africa’s educational ills is the HoD’s power, under the national policy relating to school admissions, to establish feeder zones. The use of feeder zones to ensure greater equity within the public education system can be attained through a process in which HoDs undertake transformative zoning under section 9(2) of the Constitution. Such zoning would involve reconfiguring feeder zones to ensure that historically disadvantaged and more socio economically deprived areas fall within the feeder zones of HWS. The creation and implementation of strategically designed feeder zones can serve as a remedial measure employed by the state to address the entrenched educational disadvantages suffered by impoverished black children. Given the small number of functional

¹⁴⁵⁹ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC).

¹⁴⁶⁰ *Sithole and Another v Sithole and Another* 2021 (6) BCLR 597 (CC) 26.

¹⁴⁶¹ *Sithole and Another v Sithole and Another* 2021 (6) BCLR 597 (CC) 2.

¹⁴⁶² *Sithole and Another v Sithole and Another* 2021 (6) BCLR 597 (CC) 26.

¹⁴⁶³ *King N.O. and Others v De Jager and Others* 2021 (5) BCLR 449 (CC) 229.

¹⁴⁶⁴ *King N.O. and Others v De Jager and Others* 2021 (5) BCLR 449 (CC) 213. See also *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) 29; *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (9) BCLR 1098 (CC) 99.

¹⁴⁶⁵ *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 1.

¹⁴⁶⁶ *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) 138.

¹⁴⁶⁷ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 87. See *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (9) BCLR 1098 (CC) 100.

schools within the country, transformative zoning has only a modest role to play in this regard. However, overhauling the dysfunctional component of the education system to ensure quality education provisioning for all is a complex and lengthy process requiring a layered and multitude of state interventions. The creation and implementation of strategically designed feeder zones can serve as a more immediate and innovative remedial measure to advance racially equitable access to schooling.

8.3.2 The test for affirmative action

Transformative zoning as a redress policy imposed by legislation can be measured against the jurisprudential test for what constitutes remedial measures. This stand-alone test, for legitimate remedial action was set out by the Constitutional Court in *Minister of Finance and other v Van Heerden*.¹⁴⁶⁸ The test consists of three questions all of which must all be answered in the affirmative for the remedial steps in question to pass the test. These are (a) ‘whether the programme of redress is designed to protect and advance a disadvantaged class’,¹⁴⁶⁹ (b) ‘whether the measure is “designed to protect or advance” those disadvantaged by unfair discrimination’,¹⁴⁷⁰ and (c) whether ‘the measure “promotes the achievement of equality. . . in the long run”’.¹⁴⁷¹ Due to the principle of subsidiarity, transformative zoning imposed by policy (and not legislation) must be addressed through section 14(1) of PEPUDA. Given the similarity of the text between section 14(1) and that of section 9(2) of the Constitution, the jurisprudential test developed by the Constitutional Court relating to section 9(2) should also be employed when testing policies on transformative zoning.¹⁴⁷²

The claim that engaging in transformative zoning may constitute a remedial step for purposes of section 9(2) has much significance. The Constitutional Court has stated that section 9(2) must be addressed as an aspect of the concept of equality in section 9.¹⁴⁷³ Consequently, remedial measures undertaken in section 9(2) do not amount to unfair discrimination in terms of section 9(3) to 9(5) because the Constitution authorises the taking of such steps.¹⁴⁷⁴ Once a

¹⁴⁶⁸ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC). See McConnachie C ‘Affirmative Action and Intensity of Review: South African Police Service v Solidarity obo Barnard’ (2015) 7:1 *Constitutional Court Review* 171.

¹⁴⁶⁹ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 38.

¹⁴⁷⁰ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 41.

¹⁴⁷¹ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 44.

¹⁴⁷² Boggenpoel, Draga, Gevers et al ‘South African Constitutional Law in Context’ in De Vos & Freedman (eds) (2021) 529.

¹⁴⁷³ Brickhill J ‘Testing affirmative action under the Constitution and the Equality Act’ (2006) 27:10 *Industrial Law Journal* 2012.

¹⁴⁷⁴ *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) 138.

measure has been successfully established as a remedial measure for purposes of section 9(2), it operates as a complete shield against an equality challenge.¹⁴⁷⁵ Consequently, should transformative zoning constitute a section 9(2) measure it would be insulated from legal attack on the basis that it unfairly discriminates against affected white school going children or violates their right to equality.

In what follows the requirements that a zoning measure under section 9(2) will have to comply with to avoid legal challenge in terms of section 9(3) of the Constitution are explored against the test set out in *Van Heerden*. Transformative zoning is susceptible to such a legal challenge due to its potential adverse and disparate impact on white learners who currently enjoy priority access to good schools by virtue of where they reside and the size of the feeder zones in which they reside. This discussion on the potential of school zoning as an affirmative action measure is preliminary and will require further exploration.

8.3.2.1 Designed to protect and advance a ‘disadvantaged class’

The first leg of the test focuses on the make-up of the class which is to benefit from the affirmative action measure.¹⁴⁷⁶ For corrective measures to fall within the parameters of section 9(2) it must operate to the advantage of the class of persons defined in that section.¹⁴⁷⁷ In fact it must consciously target,¹⁴⁷⁸ that ‘persons, or categories of persons, disadvantaged by unfair discrimination’.¹⁴⁷⁹ Although section 9(2) does not specify race based discrimination it is clear from the Constitution’s pledge to non-racism,¹⁴⁸⁰ that this is one of the primary targets of the affirmative action provision. The racially discriminatory treatment which black children endured in the apartheid education system are well documented.¹⁴⁸¹ The significant disparities between formerly white and black schools still mirror these historical inequities,¹⁴⁸² and

¹⁴⁷⁵ *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 38. Baqwa D ‘The resolution of affirmative disputes in the light of Minister of Finance & (and) another v. Van Heerden.’ (2006) 27:1 *Industrial Law Journal* 70.

¹⁴⁷⁶ Brickhill J ‘Testing affirmative action under the Constitution and the Equality Act’ (2006) 27:10 *Industrial Law Journal* 2012.

¹⁴⁷⁷ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 38. *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 38.

¹⁴⁷⁸ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 38. *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 37.

¹⁴⁷⁹ Section 9(2) of the Constitution.

¹⁴⁸⁰ Section 1 of the Constitution refers to non-racism as one of the Constitution’s founding values. The preamble of the Constitution ‘recognises the injustices of our past’ and proclaims as one of its goals to heal past divisions.

¹⁴⁸¹ See section 1.2.2 above.

¹⁴⁸² See section 4.3.1 above.

prevent many black children from enjoying their right to a basic education.¹⁴⁸³ Black children are unquestionably a disadvantaged class as envisaged by section 9(2).

Race, although arguably the most dominant category of disadvantage associated with section 9(2) is by no means the only one. According to Gaibie, the concept of which individuals or categories of individuals constitute potential beneficiaries under section 9(2) was purposely left ambiguous and open-ended.¹⁴⁸⁴ Such open-endedness means that the groups of people covered by the affirmative action provision may extend beyond those commonly associated with the provision. This reasoning is in line with Moseneke J's statement in *Van Heerden*, that section 9(2) is not only aimed at race but 'other levels and forms of social differentiation and systemic under privilege which still persist'.¹⁴⁸⁵ Dupper explains that in making this statement, Moseneke J recognised that disadvantage can be a cross cutting concept and that racism can, by example, coincide with classism to further compound the type of disadvantage in issue.¹⁴⁸⁶

The interplay between the apartheid designed segregated schooling and housing systems and its continued impact on impoverished black children is as a perfect example of this form of intersecting racial disadvantage. It is black and socio-economically deprived families who cannot afford to move away from apartheid designated black townships to neighbourhoods with historically white and better schools.¹⁴⁸⁷ Reformulating feeder zones for the benefit of these families targets both race and its amplifying disadvantage of poverty. Such zoning would ensure feeder zones cannot operate as an impassable barrier to poor black children accessing HWS. Secondly, it would provide impoverished black children with a stronger opportunity to gain entrance into these better schools.

Rearranging feeder zones in this way may mean that some beneficiaries of rezoning will not emanate from a 'disadvantaged class' as understood in section 9(2). In fact, there may be those children now falling within a reconfigured catchment area who are from a historically advantaged group (incidental beneficiaries). The existence of these incidental beneficiaries will not, however, in itself prevent transformative zoning from constituting a section 9(2) measure.

¹⁴⁸³ *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (12) BCLR 1365 (CC) 1.

¹⁴⁸⁴ Gaibie S 'The Constitutional Court decision in Barnard: A sequel to the Van Heerden judgment' 36:1 *Industrial Law Journal* 80 (2015) 81.

¹⁴⁸⁵ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 27.

¹⁴⁸⁶ Dupper O 'Affirmative action: Who, how and how long' (2008) 24:3 *South African Journal of Human Rights* 427 and 428.

¹⁴⁸⁷ See sections 7.2.1 to 7.2.3 above.

This is provided that the intended beneficiaries remain the overwhelming majority to benefit.¹⁴⁸⁸ An adjustment of feeder zones to include formerly black and socio-economically deprived neighbourhoods would inevitably result in a vast number of impoverished black children becoming geographically eligible to apply to better schools. Transformative zoning would then (provided the other requirements are met) still constitute a remedial measure under section 9(2) even though cases of incidental beneficiaries may arise.

There may be cases where individuals ought to have been included in the class due to being similarly discriminated against but have been left out as a consequence of the manner in which the class is drawn.¹⁴⁸⁹ The Constitutional Court has termed this concept ‘jammergevalle’.¹⁴⁹⁰ In line with this concept, affirmative rezoning may still constitute a section 9(2) measure even where there are black and poor children who are historically disadvantaged in the same way but who are not positively impacted by the reconfiguration of feeder zones. In other words, the neighbourhoods in which these historically disadvantaged children stay would, upon redesign, remain outside of the desired feeder areas. The existence of these similarly placed children who lack the benefits of transformative zoning would not negate the legitimacy of such zoning as a corrective measure for purposes of section 9(2).

8.3.2.2 Designed to ‘protect or advance’ those disadvantaged by unfair discrimination

Leg two of the Van Heerden test, demands that any remedial measures be ‘designed to protect or advance’ those disadvantaged by unfair discrimination.¹⁴⁹¹ Proving that a particular measure is so designed would ordinarily be difficult.¹⁴⁹² This is because the impact of remedial measures, whether good or bad, will generally only manifest years later and in some instances, it would be impossible to measure.¹⁴⁹³

The court in *Van Heerden* appreciates as much when it states that ‘the future is hard to predict’.¹⁴⁹⁴ A guarantee that the affirmative measures in question would succeed is therefore

¹⁴⁸⁸ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 40.

¹⁴⁸⁹ Brickhill J ‘Testing affirmative action under the Constitution and the Equality Act’ (2006) 27:10 *Industrial Law Journal* (2006) 2013.

¹⁴⁹⁰ Brickhill J ‘Testing affirmative action under the Constitution and the Equality Act’ (2006) 27:10 *Industrial Law Journal* 2013.

¹⁴⁹¹ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 41.

¹⁴⁹² McConnachie C ‘Affirmative action and intensity of review: South African Police Service v Solidarity obo Barnard’ (2015) 7:1 *Constitutional Court Review* 173.

¹⁴⁹³ McConnachie C ‘Affirmative action and intensity of review: South African Police Service v Solidarity obo Barnard’ (2015) 7:1 *Constitutional Court Review* 173.

¹⁴⁹⁴ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 41.

not required. All the test requires is that the measures adopted under section 9(2) ‘must be reasonably capable’ of achieving the desired result.¹⁴⁹⁵ That is, there must be a reasonable likelihood that the measures will serve its purpose of protecting or empowering the historically disadvantaged.¹⁴⁹⁶

In the case of transformative zoning, it must be shown that such zoning is reasonably likely to protect and uplift impoverished black children by increasing their educational opportunities. Transformative zoning involves redrawing feeder zones of HWS to include socio-economically deprived areas. It is in these areas where most impoverished black families live. It is therefore these children who will no longer be deprived of accessing good schools solely on the basis of where they stay. It is also these children who will enjoy preferential admission for that self-same reason. The use of school zoning to further racial equality in some areas of the US will be explored in the next chapter.

An affirmative action measure may, under certain circumstances, disadvantage one group so as to uplift the other. However, advocates of affirmative action are not required to demonstrate that it is necessary to impose a disadvantage on a particular group to achieve the remedial objective. In other words, they will not be required to establish that there is no less burdensome manner in which the corrective objectives of section 9(2) may be attained.¹⁴⁹⁷ For example, a section 9(2) measure may disadvantage white children to realise the right to basic education of black children even in instances where there are other ways in which black children’s right to a basic education can be fulfilled. Any remedial measure must, however, be designed in such a manner that it minimises the ever present danger that white and more affluent children may leave the public education system altogether taking their human capital and other resources with them. The impact of transformative zoning on the educational possibilities of these more privileged learners should therefore not be repressive.

¹⁴⁹⁵ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 41. *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 39. *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 39. Gaibie S ‘The Constitutional Court decision in Barnard: A sequel to the Van Heerden judgment’ 36:1 *Industrial Law Journal* 80 (2015) 82. Gaibie states that the ‘term ‘reasonably possible’ is open-ended and its meaning will have to be developed by the courts over time.’

¹⁴⁹⁶ *McConnachie C ‘Affirmative Action and intensity of review: South African Police Service v Solidarity obo Barnard’* (2015) 7:1 *Constitutional Court Review* 172.

¹⁴⁹⁷ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 43.

Transformative zoning would therefore still constitute an affirmative action measure under section 9(2) even if detractors can illustrate that the same objectives can be achieved with a less invasive impact on the negatively affected children. However, remedial measures should not be ‘arbitrary, capricious or display naked preference’.¹⁴⁹⁸ Instead, they should be fashioned to advance or protect the groups and categories of persons mentioned in section 9(2).¹⁴⁹⁹ Transformative zoning when implemented correctly would not constitute some impulsive and/or arbitrary line drawing in which different neighbourhoods are roped together in the simple hope of ensuring that poor and black children have a stronger opportunity to enter HWS. Rather, transformative zoning is to be a carefully calibrated system which is reasonably capable of increasing the educational opportunities available to black children.

8.3.2.3 Designed to promote the achievement of equality

Leg three of the Van Heerden test involves a consideration of whether the remedial measures in issue ‘promotes the achievement of equality’.¹⁵⁰⁰ To make this determination, the court explains, first requires an understanding of the effect of the particular corrective measure ‘in the context of our broader society’.¹⁵⁰¹ Such an appreciation demands that one be conscious of the constitutional goal of a society where sex and race are non-factors, and everyone’s dignity is respected.¹⁵⁰² Core to this goal is a society in which our diversity is celebrated and safeguarded, and equality is experienced by all. A measure should not ‘constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.’¹⁵⁰³

The ‘context of our broader society’ is one far from the constitutional dream. South Africa is a country wracked with deep socio-economic cleavages which closely follow racial patterns. South Africa can lay claim to the notorious title of being the most unequal nation across the globe.¹⁵⁰⁴ The wealthiest 10% of the country amass 90% of the nation’s wealth and 65% of its income.¹⁵⁰⁵ South Africa’s official unemployment rate sits at a devastating plus minus

¹⁴⁹⁸ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 41. *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 47.

¹⁴⁹⁹ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 41.

¹⁵⁰⁰ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 44.

¹⁵⁰¹ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 44.

¹⁵⁰² *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 44.

¹⁵⁰³ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 44.

¹⁵⁰⁴ Spaul N ‘Equity: A price too high to pay?’ in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 1.

¹⁵⁰⁵ The World Inequality Lab *World inequality report* (2018) 150.

30.8%.¹⁵⁰⁶ Whilst 8.8% of all white people are unemployed this figure increases to a sizeable 25.7% for coloureds and a seismic 36.5% for Africans.¹⁵⁰⁷ Less than one percent of South Africa's white population are beneath the poverty line compared to nearly half of all African people.¹⁵⁰⁸ Moreover, 70% of African children have a higher probability of experiencing poverty in contrast to children of other racial groups.¹⁵⁰⁹

The state of education in the country reflects these deep racial divides. Educational inequality is unrelenting, and the public education system remains in a drawn-out crisis. The majority of South Africa's learners are enrolled in poorly resourced schools, are taught by ill prepared teachers, are surrounded by weak school infrastructure, and achieve low academic scores.¹⁵¹⁰ The educational disadvantages that most black children in South Africa continue to suffer are as disgraceful as they are obvious. These children's lack of access to quality education creates a never-ending cycle of socio-economic hardship. Basic education is the very 'pivot of transformation' because it serves to redress historical hardship.¹⁵¹¹ Education, given its transformative potential, is therefore key to breaking this devastating cycle of poverty and historical disadvantage. There is no better mechanism than education to 'promote the achievement of equality' in South Africa.¹⁵¹² Transformative zoning would provide some impoverished black children with the opportunity to attend historically white and well-resourced schools which they would otherwise stand little chance of entering. Whilst this will by no means bring about a seismic shift in the level of educational inequalities, it nevertheless bears the potential to help alleviate some of the racialised disadvantage which characterises the public education system.

The third requirement of the *Van Heerden* test requires an appreciation that some in society, especially those who were historically advantaged would be negatively impacted by the execution of remedial measures.¹⁵¹³ This disproportionate burden on the historically favoured

¹⁵⁰⁶ Department of National Treasury *Budget 2021: Budget Review* (2021) 19.

¹⁵⁰⁷ *Quarterly Labour Force Survey Quarter 4: 2020* (2021). South African Federation of Trade Unions 'Unemployment is worsening! Government's neoliberal economic policies are failing even faster!' *Polity* 24 February 2021 available <https://www.polity.org.za/article/unemployment-is-worsening-governments-neoliberal-economic-policies-are-failing-even-faster-2021-02-24> (accessed 22 March 2021). SAFTU discusses the results of the Quarterly Labour Force Survey.

¹⁵⁰⁸ Amnesty International *Broken and Unequal: The State of Education in South Africa* (2020) 7.

¹⁵⁰⁹ Statistics South Africa *Child Poverty in South Africa: A Multiple Overlapping Deprivation Analysis* (2020) xv and 18.

¹⁵¹⁰ Parker R, Morris K and Hofmeyr J *Education, Inequality and Innovation in the time of COVID-19* (2020) 1.

¹⁵¹¹ *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG) 4.

¹⁵¹² Section 9(2) of the Constitution.

¹⁵¹³ *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) 44. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) 76. *Bel Porto*

is what the Constitution mandates to alleviate previous wrongs and achieve social justice.”¹⁵¹⁴ The price the disadvantaged must, however, pay must be reasonable.¹⁵¹⁵ As the Constitutional Court emphasised in *South African Police Service v Solidarity obo Barnard*,¹⁵¹⁶ remedial measures must be carefully constructed so as not to excessively affect the dignity of the disfavoured if social transformation is to be truly realised.¹⁵¹⁷

Fergus states that built into the third requirement of the *Van Heerden* test is the protection of the interests and rights of the historically advantaged class.¹⁵¹⁸ Cameron points out that although the impact on the advantaged is considered, this is not core to the analysis on whether section 9(2) applies.¹⁵¹⁹ According to Cameron, the third leg of the test clearly anticipates somewhat of a proportionality investigation. It entails evaluating the benefits of the remedial measure against its effects on those individuals or groups disfavoured by these measures.”¹⁵²⁰ The impact that transformative zoning would have on the disfavoured class would clearly depend on the zoning method used to achieve such transformation. Transformative zoning can occur in a manner in which existing zones are merely expanded to include historically black areas with no additional remedial interventions. In such a case, white learners who fell within the feeder zone prior to its expansion, will continue to enjoy preferential admission to their neighbourhood schools based on where they stay. These learners would only be disadvantaged to the extent that the pool of learners falling within the zone would have increased in size. On the other hand, positively impacted impoverished black learners would now be able to access a quality education which they would otherwise have been denied. Such access comes with numerous and enormous benefits. This would include being empowered to uplift themselves and their families from their impoverished conditions. Under these circumstances, it would be easier to argue that the favour bestowed on the historically disadvantaged learners outweighs the adverse implications for learners who are disfavoured by such remedial zoning. This is

School Governing Body and Others v Premier of the Western Cape Province and Another 2002 (9) BCLR 891 (CC) 7.

¹⁵¹⁴ *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (9) BCLR 1099 (CC) 46.

¹⁵¹⁵ Dupper O ‘Affirmative action: Who, how and how long’ (2008) 24:3 *South African Journal of Human Rights* 433.

¹⁵¹⁶ *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC).

¹⁵¹⁷ *South African Police Service v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) 30-32.

¹⁵¹⁸ Fergus E ‘Towards unity - Reconciling fairness and rationality in affirmative action disputes’ (2015) 36:1 *Industrial Law Journal* 69.

¹⁵¹⁹ Chris McConnachie C ‘Affirmative action and intensity of review: *South African Police Service v Solidarity obo Barnard*’ (2015) 7:1 *Constitutional Court Review* 172 and 173.

¹⁵²⁰ McConnachie C ‘Affirmative action and intensity of review: *South African Police Service v Solidarity obo Barnard*’ (2015) 7:1 *Constitutional Court Review* 172.

because the disfavour these learners are experiencing is not a consequence of having had an advantage removed from them but rather of no longer holding the monopoly on such an advantage.

However, those tasked with designing a transformative zoning approach requiring an expansion of existing zones must be cognisant of the possibility that poor and impoverished learners may nevertheless be squeezed out of successful admission by learners coming from traditionally zoned areas. A transformative zoning approach would therefore need to be tweaked to ensure that this possibility does not materialise. The Constitutional Court has also stressed the need to engage in proper consultation with the group who stands to be adversely impacted by remedial measures.¹⁵²¹ A process of transformative zoning would therefore require consultation with those learners and parents who will be disadvantaged pursuant to such zoning.

Transformative zoning could also possibly occur in a manner in which feeder zones are reconfigured so that some learners who previously enjoyed priority admission by virtue of place of residence no longer do. In such a scenario, one would have to consider the advantages of transformative zoning in comparison to the impact such zoning would have on children who, subsequent to zoning, would no longer fall within their desired feeder zone. Where school zones are reconfigured in this way, disfavoured learners are not grossly burdened by such a change in zoning boundaries. Unlike impoverished black families, most white families are likely to possess the economic and social capital that continue to buy them sufficient parental choice within the public schooling system. That is, choice outside of their desired neighbourhood school whose feeder zone has been re-shaped to their disadvantage. These families are able to pay the school fees charged by other HWS of similar status. They are also well positioned to defray the transport costs of attending a school further from home. Moreover, affected white and privileged families are more likely to have access to social networks who can direct their attention to other good schools. None of these options are available to impoverished black families whose children stand to benefit from a redesigned feeder zone. Given the options available to white and more privileged families, it is difficult to argue that transformative zoning would impose an extreme hardship on these families or undermine their dignity in some form. In comparison, denying a poor black child a space at a good school in a

¹⁵²¹ *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (9) BCLR 891 (CC) 245.

HWA because they do not live there effectively excludes them based on their race and their inferior economic status. It undeniably undermines their dignity as it signals that their lives and their futures do not matter because of the colour of their skin and the size of their parent's wallet. It also painfully impacts on the families of these vulnerable children by re-invoking generational trauma related to apartheid spacial and educational injustice.

The possibility exists that those detrimentally impacted by reconfigured zones could choose to exit the public education system altogether. This is what is referred to as the so-called threat of 'white flight', a phenomenon where there is a massive exodus of white learners from the public schooling system.¹⁵²² With white flight comes the potential danger that the quality of education provisioning at HWS would drop, thus creating an inferior black public education system and a better quality white/elite private education system.¹⁵²³ Any transformative zoning approach must therefore balance the needs of the favoured and disfavoured learners in a manner that best maintains the resources of the white middle class in the public schooling system.

A further consideration is that transformative zoning could detrimentally impact more well-off black learners who would have moved into these HWA and who now enjoy preferential admission to HWS. However, this much is permissible under section 9(2) of the Constitution to advance those doubly disadvantaged by poverty and blackness. Section 9(2) does not insulate a historically disadvantaged category from experiencing disfavour as a result of a remedial measure. Employment equity requirements that favour one historical racial group over another is an example that comes to mind. This would particularly be the case where the advantage enjoyed by a historically disenfranchised group operates to disadvantage (and violate the rights of) a group that remains highly marginalised.

8.4 CONCLUSION

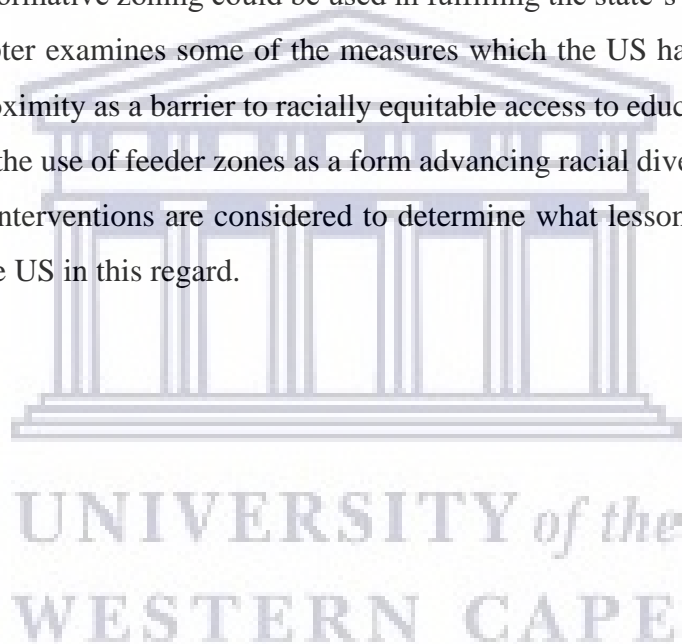
This chapter aimed to apply the test related to the right to equality to the zoning issues discussed in this thesis. The chapter found that the exclusionary zoning practices of HWS can constitute unfair race and poverty based discrimination. This means that such practices are unconstitutional and must be prevented.

¹⁵²² Spaull N 'Equity: A price too high to pay?' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7.

¹⁵²³ Spaull N 'Equity: A price too high to pay?' in Spaull N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 7.

Moreover, not only must these practices cease, the state must take steps to ensure equal access to quality education. To this end, the chapter considered whether transformative zoning could constitute an affirmative action measure under section 9(2) of the Constitution. This chapter concludes that feeder zones that are redrawn to include historically black communities may, provided it is done in a carefully calibrated manner, meet the legal criteria to be considered a remedial measure under section 9(2). This finding is significant as a section 9(2) measure is immune from legal attack on the basis of unfair discrimination. Learners adversely affected by transformative zoning therefore cannot succeed with a legal claim that such zoning has unfairly discriminated against them.

Having found that transformative zoning could be used in fulfilling the state's section 29(1)(a) duty, the following chapter examines some of the measures which the US has undertaken to address geographical proximity as a barrier to racially equitable access to education. One such intervention explored is the use of feeder zones as a form advancing racial diversity within US schools. These various interventions are considered to determine what lessons, if any, South Africa can draw from the US in this regard.



CHAPTER 9

‘THE BIG YELLOW BUS WAS THE WAY I GOT TO SCHOOL’:

LESSONS FROM THE UNITED STATES

9.1 INTRODUCTION

It is just another weekday morning in 1970 in the flatlands of Berkeley, California, a working class area on the west side of the city.¹⁵²⁴ Kamala, a young first grader of Indian and Jamaican descent, receives a kiss goodbye from her mother as she walks out the door and heads to the corner of her street.¹⁵²⁵ A yellow school bus rolls in, squeaks, hisses and stops. The doors wheeze open and Kamala climbs on, joining her classmates already on board. Kamala and the other children play clapping games to help hasten the time on their long journey to the affluent Thousand Oaks Elementary, a white school in the wealthy hills of east Berkeley.¹⁵²⁶ The young commuters, en route to Thousand Oaks, oblivious to the fierce political battles that have rendered their daily ride to a more promising future a reality. Kamala herself would later become no stranger to politics, ascending to Senator Kamala Harris, now Vice President Kamala Harris of the United States. But back in 1970, first grader Kamala was just one of several students who formed part of a city-wide two-way busing scheme. The city’s scheme bused non-white students from the lower-income flatlands in the west of Berkeley up to schools in the affluent hills in the east and white students to schools in the opposite direction with the object of achieving a more even range of skin shades in every one of the city’s school.¹⁵²⁷ Vice President Harris speaks about being bused to school in her 2019 memoir ‘The Truths We Hold: An American Journey’.¹⁵²⁸ Harris recounts ‘I only learned later that we were part of a national experiment in desegregation.... At the time, all I knew was that the big yellow bus was the way I got to school.’¹⁵²⁹ The previous chapter concluded that transformative zoning can be used as a tool to ensure equitable access to basic education. This chapter seeks to draw on lessons from

¹⁵²⁴ Harris K *The Truths We hold: An American Journey* (2019) 5.

¹⁵²⁵ Harris K *The Truths We hold: An American Journey* (2019) 5.

¹⁵²⁶ Bowles N ‘Kamala Harris and classmates were bused across Berkeley. The experience changed them’ *The New York Times* 30 June 2019 available at <https://www.nytimes.com/2019/06/30/us/politics/kamala-harris-berkeley-busing.html> (accessed 16 January 2023). Johnson N ‘Zoned out: One woman’s half-century fight to desegregate Berkeley’ *Grist* 24 March 2021 available at <https://grist.org/cities/zoned-out-one-womans-half-century-fight-to-desegregate-berkeley/> (accessed 16 January 2023).

¹⁵²⁷ Johnson N ‘Zoned out: One woman’s half-century fight to desegregate Berkeley’ *Grist* 24 March 2021 available at <https://grist.org/cities/zoned-out-one-womans-half-century-fight-to-desegregate-berkeley/> (accessed 16 January 2023).

¹⁵²⁸ Harris K *The Truths We hold: An American Journey* (2019) 5.

¹⁵²⁹ Harris K *The Truths We hold: An American Journey* (2019) 5.

the United States (US) on how this exercise should be approached. Attention is given to the US due to its historical and on-going efforts to racially desegregate its public schools. First, this chapter discusses the limitations of looking to the US to obtain guidance on how to achieve more racially equitable access to schooling in South Africa. Next, the present day parallels between the US and South Africa as regards racially segregated schools and neighbourhoods are considered. This is done in an effort to establish why the US is such a pertinent example from which South Africa can learn. However, attempting to learn from the US would be futile absent an understanding of the nature of the rights to education and equality in the US and how it contrasts with the South African legal position. This chapter thus goes on to examine these differing legal contexts. The US public education model is then explained. Thereafter, this chapter considers the famous United States Supreme Court (US Supreme Court) decisions of *Brown v Board of Education of Topeka*,¹⁵³⁰ (*Brown I*) declaring racially segregated schooling unconstitutional and, *Brown v Board of Education of Topeka (Brown II)* mandating that schools be desegregated.¹⁵³¹ (These judgments are collectively referred to as *Brown*). Some of the various methods of schooling integration pioneered by the US following *Brown* are discussed. This is done for purposes of exploring alternative solutions to the use or exclusive use of feeder zones based purely on geographical proximity in the admission criteria of South African schools. This chapter first discusses the use of freedom of choice plans. Thereafter, the more controversial and best known method of ‘busing’ (to which Kamala Harris’s story refers) is considered. Also examined is the use of ‘controlled choice plans’.¹⁵³² These various desegregation techniques are explored against the backdrop of some of the famous strategic litigation to which they relate. The final section of this chapter fixates on the issue of attendance zones in the US. Drawing on the US example, this chapter considers how school zoning can be used as a tool for achieving more racially equitable access to education in South Africa.

9.2 LIMITATIONS AND BENEFITS IN LOOKING TO THE US

Seeking to learn lessons from the US on the issue of desegregated schooling is not without its limitations. There are stark contrasts between South Africa and the US that undermine such a comparative analysis. The economic, cultural, religious, contextual, and government structures

¹⁵³⁰ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 495 (1954).

¹⁵³¹ *Brown v Board of Education of Topeka (Brown II)* 349 U.S. 294 (1955).

¹⁵³² Yarbrough MV ‘School choice and racial balance: Silver bullet or poison dart’ (1992) 2:2 *Kansas Journal of Law & Public Policy* 29.

of the two nations diverge immensely.¹⁵³³ So too does the racial make-up. In the US the black population is small in comparison to the white, whereas in South Africa the opposite holds true.¹⁵³⁴ The overwhelming majority of South Africa's population is therefore also the disadvantaged who suffered racial oppression.¹⁵³⁵ The same cannot be said of the US.¹⁵³⁶ As a result of these demographics, opportunities for black South African children to access better resourced HWS are significantly more limited. There are simply far too few quality schools to accommodate the multitude of black South African learners seeking access to an adequate education. Other differences which complicate a comparison include the significant variance in historical timelines. When the US Supreme Court handed down its famed 1954 decision finding racially segregated schooling inherently unequal,¹⁵³⁷ the Bantu Education Act demanding such segregation was only four months old.¹⁵³⁸ It was only in 1994, with the hailing in of its new democracy, that school desegregation became a legal necessity in South Africa.¹⁵³⁹ The US is thus decades ahead of South Africa as regards ensuring equitable resource provisioning for all schools. So much so that some of the most impoverished American schools are wealthy in comparison to South Africa's poorest.¹⁵⁴⁰ The unequal divide between South Africa's former black and white schools are significantly larger than that same gap within the US¹⁵⁴¹ South Africa's funding to address these racial disparities is also significantly less.¹⁵⁴² The US and South Africa have vastly different public education funding and governance models due to these countries differing governance structures. Public education in South Africa is administered at a broader (provincial) level acting in concert with the principals of individual

¹⁵³³ Carter P, Caruthers J & Foster J 'Knowing their lines: how social boundaries undermine equity-based integration policies in United States and South African schools (2009) 27:4 *Perspectives in Education* 354. Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 166.

¹⁵³⁴ Tihanyi K 'Racial integration in the USA and South Africa: Lessons in a comparative perspective' (2007) 11:2 *International Journal of Inclusive Education* 182.

¹⁵³⁵ Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 534 and 535.

¹⁵³⁶ Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 517.

¹⁵³⁷ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

¹⁵³⁸ The Bantu Education Act 47 of 1953 came into force on 1 January 1954.

¹⁵³⁹ Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 165.

¹⁵⁴⁰ Carter PL *Stubborn Roots: Race, Culture, and Inequality in U.S and South African Schools* (2012) 27.

¹⁵⁴¹ Books S and Ndalane T 'What the U.S. could learn from South Africa about education and social justice' (2011) 25:1-2 *Educational Foundations* 84.

¹⁵⁴² Kolasa TS *The South African Communist Party: Adapting to Thrive in a Post-Communist Age* (2016) 158.

schools.¹⁵⁴³ In the US, it is subject to firm localised control.¹⁵⁴⁴ The constitutions of the two countries also vary greatly. The South African Constitution explicitly empowers government to take affirmative measures to redress historical patterns of disadvantage.¹⁵⁴⁵ The United States Federal Constitution (the US Constitution),¹⁵⁴⁶ has no equivalent clause.¹⁵⁴⁷ This limitation is somewhat mitigated by the US Supreme Court ruling compelling the use of affirmative measures to dismantle legally segregated schooling in certain instances.¹⁵⁴⁸ Despite these sharp differences, the US nevertheless makes for valuable comparison. This is because both countries are confronted with the complex challenge of addressing racially segregated schooling in racially segregated neighbourhoods as a product of racist state laws and actions. South Africa also has the benefit of a deep well of US experience from which to draw as regards achieving racially equitable access to schooling.

9.3 PRESENT-DAY PARALLELS: RACIALLY SEGREGATED SCHOOLS AND NEIGHBOURHOODS

Both the US and South Africa battle to eliminate the vestiges of state endorsed racially segregated schooling.¹⁵⁴⁹ Historically deprived bantu schools in South Africa and their US equivalents have never been adequately transformed.¹⁵⁵⁰ Unjust parallels can now be found in the enormous challenges these two governments face in ensuring the equitable provisioning of public education.¹⁵⁵¹ The huge inequalities in wealth experienced by both nations makes equitable access to education in these countries particularly difficult to attain.¹⁵⁵² The interlink between race and poverty even now dominates every facet of American and South African

¹⁵⁴³ Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 534.

¹⁵⁴⁴ Isaacs D 'Realising the right to education in South Africa: Lessons from the United States of America' (2010) 26:2 *South African Journal on Human Rights* 364.

¹⁵⁴⁵ Section 9(2) of the Constitution.

¹⁵⁴⁶ Constitution of the United States, 1789.

¹⁵⁴⁷ Sellers Diamond AA 'Constitutional comparisons and converging histories: Historical developments in equal educational opportunity under the Fourteenth Amendment of the United States Constitution and the New South African Constitution' (1999) 26:4 *Hastings Constitutional Law Quarterly* 902 and 903.

¹⁵⁴⁸ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

¹⁵⁴⁹ Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 186.

¹⁵⁵⁰ Thompson-Dudiak M 'Comparison: Improving how the legacies of state-sponsored segregation in the United States and South Africa affect equity and inclusion in American and South African higher education systems' (2019) 49:1 *California Western International Law Journal* 186.

¹⁵⁵¹ Carter P, Caruthers J & Foster J 'Knowing their lines: How social boundaries undermine equity-based integration policies in United States and South African schools' (2009) 27:4 *Perspectives in Education* 355.

¹⁵⁵² Berger E 'The right to education under the South African Constitution' (2003) 26 *College of Law, Faculty Publications* 653 and fn 208.

social existence, although more so in South Africa.¹⁵⁵³ These inequalities in South Africa's case run so deep that the public education system has been described as a 'tale of two systems'.¹⁵⁵⁴ The one, characterised as functional and serving a privileged few and the other, dysfunctional and catering for the remainder. This description of the state of public education in South Africa reverberates in the characterisation of the US education system as reflecting 'two America's'.¹⁵⁵⁵ Albeit the level of poverty and other inequities in South Africa's public education system is significantly larger than that of the US.¹⁵⁵⁶

The vast majority of American and South African children attend public as opposed to private schools.¹⁵⁵⁷ Of all public schools in the US an excess of 95% employ some variety of catchment areas for purposes of student assignment.¹⁵⁵⁸ The overwhelming majority of American children are therefore assigned to public schools according to where they reside.¹⁵⁵⁹ In South Africa, the use of feeder zones by SGBs to determine eligibility for school admission is also prevalent.¹⁵⁶⁰ It is thus unsurprising that in both nations segregated neighbourhoods are associated with segregated schools.¹⁵⁶¹ American and South African families of less means have little opportunity to access better schools in more pricey neighbourhoods.¹⁵⁶² Moreover, both countries are confronted with educational inequalities that manifest in an incessant achievement gap between learners that run along racial lines.¹⁵⁶³ Public education in both countries thus serve to further entrench the deep racial inequalities which exist in these societies. Any discussions on attempts by the US to address racially inequitable access to

¹⁵⁵³ Books S and Ndlalane T 'What the U.S. could learn from South Africa about education and social justice' (2011) 25:1-2 *Educational Foundations* 88. Tihanyi K 'Racial integration in the USA and South Africa: Lessons in a comparative perspective' (2007) 11:2 *International Journal of Inclusive Education* 178.

¹⁵⁵⁴ Spaul N 'Poverty & privilege: Primary school inequality in South Africa' (2013) 33:5 *International Journal of Educational Development* 444.

¹⁵⁵⁵ Books S and Ndlalane T 'What the U.S. could learn from South Africa about education and social justice' (2011) 25:1-2 *Educational Foundations* 98.

¹⁵⁵⁶ Books S and Ndlalane T 'What the U.S. could learn from South Africa about education and social justice' (2011) 25:1-2 *Educational Foundations* 84. Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 534 and 535.

¹⁵⁵⁷ Johnson MM *Education inequity: a comparative analysis of Johannesburg and Chicago city schools* (Unpublished Honours thesis, University of Northern Iowa, 2017) 6.

¹⁵⁵⁸ Brill S 'The law of school catchment areas' (2019) 30:2 *Stanford Law & Policy Review* 352 and 353.

¹⁵⁵⁹ Richards MP 'Gerrymandering educational opportunity' (2017) 99:3 *Phi Delta Kappan* 66. Goyette KA, Farrie D & Freely J 'This school's gone downhill: Change and perceived school quality among whites' (2012) 59:2 *Social Problems* 161 fn3.

¹⁵⁶⁰ McKay T 'The geography of education: From race to class apartheid?' in Knight J and Rogerson C (eds) *The geography of South Africa - 2019: Contemporary changes and new directions* (2019) 160.

¹⁵⁶¹ Carter PL *Stubborn Roots: Race, Culture, and Inequality in U.S and South African Schools* (2012) 26.

¹⁵⁶² Deluca S & Rosenblatt P 'Does moving to better neighbourhoods lead to better schooling opportunities? Parental school choice in an experimental housing voucher program (2010) 112:5 *Teachers College Record* 1145. Yamauchi F 'School quality, clustering and government subsidy in post-apartheid South Africa' (2011) 30:1 *Economics of Education Review* 150.

¹⁵⁶³ Carter PL *Stubborn Roots: Race, Culture, and Inequality in U.S and South African Schools* (2012) 31.

schooling must be grounded in an appreciation of the US legal context. It is to this issue that this chapter now turns.

9.4 THE NATURE OF THE RIGHT TO EDUCATION IN THE US AND THE 14TH AMENDMENT

To make sense of the nature of the right to education in the US it is important to first understand the workings of the US Constitution. The US Constitution is a charter of negative rights.¹⁵⁶⁴ It does not place any affirmative obligations on the US federal government, nor does it make any mention of education.¹⁵⁶⁵ The right to education in the US is therefore not enshrined on the national level. The US Supreme Court has long made clear that there is no fundamental constitutional right to education in the US Constitution.¹⁵⁶⁶ In this way the US differs from South Africa where the right to a basic education enjoys constitutional protection under section 29(1)(a) of the South African Constitution. The US Constitution delegates certain powers to the federal government. Under the tenth amendment all residual powers (those not expressly delegated to federal government) devolve upon the states.¹⁵⁶⁷ It is through this ‘reserve clause’ that state governments bear responsibility for taking command and direction of education in their respective states.¹⁵⁶⁸ All state constitutions impose an obligation upon their respective states to both establish and preserve public schools.¹⁵⁶⁹ All of these constitutions also contain some form of clause expressing an affirmative commitment to the provision of public education or entrenching a right thereto.¹⁵⁷⁰ Most of these clauses are akin to section 29(1)(a) of South

¹⁵⁶⁴ *San Antonio Independent School District v Rodriguez* 411 U.S. 1 (1973).

¹⁵⁶⁵ Isaacs D ‘Realising the right to education in South Africa: Lessons from the United States of America’ (2010) 26:2 *South African Journal on Human Rights* 379.

¹⁵⁶⁶ Levesque RJR ‘The right to education in the United States: Beyond the limits of the lore and lure of law’ (1997) 4:1 *Annual Survey of International and Comparative Law* 216. *San Antonio Independent School District v Rodriguez* 411 U.S. 1 (1973).

¹⁵⁶⁷ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) Paper 13 *Educational Leadership Faculty Publications* 5.

¹⁵⁶⁸ Lunenburg FC ‘The legal framework for public education’ (2012) 6:1 *Focus on Colleges, Universities, and Schools* 5 and 6. Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) Paper 13 *Educational Leadership Faculty Publications* 5.

¹⁵⁶⁹ Isaacs D ‘Realising the right to education in South Africa: Lessons from the United States of America’ (2010) 26:2 *South African Journal on Human Rights* 379.

¹⁵⁷⁰ Haberle M & Tegeler P ‘Coordinated action on school and housing integration: The role of state government’ (2019) 53 *University of Richmond Law Review* 969. Levesque RJR ‘The right to education in the United States: Beyond the limits of the lore and lure of law’ (1997) 4:1 *Annual Survey of International and Comparative Law* 218. Shaman JM ‘The evolution of equality in state constitutional law’ (2003) 34:4 *Rutgers Law Journal* 1087. All state constitutions provide at least a minimum assurance of quality education. Twenty two states have construed their respective constitutions as imposing an affirmative duty on the state to deliver an adequate education. Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s public schools’ (2018) 16 *Northwestern Journal of Human Rights* 115.

Africa's Constitution.¹⁵⁷¹ The similarity between many of these clauses and the right to basic education in South Africa allows for fruitful comparison as regards the steps taken to realise the constitutional commitment to delivering quality education for all.

The US Constitution imposes no express obligation on state governments to introduce remedial measures to address historical disadvantages within the country.¹⁵⁷² In contrast, the South African Constitution was designed with affirmative action firmly in mind and explicitly provided for.¹⁵⁷³ The South African government is therefore constitutionally obliged to take steps to address historical injustices in the provision of basic education. This includes measures to address racial inequities within public education. Despite the lack of an affirmative action clause in the US Constitution, the US Supreme Court in the 1955 decision of *Brown II* compelled school authorities to adopt affirmative measures to desegregate schools 'with all deliberate speed'.¹⁵⁷⁴ The US Supreme Court's preceding decision in *Brown I* which rendered segregated schooling unconstitutional was premised on the 14th Amendment of the US Constitution.¹⁵⁷⁵ The 14th Amendment provides, in part, that '[n]o state shall... deny to any person within its jurisdiction the equal protection of the laws.' The US Supreme Court concluded that racially segregated schooling denied black children equal protection of the law under the 14th Amendment. This Amendment has become the most frequently cited constitutional clause in school centred litigation in the US.¹⁵⁷⁶ *Brown I and II* will be examined more closely later in this chapter.

The US Supreme Court has emphasised the distinction between de jure as opposed to de facto segregation. De jure segregation arises from the unlawful and discriminatory actions of school authorities whilst de facto segregation is viewed as a product of factors unrelated to such discriminatory action. It is only in the case of the former that the *Brown II* mandate to desegregate American schools applies.¹⁵⁷⁷ The South African Constitution, in contrast, forbids

¹⁵⁷¹ Isaacs D 'Realising the right to education in South Africa: Lessons from the United States of America' (2010) 26:2 *South African Journal on Human Rights* 379.

¹⁵⁷² Sellers Diamond AA 'Constitutional comparisons and converging histories: Historical developments in equal educational opportunity under the Fourteenth Amendment of the United States Constitution and the new South African Constitution' (1999) 26:4 *Hastings Constitutional Law Quarterly* 902 and 903.

¹⁵⁷³ Section 9(2) of the Constitution.

¹⁵⁷⁴ *Brown v Board of Education of Topeka (Brown II)* 349 U.S. 294 (1955) 301.

¹⁵⁷⁵ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 495 (1954).

¹⁵⁷⁶ Lunenburg FC 'The legal framework for public education' (2012) 6:1 *Focus on Colleges, Universities, and Schools* 4.

¹⁵⁷⁷ *Parents Involved in Community Schools v. Seattle School District* 551 U.S. 701 (2007). See May GV Jnr 'Busing: A constitutional precipice' (1972) 7:1 *Suffolk University Law Review* 55. Waldrop RL Jnr 'Busing and racial imbalance: Judicial sword and social dragon' (1972) 39:4 *Tennessee Law Review* 647 and 648.

unfair race based discrimination even where discriminatory acts are indirect. Thus, the prohibition applies even where the discriminatory consequences are not a direct product of the state's intent.¹⁵⁷⁸ The steps which various school districts across the US adopted to fulfil the *Brown II* order can serve as examples of the types of interventions that South Africa should potentially follow or, in fact, steer clear of when dealing with historical injustices within education delivery.

Before examining some of the desegregation efforts of US school districts it is necessary to understand what school districts are, and how they fit into the broader education structure within the US. These issues are discussed in what follows.

9.5 THE US PUBLIC EDUCATION SYSTEM

The US has never had a nationally centralised and uniform public education system.¹⁵⁷⁹ Uniformity as regards education provisioning is provided at state level via state constitutions and laws enacted through the state legislature.¹⁵⁸⁰ In other words, each of the 50 states have their own public education system. Across the US, state education departments and state level education boards bear responsibility for administering state education laws. They defer this responsibility to firmly established,¹⁵⁸¹ local school boards.¹⁵⁸² These boards are largely created under the various state constitutions.¹⁵⁸³ The state government has full command over the jurisdiction, borders, financing, and defined powers of school boards.¹⁵⁸⁴ School boards are accountable for the management of their respective local school districts. These districts constitute 'quasi-municipal corporations' that are established and organised by the various state

¹⁵⁷⁸ Sections 9(3) of the Constitution prohibits both direct and indirect discrimination by the state against anyone based on, amongst others, race. See *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) 31 and 32 where differentiation on the basis of geography was found to amount to race based discrimination.

¹⁵⁷⁹ Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *APaper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 11. Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 5.

¹⁵⁸⁰ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 5 and 7.

¹⁵⁸¹ Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 524.

¹⁵⁸² Saiger AJ 'The school district boundary problem' (2010) 42:3 *Urban Lawyer* 509-510.

Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 5.

¹⁵⁸³ Freeman C *School Boards and Local Control: Roles and Responsibilities* (2002) 6.

¹⁵⁸⁴ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 7.

legislatures.¹⁵⁸⁵ Quasi-municipal corporations are political bodies established purely to perform a single public function.¹⁵⁸⁶ School districts operate as the ‘basic administrative unit’ within state education systems.¹⁵⁸⁷ That is, they bear administrative responsibilities in the running of a particular district’s education system. There are thousands of school districts throughout the US.¹⁵⁸⁸ Districts range dramatically in size and profile.¹⁵⁸⁹ An overwhelming number of school districts, with the exclusion of some states, have boundaries that coincide with municipal or multiple municipal borders.¹⁵⁹⁰ School boards, and in some instances the state governor (the publicly elected head of the state executive branch),¹⁵⁹¹ bear responsibility for appointing a superintendent general.¹⁵⁹² The superintendent general is tasked with overseeing all school district operations within a particular district.¹⁵⁹³ Superintendents must ensure that all schools within their district function properly.¹⁵⁹⁴ They fulfil this mandate with the assistance of central district staff officials, the number of which range in line with the size of the community served.¹⁵⁹⁵

School boards serve the educational needs of all children who attend schools within their geographical boundaries. That is, all children living within the borders of that particular school district.¹⁵⁹⁶ In contrast, SGBs have jurisdiction for one particular school although they are

¹⁵⁸⁵ Law Library - American Law and Legal Information ‘Schools and School Districts: Private School Vouchers: Church Vs. State, Charter Schools: The Educational Petri Dish, Further Readings’ available at <https://law.jrank.org/pages/10032/Schools-School-Districts.html> (accessed 12 January 2022).

¹⁵⁸⁶ Law Library - American Law and Legal Information ‘Schools and School Districts: Private School Vouchers: Church Vs. State, Charter Schools: The Educational Petri Dish, Further Readings’ available at <https://law.jrank.org/pages/10032/Schools-School-Districts.html> (accessed 12 January 2022).

¹⁵⁸⁷ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) Paper 13 *Educational Leadership Faculty Publications* 5.

¹⁵⁸⁸ Lunenburg FC ‘The legal framework for public education’ (2012) 6:1 *Focus on Colleges, Universities, and Schools* 7.

¹⁵⁸⁹ Lemon A & Battersby-Lennard J ‘Overcoming the apartheid legacy in Cape Town schools’ (2009) 99:4 *Geographical Review* 531. Orfield G & Gándara P ‘Housing and School Segregation and Intergenerational Inequality in the U.S.’ (2009) *A paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 11.

¹⁵⁹⁰ Frankenberg E & Kotok S ‘Demography and educational politics in the suburban marketplace’ (2013) 88:1 *Peabody Journal of Education* 116.

¹⁵⁹¹ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) Paper 13 *Educational Leadership Faculty Publications* 6.

¹⁵⁹² Shi Y & Singleton JD *Expertise and Independence on Governing Boards: Evidence from School Districts* (2019) 6.

¹⁵⁹³ Freeman C *School Boards and Local Control: Roles and Responsibilities* (2002) 6. Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) Paper 13 *Educational Leadership Faculty Publications* 7.

¹⁵⁹⁴ Freeman C *School Boards and Local Control: Roles and Responsibilities* (2002) 5. Orfield G & Gándara P ‘Housing and School Segregation and Intergenerational Inequality in the U.S.’ (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 11.

¹⁵⁹⁵ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) Paper 13 *Educational Leadership Faculty Publications* 7.

¹⁵⁹⁶ Kiel D ‘The enduring power of Milliken’s fences’ (2013) 45:1 *Urban Lawyer* 140.

required to consider the needs of the broader community. This distinction notwithstanding, both SGBs and school boards serve as extensions of the state which operate to assist government in the provision of education at a more localised level.¹⁵⁹⁷ Although the South African Schools Act gives SGBs powers analogous to, though less far-reaching, than those wielded by school boards in the US.¹⁵⁹⁸ School boards, in discharging their mandate, must comply with the general policies and laws of both state and federal government.¹⁵⁹⁹

Both SGBs and school boards bear democratic legitimacy as a result of being elected by local residents. As concerns school boards, between five to nine citizens are elected to serve (although this figure may be larger in bigger districts).¹⁶⁰⁰ Both the US and South African public education systems therefore contemplate community representation in the running of the local affairs of schools.¹⁶⁰¹ Schools boards must determine both policies and procedures to govern the administration of education provisioning within their district. This has been described as the legislative (and chief) function of these boards.¹⁶⁰² It is traditionally at school board level where community members within the district and parents are able to impact education policymaking.¹⁶⁰³

School boards in the US have control over school admissions through what is termed 'the school assignment process'. That is, the process for determining which children in the district are assigned to which schools.¹⁶⁰⁴ Nearly all school boards are mandated to draw feeder areas

¹⁵⁹⁷ Wilson EK 'Toward a theory of equitable federated regionalism in public education' (2014) 61:5 *UCLA Law Review* 1436. *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) BCLR 989 (CC) 208.

¹⁵⁹⁸ Isaacs D 'Realising the right to education in South Africa: Lessons from the United States of America' (2010) 26:2 *South African Journal on Human Rights* 364.

¹⁵⁹⁹ Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 11. Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 5.

¹⁶⁰⁰ Mashu TS, Kone LR & Mutshaeni HN 'Improving participation in quality education in South Africa: Who are the stakeholders?' (2014) 7:3 *International Journal of Education Science* 563 and Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The School District Superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 7.

¹⁶⁰¹ See sections 5(5), 6(2) and 8(1) of the South African Schools Act.

¹⁶⁰² Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 7. Freeman C *School Boards and Local Control: Roles and Responsibilities* (2002) 6.

¹⁶⁰³ Björk LG, Kowalski TJ & Tricia Browne-Ferrigno 'The school district superintendent in the United States of America' (2014) Paper 13 *Educational Leadership Faculty Publications* 7.

¹⁶⁰⁴ Shi Y & Singleton JD *Expertise and Independence on Governing Boards: Evidence from School Districts* (2019) 6.

(attendance zones) for schools within their district.¹⁶⁰⁵ Most districts do in fact establish these.¹⁶⁰⁶ Consequently, American children have either sparse or no access to schools beyond their geographic district.¹⁶⁰⁷ In contrast, the relationship between schools and neighbourhoods in South Africa is not nearly as rigid.

In the US, public schools are funded through a mixture of federal, state and local taxes in proportions that differ across and within the respective states.¹⁶⁰⁸ Funding at the local level is derived from local property taxes,¹⁶⁰⁹ which is the chief source of financing in most states.¹⁶¹⁰ Local property values thus dictate the degree of local school financing.¹⁶¹¹ School boards could therefore potentially pander to the demands of those with higher property values less they exit the district. School boards are responsible for determining the allocation of resources in their respective districts.¹⁶¹² Boards also manage their own budget.¹⁶¹³ In comparison, South Africa's national treasury allocates monies to the country's nine provincial governments. Provincial governments then decide what proportion of these monies they wish to allocate to basic education within their respective provinces.¹⁶¹⁴

The US Supreme Court has lent much credence to what the court has characterised as the local autonomy and control of school districts.¹⁶¹⁵ The court views district autonomy as vital to ensuring that communities in the US remain invested in their schools and, that the quality of education remains high.¹⁶¹⁶ School districts thus have a significant amount of control over how

¹⁶⁰⁵ Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 110 fn 140.

¹⁶⁰⁶ Tefera A, Frankenberg E, Siegel-Hawley G, et al 'Integrating Suburban Schools: How to Benefit from Growing Diversity and Avoid Segregation' (2011) 18.

¹⁶⁰⁷ Kiel D 'The enduring power of Milliken's fences' (2013) 45:1 *Urban Lawyer* 144.

¹⁶⁰⁸ Peter G. Peterson Foundation 'How is K-12 Education Funded?' available at <https://www.pgpf.org/budget-basics/how-is-k-12-education-funded> (accessed 18 December 2022).

¹⁶⁰⁹ Peter G. Peterson Foundation 'How is K-12 Education Funded?' available at <https://www.pgpf.org/budget-basics/how-is-k-12-education-funded> (accessed 18 December 2022).

¹⁶¹⁰ U.S. Department of Housing and Urban Development | Office of Policy Development and Research 'Insights into Housing and Community Development Policy - Breaking Down Barriers: Housing, Neighborhoods, and Schools of Opportunity' (2016) PD&R 5.

¹⁶¹¹ U.S. Department of Housing and Urban Development | Office of Policy Development and Research 'Insights into Housing and Community Development Policy - Breaking Down Barriers: Housing, Neighborhoods, and Schools of Opportunity' (2016) PD&R.

¹⁶¹² Freeman C *School Boards and Local Control: Roles and Responsibilities* (2002) 6.

¹⁶¹³ Freeman C *School Boards and Local Control: Roles and Responsibilities* (2002) 6 and 13.

¹⁶¹⁴ McLaren D 'Funding basic education' in Veriava F and Fish Hodgson TF (eds) in 'Basic Education Rights Handbook: Education Rights in South Africa' (2017) 48.

¹⁶¹⁵ Wilson EK 'Toward a theory of equitable federated regionalism in public education' (2014) 61:5 *UCLA Law Review* 1443. The court has stated that '[n]o single tradition in public education is more deeply rooted than local control over the operation of schools' See *Milliken v. Bradley* 418 U.S. 717 (1974) 741 and 742.

¹⁶¹⁶ *Milliken v. Bradley* 418 U.S. 717 (1974) 741 and 742.

school integration is to be addressed.¹⁶¹⁷ The court has been criticised for perpetuating the fallacy that school district autonomy is sacrosanct and for its failure to recognise that districts are not sovereign entities under the law.¹⁶¹⁸ It has been argued that the US Supreme court has empowered school districts to function as ‘their own fiefdoms’. These ‘fiefdoms’ are permitted to deliver uneven education based on geography which correlates with race and class.¹⁶¹⁹ This concentrated control over the provision of education has constrained school desegregation efforts in the US.¹⁶²⁰ The provincial governments in South Africa are not pained by excessive localised control over the provision of education as seen in the US. Indeed, national policy explicitly empowers HoDs to determine feeder zones for all schools across their respective provinces.¹⁶²¹ South Africa’s PEDs are therefore better placed to reconfigure feeder zones as a transformative measure. However, PEDs have not done so. The following section examines some of the efforts by school districts in the US to desegregate schools there. These interventions may provide useful examples which South Africa’s PED’s can draw on to ensure more racially equitable access to schools in South Africa.

9.6 BROWN AND THE ATTEMPTS AT DESEGREGATION THAT FOLLOWED

In 1951, Oliver Brown attempted to enrol his daughter, Linda, in Sumner Elementary School in Topeka, Kansas. Sumner was a whites-only school, and the Brown family were black. Linda was therefore denied admission because of her race. The Brown family formed part of a class suit against the Topeka Board of Education challenging the constitutionality of the segregation policy that compelled black learners to enrol in separate schools.¹⁶²² In *Brown I*, the US Supreme Court found that the policy of segregated schooling which disqualified Linda from accessing Sumner because of her race was unconstitutional.¹⁶²³ Prior to *Brown I*, the prevailing legal position on racially segregated facilities was set out in the US Supreme Court decision of *Plessy v Ferguson*.¹⁶²⁴ *Plessy* established the ‘separate but equal’ doctrine. In terms of this

¹⁶¹⁷ Carter PL *Stubborn Roots: Race, Culture, and Inequality in U.S and South African Schools* (2012) 30.

¹⁶¹⁸ Saiger AJ ‘The school district boundary problem’ (2010) 42:3 *Urban Lawyer* 507-509. Wilson EK ‘Toward a theory of equitable federated regionalism in public education’ (2014) 61:5 *UCLA Law Review* 1441-1444. Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s public schools’ (2018) 16 *Northwestern Journal of Human Rights* 114 and 115. Orfield M ‘Milliken, Meredith and metropolitan segregation’ (2015) 62:2 *UCLA Law Review* 406-407.

¹⁶¹⁹ Wilson EK ‘Toward a theory of equitable federated regionalism in public education’ (2014) 61:5 *UCLA Law Review* 1443. Kiel D ‘The enduring power of Milliken’s fences’ (2013) 45:1 *Urban Lawyer* 144.

¹⁶²⁰ Lemon A & Battersby-Lennard J ‘Overcoming the apartheid legacy in Cape Town schools’ (2009) 99:4 *Geographical Review* 534.

¹⁶²¹ See section 5.3.2 above.

¹⁶²² *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483 (1954).

¹⁶²³ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483 (1954).

¹⁶²⁴ *Plessy v Ferguson* 163 U.S. 537 (1896).

doctrine, equality of treatment is present when race groups are afforded ‘substantially equal facilities’ even if these facilities are separate.¹⁶²⁵ In *Brown I*, the US Supreme Court rejected the ‘separate but equal’ doctrine, ruling it ‘inherently unequal’.¹⁶²⁶

The US Supreme Court explained that segregating black children from their white peers had an adverse effect on the black children so separated. The court reasoned that such segregation produced a sense of inferiority in black children ‘that may affect their hearts and minds in a way unlikely ever to be undone’.¹⁶²⁷ It also undermined their educational opportunities.¹⁶²⁸ The court concluded that such segregation denied black children equal protection of the law under the 14th Amendment of the US Constitution.¹⁶²⁹ In *Brown II* the US Supreme Court required all school boards operating racially segregated schooling systems ‘to effectuate a transition to a racially non-discriminatory school system.’¹⁶³⁰ More particularly, school boards were obliged to ‘make a prompt and reasonable start’ at desegregating schools.¹⁶³¹ The following section explores some of the post *Brown I and II* interventions undertaken by school boards in the US to achieve more racially diverse schools there. Also discussed, is some of the US Supreme Court’s rulings as to the constitutionality of these various interventions. The first intervention considered is, what is termed, ‘freedom of choice plans’. Thereafter, the use of quotas, satellite zoning, student reassignments (busing) as well as so called ‘pairing and clustering’ initiatives are examined. Finally, ‘controlled choice plans’ are considered.

9.6.1 ‘Freedom of Choice’

As desegregation took hold in the US in the 1960’s, thousands of education districts across the south responded to the demand for desegregation through initiating ‘freedom of choice plans’.¹⁶³² Under these plans separate schools were preserved but children were permitted to transfer to a different school.¹⁶³³ Students were allowed an unrestricted choice as to which

¹⁶²⁵ *Plessy v Ferguson* 163 U.S. 537 (1896).

¹⁶²⁶ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 495 (1954).

¹⁶²⁷ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 494 (1954).

¹⁶²⁸ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 494 (1954).

¹⁶²⁹ *Brown v Board of Education of Topeka (Brown I)* 347 U.S. 483, 495 (1954).

¹⁶³⁰ *Brown v Board of Education of Topeka (Brown II)* 349 U.S. 294 (1955) 349 U.S. 300.

¹⁶³¹ *Brown v Board of Education of Topeka (Brown II)* 349 U.S. 294 (1955) 349 U.S. 300.

¹⁶³² Orfield G & Gándara P ‘Housing and School Segregation and Intergenerational Inequality in the U.S.’ (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 38.

¹⁶³³ Orfield G & Gándara P ‘Housing and School Segregation and Intergenerational Inequality in the U.S.’ (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 38 and 40.

school in their district they wished to attend.¹⁶³⁴ The only constraints being overcrowding or exceptional circumstances.¹⁶³⁵ This meant that African American families could now opt to send their children to white schools.¹⁶³⁶ However, the opportunity to make such choices were not genuinely viable. Many black students seeking to transfer were denied the opportunity for various reasons.¹⁶³⁷ Black children, for instance, faced harassment and intimidation including threats of violence for choosing to transfer to white schools.¹⁶³⁸ School officials also actively dissuaded black children from attempting to make this shift,¹⁶³⁹ and placed significant administrative barriers in their way.¹⁶⁴⁰ Black students' admissions applications were rejected on suspicious grounds such as 'improper registration',¹⁶⁴¹ a seeming lack of space,¹⁶⁴² and 'bad character'.¹⁶⁴³ Nevertheless, freedom of choice plans were deemed an acceptable desegregation method by the United States Office of Education under its 1965 guidelines on school desegregation in the South.¹⁶⁴⁴ The 1966 revised guidelines (the revised guidelines),¹⁶⁴⁵ included comprehensive procedural requirements to be met when implementing freedom of choice plans.¹⁶⁴⁶ The revised guidelines required close government involvement in and

¹⁶³⁴ Mathewson AD 'The picture of equality' (2005) 16:2 *University of Florida Journal of Law and Public Policy* 300; Brown RW 'Freedom of choice in the South: A constitutional perspective' (1968) 28:3 *Louisiana Law Review* 456 and 457.

¹⁶³⁵ Deinlein JN 'Civil rights-school desegregation: Freedom of choice plans in school desegregation: *Green v. New Kent County School Board*, 391 U.S. 430 (1968)' (1969) 5:2 *Wake Forest Intramural Law Review* 344; Brown RW 'Freedom of choice in the South: A constitutional perspective' (1968) 28:3 *Louisiana Law Review* 456 and 457.

¹⁶³⁶ Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 108.

¹⁶³⁷ Moe T 'Beyond the free market: The structure of school choice' (2008) 2008:2 *Brigham Young University Law Review* 566.

¹⁶³⁸ Slippen R 'Title VI enforcement process - Administrative enforcement of civil rights in public education: Title VI, *Hew*, and the civil rights reviewing authority' (1975) 21:3 *Wayne Law Review* 944 fn 74.

¹⁶³⁹ Slippen R 'Title VI enforcement process - Administrative enforcement of civil rights in public education: Title VI, *Hew*, and the civil rights reviewing authority' (1975) 21:3 *Wayne Law Review* 944 fn 74.

¹⁶⁴⁰ Frankenberg E & Siegel-Hawley G 'Choosing diversity: School choice and racial integration in the age of Obama' 2010 *Stanford Journal of Civil Rights & Civil Liberties* 223 and fn 21.

¹⁶⁴¹ Rossell C *The Carrot or the Stick for School Desegregation Policy* (1991) 1965.

¹⁶⁴² Rhinesmith D 'District court opinions as evidence of influence: *Green v. School Board* and the Supreme Court's role in local school desegregation.' (2010) 96:5 *Virginia Law* 1139. Rossell C *The Carrot or the Stick for School Desegregation Policy* (1991) 5.

¹⁶⁴³ Rossell C *The Carrot or the Stick for School Desegregation Policy* (1991) 5.

¹⁶⁴⁴ General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools 1965. Issued by the Department of Health, Education and Welfare.

¹⁶⁴⁵ 'Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964' 1966 (as amended). Issued by the Department of Health, Education and Welfare.

¹⁶⁴⁶ Shane PM 'School desegregation remedies and the fair governance of schools' (1984) 132:5 *University of Pennsylvania Law Review* 1062 fn 60.

supervision over these plans,¹⁶⁴⁷ and set an objective standard for determining its effectiveness.¹⁶⁴⁸

Under the revised guidelines, freedom of choice plans conferred a choice of desired schools on a parent or an adult acting in that capacity. Where a student was 15 years or older at the date of selection and their choice concerned the ninth grade or above, they could make their own decision. However, where their parent/guardian differed as to the desired school the parent/guardian's choice prevailed.¹⁶⁴⁹ Selection was to occur annually,¹⁶⁵⁰ within a thirty day window period in the preceding academic year (although a further period could be mandated).¹⁶⁵¹ A student retained the ability to make a selection at any time prior to the commencement of the relevant academic year.¹⁶⁵² However, choices made outside the designated period were subordinate to choices made within it.¹⁶⁵³ No preference was conferred on those who exercised their choice earlier within the assigned period.¹⁶⁵⁴ A student who failed to choose within a week of the new academic year was allocated to the school closest their area of residence if capacity existed.¹⁶⁵⁵ A uniform standard had to be applied when establishing school capacity.¹⁶⁵⁶

On day one of the selection period the education district was required to ensure that the parent/guardian of every student currently enrolled received, via mail, a standardised selection form, letter, and an explanatory note. This was to be accompanied with a return envelope for the attention of the superintendent.¹⁶⁵⁷ Selection forms contained the names and addresses of all schools and the grades they served. Students were required to disclose their address and race when completing these forms.¹⁶⁵⁸ Provision was made for instances where the prescribed form was not available to parents.¹⁶⁵⁹ A selection, once made, could only be altered on the basis of

¹⁶⁴⁷ Rhinesmith D 'District court opinions as evidence of influence: Green v. School Board and the Supreme Court's role in local school desegregation.' (2010) 96:5 *Virginia Law* 1154.

¹⁶⁴⁸ Dunn JR 'Title VI, the Guidelines and school desegregation in the South' (1967) 53:1 *Virginia Law Review* 44.

¹⁶⁴⁹ Section 181.42 of the 'Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964' 1966 (as amended).

¹⁶⁵⁰ Section 181.43. United States Commission on Civil Rights *Southern School Desegregation* (1967) (Revised Guidelines).

¹⁶⁵¹ Section 181.44 of the Revised Guidelines.

¹⁶⁵² Section 181.45 of the Revised Guidelines.

¹⁶⁵³ Section 181.45 of the Revised Guidelines.

¹⁶⁵⁴ Section 181.44 of the Revised Guidelines.

¹⁶⁵⁵ Section 181.45 of the Revised Guidelines.

¹⁶⁵⁶ Section 181.45 of the Revised Guidelines.

¹⁶⁵⁷ Section 181.46 of the Revised Guidelines.

¹⁶⁵⁸ Section 181.46 of the Revised Guidelines.

¹⁶⁵⁹ Section 181.46 of the Revised Guidelines.

‘compelling hardship’ or where the student’s place of residence had changed and there was another school situated closer to the new residence.¹⁶⁶⁰ In the event of overcrowding, preference was to be conferred on those who lived within closer proximity to the school irrespective of their race or colour.¹⁶⁶¹ No preference would be given on the basis of previous attendance if this would result in blocking another student’s free choice.¹⁶⁶²

Students and parents/guardians received written notification of the school to which the student was assigned.¹⁶⁶³ Written notification was also required where a request was denied. In this event, the student could choose from any school within the district where capacity remained.¹⁶⁶⁴ Uniform standards had to be applied for purposes of determining capacity.¹⁶⁶⁵ Where the free choice system caused ‘unusual difficulty’ the commissioner (the head of the Federal Office of Education) could be approached to reconsider the assignment. Examples of such difficulty included family members unable to attend the same school as well as requiring access to schools accommodating unique student needs.¹⁶⁶⁶ The education district possessed a discretion to give preference to any student selecting a school where their race was in the minority.¹⁶⁶⁷ Teachers, employees and officials were prohibited from indirectly or directly attempting to sway a student’s school selection or from conferring any benefit or punishment on any student due to their selection.¹⁶⁶⁸

The US Supreme Court was called upon to evaluate the effectiveness of a freedom of choice plan in the 1968 case of *Green v County School Board of New Kent County (Green)*.¹⁶⁶⁹ The case was filed on behalf of African American students from New Kent County, Virginia seeking relief against New Kent County School Board’s preservation of a racially segregated education system. New Kent County was a rural county and was not residentially segregated. There were also no attendance zones. The county’s education system served 1 300 students of which 550 were white and 740 black. Only two schools serviced the county. Despite more than a decade having lapsed since the US Supreme Court first ordered school boards to desegregate, the two schools in the county remained racially segregated. Months after the case was filed the

¹⁶⁶⁰ Section 181.48 of the Revised Guidelines.

¹⁶⁶¹ Section 181.49 of the Revised Guidelines.

¹⁶⁶² Section 181.49 of the Revised Guidelines.

¹⁶⁶³ Section 181.49 of the Revised Guidelines.

¹⁶⁶⁴ Section 181.49 of the Revised Guidelines.

¹⁶⁶⁵ Section 181.49 of the Revised Guidelines.

¹⁶⁶⁶ Section 181.49 of the Revised Guidelines.

¹⁶⁶⁷ Section 181.49 of the Revised Guidelines.

¹⁶⁶⁸ Section 181.52 of the Revised Guidelines.

¹⁶⁶⁹ *Green v County School Board of New Kent County* 391 U.S. 430 (1968).

school board adopted a freedom of choice plan, ostensibly to facilitate desegregation of the county's schooling system. The school board adopted the plan to avoid being rendered ineligible for federal financial assistance.¹⁶⁷⁰ The plan allowed each student, except for those enrolling in the first and eighth (entry) grades, to select which of the two schools in the county they wished to attend. Where no selection occurred, students were assigned to their previous school. However, no white children opted to change schools and whilst several black children chose to transfer, the New Kent County education system remained segregated. The US Supreme Court found that freedom of choice plans may potentially serve as a permissible method for desegregation where 'it offers real promise of aiding a desegregation program'.¹⁶⁷¹ However, the court explained, where there were other reasonable desegregation techniques 'promising speedier and more effective conversion', freedom of choice plans were unacceptable.¹⁶⁷² The court cited the use of school zoning as a potential alternative to freedom of choice.¹⁶⁷³ The school board was ordered to design a new desegregation plan,¹⁶⁷⁴ that would ensure 'racial discrimination would be eliminated root and branch.'¹⁶⁷⁵

Despite its extensive implementation, freedom of choice plans made little impact on the desegregation of American schools.¹⁶⁷⁶ White children never opted to attend black schools and only a negligible number of black children chose to make the leap to white schools.¹⁶⁷⁷ Notwithstanding its seemingly neutral character, freedom of choice plans perpetuated segregation within southern state schools.¹⁶⁷⁸ In fact, it was deliberately used by some southern school boards to do just that.¹⁶⁷⁹ It is improbable that a similar freedom of choice system as employed in the US would prove an effective mechanism for achieving more equitable access

¹⁶⁷⁰ *Green v County School Board of New Kent County* 391 U.S. 430, 433 (1968).

¹⁶⁷¹ *Green v County School Board of New Kent County* 391 U.S. 430, 440-441 (1968).

¹⁶⁷² *Green v County School Board of New Kent County* 391 U.S. 430, 441 (1968).

¹⁶⁷³ *Green v County School Board of New Kent County* 391 U.S. 430, 441 (1968).

¹⁶⁷⁴ *Green v County School Board of New Kent County* 391 U.S. 430, 442 (1968).

¹⁶⁷⁵ *Green v County School Board of New Kent County* 391 U.S. 430, 437-438 (1968).

¹⁶⁷⁶ Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 38. Mathewson AD 'The picture of equality' (2005) 16:2 *University of Florida Journal of Law and Public Policy* 313.

¹⁶⁷⁷ Dunn JR 'Title VI, the Guidelines and school desegregation in the South' (1967) 53:1 *Virginia Law Review* 44. Shane PM 'School desegregation remedies and the fair governance of schools' (1984) 132:5 *University of Pennsylvania Law Review* 1051. Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 38.

¹⁶⁷⁸ Welner KG 'Much Ado About Politics (And Much Ignored in Research Evidence) Analyzing the Voucher/Desegregation Dispute between Gov. Jindal and the US Department of Justice' (2013) 5.

¹⁶⁷⁹ Brown RW 'Freedom of choice in the South: A constitutional perspective' (1968) 28:3 *Louisiana Law Review* 457.

to schooling in South Africa. To forego the use of feeder zones in its entirety and rely on freedom of choice instead would threaten to exacerbate rather than address existing inequalities in accessing educational opportunities. A free choice system would place better off South African parents in a better position to ensure their children gain access to the best schools. This is because it is these privileged parents who have the knowledge and resources to navigate the school admissions process more comfortably. The experience with the use of freedom of choice plans in the US south shows that an open market system is not a viable solution to achieving more equitable access to education in South Africa. Schools historically designated for African children under apartheid South Africa remain virtually all black.¹⁶⁸⁰ Freedom of choice plans will not see white South African parents suddenly choosing to enrol their children in historically black, significantly under resourced, and underperforming schools.

9.6.2 Racial quotas, pairing and clustering and, busing

The US Supreme Court's decision in *Green* ushered in an era of involuntary segregation that involved, amongst other interventions, what is commonly referred to as 'busing'.¹⁶⁸¹ Busing was by far the most controversial mechanism for ensuring school desegregation in the US.¹⁶⁸² Busing as a tool for desegregation arose as a result of the use of racial balance quotas for purposes of student assignment.¹⁶⁸³ The phrase 'busing' applied to two methods for desegregating schools.¹⁶⁸⁴ The first, termed 'pairing and clustering', was a commonly used technique for ensuring more equitable access to schooling in the US. This approach entailed linking two schools that served the same grades with each other, one white and the other a school for minorities. The student populations of these schools would then be reconfigured so that school A would now house all the lower grade students, and school B all the more senior grades.¹⁶⁸⁵ The paired schools would fall within the same education district.¹⁶⁸⁶ Clustering was

¹⁶⁸⁰ Chisholm L 'The state of South Africa's schools' in Daniel J, Southall R & Lutchman J (eds) *State of the Nation: South Africa 2004-2005* (2004) 217.

¹⁶⁸¹ Center for New York City Affairs *The Paradox of Choice: How School Choice Divides New York City Elementary Schools* (2018) Center for New York City Affairs 6.

¹⁶⁸² Liley B 'Beyond bussing and integration to accountability for educational institutions' (1978) 2:1 *Glendale Law Review* 42. Sepaniak A 'Bussing — A permissible tool of school desegregation' (1971) 49:2 *Journal Urban Law* 415.

¹⁶⁸³ Armor DJ & Rossell CH 'Desegregation and Resegregation in the Public Schools' in Thernstrom A & Thernstrom S (eds) *Beyond Victimization* (2002) 219 and 220.

¹⁶⁸⁴ Rossell CH & Armor DJ 'The effectiveness of school desegregation plans, 1968-1991' (1996) 24:3 *American Politics Quarterly* 279.

¹⁶⁸⁵ Raffel J *Historical dictionary of school segregation and desegregation: The American Experience* (1998) 195.

¹⁶⁸⁶ Forletta F 'A Historical Case Study of School Desegregation and Resegregation in Las Vegas, Nevada, 1968-2008' (Unpublished Doctoral thesis, University of Nevada, 2012) 3.

similar to pairing except it involved the bringing together of more than two schools.¹⁶⁸⁷ Schools that were so paired or clustered were ordinarily from separate areas within a city.¹⁶⁸⁸ The second school desegregation method associated with busing is termed ‘satellite zoning’. This method was also described as ‘island’ or ‘pocket zoning’. A satellite zone was one that was paired with the main zone.¹⁶⁸⁹ Satellite zoning involved allocating an area with a certain racial demographic to a school with an opposing racial demographic.¹⁶⁹⁰ The implication of this race-based assignment process was that students in more sizeable districts were required to traverse lengthy distances from their previous school to their new one across a city or county, hence the need for busing.¹⁶⁹¹

A distinction existed between one-way and two-way busing. The former entailed placing almost entirely non-white students on buses destined for white schools for purposes of correcting racial imbalance in the student body composition of those schools.¹⁶⁹² The latter concerned placing both white and non-white students on buses destined for the school in which their race was the minority to achieve the same purpose.¹⁶⁹³ In the 1971 decision of *Swann v. Charlotte-Mecklenburg Board of Education* (*Swann*), the US Supreme Court considered school desegregation plans involving race-based quotas, pairing and busing. The court further considered whether and to what extent attendance zones could be altered to further school desegregation. *Swann* together with other African American parents from North Carolina first filed suit against the Charlotte-Mecklenburg Board of Education in 1965. These parents requested that the federal district court compel the school board to desegregate the education system. The board filed a desegregation plan at the start of the case which the court approved.¹⁶⁹⁴ However, some years later Charlotte-Mecklenburg’s education system (then making up 107 schools with a student population totalling 71% white and 29% black) remained significantly segregated. About two thirds of black students attended schools within the city

¹⁶⁸⁷ Raffel J ‘Historical dictionary of school segregation and desegregation: The American Experience’ (1998) 195.

¹⁶⁸⁸ Rossell CH & Armor DJ ‘The effectiveness of school desegregation plans, 1968-1991’ (1996) 24:3 *American Politics Quarterly* 279.

¹⁶⁸⁹ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 27-29 read with fn 3 (1971).

¹⁶⁹⁰ Armor DJ & Rossell CH ‘Desegregation and resegregation in the public schools’ in Thernstrom A & Thernstrom S (eds) *Beyond Victimization* (2002) 219 and 220.

¹⁶⁹¹ Armor DJ & Rossell CH ‘Desegregation and resegregation in the public schools’ in Thernstrom A & Thernstrom S (eds) *Beyond Victimization* (2002) 219 and 220.

¹⁶⁹² Dexheimer A ‘“Busing did not fail. We did.”: Doublespeak, whiteness, and the contradictions of liberalism in public schooling’ (2020) 9:1 Article 6 *Tapestries: Interwoven Voices of Local and Global Identities*.

¹⁶⁹³ Ducharme GD & Eickholt EH ‘Brown and bussing’ 1967 44 *Journal of Urban Law* 635. Dexheimer A ‘“Busing did not fail. We did.”: Doublespeak, whiteness, and the contradictions of liberalism in public schooling’ (2020) 9:1 Article 6 *Tapestries: Interwoven Voices of Local and Global Identities*.

¹⁶⁹⁴ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 1 (1971).

limits which were entirely or virtually entirely black.¹⁶⁹⁵ Following *Green* and related cases, Swann petitioned the court for further relief. The district court refused to approve the school board's additional proposals for desegregation. Instead, the court appointed an expert to provide suggestions on viable ways to desegregate. The district court approved the expert's plan which involved, amongst others, the use of race-based quotas for school assignments, pairing and, the establishment of satellite zones.¹⁶⁹⁶ The case eventually reached the US Supreme Court. The US Supreme court approved the application of race-based quotas for school assignments as a 'starting point' to achieve desegregation.¹⁶⁹⁷ The court further endorsed the use of pairing, the grouping of non-adjacent school zones and busing in certain circumstances to address racially skewed demographics in a district's schools.¹⁶⁹⁸ Adjusted zones could include the establishment of satellite zones, described as areas which are not contiguous with the main attendance zone in the immediate proximity of the school.¹⁶⁹⁹ *Swann* thus illustrates the US Supreme Court's endorsement of de-segregative school zoning even where this takes on a non-contiguous form.¹⁷⁰⁰ The reconfiguration of attendance zones by some US education districts for the purpose of advancing racial diversity in schools are discussed later in this chapter.

As a consequence of *Swann*, courts during the 1970s compelled several urban education districts to institute busing as a means to ensure desegregated schooling.¹⁷⁰¹ For the next almost 30 years US courts continued to draw on busing as a remedial measure.¹⁷⁰² The use of busing to address racially desegregated schooling was hugely unpopular across the US.¹⁷⁰³ In fact, US president Richard Nixon openly and strongly opposed busing as a tool for integration and drew on his political power to undermine its use.¹⁷⁰⁴ The opposition of many communities within

¹⁶⁹⁵ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 7 (1971).

¹⁶⁹⁶ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 9 (1971).

¹⁶⁹⁷ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 25 (1971).

¹⁶⁹⁸ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 28 (1971).

¹⁶⁹⁹ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 27-29 read with fn 3 (1971).

¹⁷⁰⁰ Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master's thesis, University of Texas, 2012) 9.

¹⁷⁰¹ Law Library - American Law and Legal Information 'School Desegregation: The 1970s - Swann and Busing' available at <https://law.jrank.org/pages/10023/School-Desegregation-1970s-Swann-Busing.html> (accessed 18 May 2020). See for instance *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974).

¹⁷⁰² Law Library - American Law and Legal Information 'School Desegregation: The 1970s - Swann and Busing' available at <https://law.jrank.org/pages/10023/School-Desegregation-1970s-Swann-Busing.html> (accessed 18 May 2020).

¹⁷⁰³ May GV Jnr 'Busing: A constitutional precipice' (1972) 7:1 *Suffolk University Law Review* 55. Waldrop RL Jnr 'Busing and racial imbalance: Judicial sword and social dragon' (1972) 39:4 *Tennessee Law Review* 681.

¹⁷⁰⁴ Delmont MF 'Why busing failed: Race, media, and the national resistance to school desegregation' (2016) 116-118. Sepaniak A 'Bussing — A permissible tool of school desegregation' (1971) 49:2 *Journal Urban Law* 421 and 422. May GV Jnr 'Busing: A constitutional precipice' (1972) 7:1 *Suffolk University Law Review* 54.

the US to busing was also fierce.¹⁷⁰⁵ Although amongst minority populations the response to bussing appeared more mixed.¹⁷⁰⁶ Throughout the 1990's federal courts discharged desegregation orders that had been imposed on numerous education districts on the basis that these districts had achieved a unitary public education system. The 1999 release of the education district in *Swann* from court ordered supervision sounded the death knell for bussing as a tool of school desegregation in the US.¹⁷⁰⁷ There remains a divergence of opinion as to the success of bussing as a vehicle to achieve school integration in the US.¹⁷⁰⁸ Busing has been labelled by some as a failure because of the significant burden it imposed on non-white students who had to traverse lengthy distances to school and who sometimes encountered hostile communities at the end of their journey.¹⁷⁰⁹ These hostilities could be observed in areas such as Boston, Massachusetts.¹⁷¹⁰ Numerous scholars and activists assert that bussing engendered 'white flight'. This refers to the phenomenon where white families flee mixed race districts for the suburbs thus weakening integration efforts in those districts.¹⁷¹¹ Theoharis argues that those who claim that bussing as a tool for desegregation in the 1970's and 1980's failed are incorrect. Theoharis points out that this epoch in fact witnessed a substantial improvement in educational equity. This, Theoharis argues, can be observed in the substantial narrowing of the reading gap between black and white children by 1988.¹⁷¹²

¹⁷⁰⁵ Sepaniak A 'Bussing — A permissible tool of school desegregation' (1971) 49:2 *Journal Urban Law* 421 and 422.

¹⁷⁰⁶ 'New perspectives on court ordered bussing' (1972) 8:3 *Columbia Journal of Law and Social Problems* 347.

¹⁷⁰⁷ Law Library - American Law and Legal Information 'School Desegregation: The 1970s - *Swann* and Busing' available at <https://law.jrank.org/pages/10023/School-Desegregation-1970s-Swann-Busing.html> (accessed 18 May 2020).

¹⁷⁰⁸ Hannah-Jones N 'It was never about bussing: Court-ordered school desegregation worked. But white racism made it hard to accept' *The New York Times* 12 July 2019 available at <https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html> (accessed 18 May 2020). Theoharis G 'Forced bussing' didn't fail. Desegregation is the best way to improve our schools' *The Washington Post* 23 October 2015 available at <https://www.washingtonpost.com/posteverything/wp/2015/10/23/forced-busing-didnt-fail-desegregation-is-the-best-way-to-improve-our-schools/> (accessed 18 May 2020).

¹⁷⁰⁹ NPCR 'Why Busing Didn't End School Segregation' 6 October 2016 available at <https://www.npr.org/sections/ed/2016/10/06/496411024/why-busing-didnt-end-school-segregation> (accessed 14 January 2023).

¹⁷¹⁰ NPCR 'Why Busing Didn't End School Segregation' 6 October 2016 available at <https://www.npr.org/sections/ed/2016/10/06/496411024/why-busing-didnt-end-school-segregation> (accessed 14 January 2023).

¹⁷¹¹ Liley B 'Beyond bussing and integration to accountability for educational institutions' (1978) 2:1 *Glendale Law Review* 39, 40, 42 and 43. Vickerstaff JM 'Getting off the bus: Why many black parents oppose bussing' (1998) 27:1 *Journal of Law & Education* 160.

¹⁷¹² Theoharis G 'Forced bussing' didn't fail. Desegregation is the best way to improve our schools' *The Washington Post* 23 October 2015 available at <https://www.washingtonpost.com/posteverything/wp/2015/10/23/forced-busing-didnt-fail-desegregation-is-the-best-way-to-improve-our-schools/> (accessed 18 May 2020).

South Africa's provincial governments' ability to implement busing as a mechanism to address geographical inequities in the school admissions process is arguably stronger than that of the US. South Africa's PEDs do not have to navigate the political quagmire of local authorities and the segregating effect of district borders to implement busing. The heads of the various PEDs appear better placed to compel desegregation by way of busing. However, it is inconceivable how the busing model as adopted in the US could succeed in a South African context. This is so for several reasons. First, the success of such a busing system rides on the availability of sufficient resources to pull off a project of such magnitude. In this regard, the US is a far wealthier nation than South Africa.¹⁷¹³ South Africa, lacks the resources to implement a busing model such as that undertaken by the US.¹⁷¹⁴ Secondly, buses as a mode of student commute already formed a fundamental component of the US public education scheme by the time the US Supreme Court endorsed its use as a remedy for school desegregation.¹⁷¹⁵ In South Africa's case existing scholar transport provisioning suffers from, amongst others, policy implementation gaps, confusion around the delineation of responsibilities within different departments and a lack of government oversight.¹⁷¹⁶ Further struggles include unroadworthy vehicles, budgetary issues, financial mismanagement, fraud, and corruption.¹⁷¹⁷ It is hard to see how these same challenges will not materialise should South Africa adopt a US style school busing scheme. Two-way busing is especially unviable given the substantial inequities in the provision of public education in South Africa.¹⁷¹⁸ This is manifested in the extreme gap between superior and inferior schools. South African white and/or middle class parents would not sit idly by if their children were suddenly required to be bussed off to significantly inferior public schools.¹⁷¹⁹ These parents will rather choose private education over public should this be the case.¹⁷²⁰ Finally, violence inflicted against children

¹⁷¹³ Carter PL *Stubborn Roots: Race, Culture, and Inequality in U.S. and South African Schools* (2012) 27.

¹⁷¹⁴ Tihanyi K 'Racial integration in the USA and South Africa: Lessons in a comparative perspective' (2007) 11:2 *International Journal of Inclusive Education* 178.

¹⁷¹⁵ Sepaniak A 'Bussing — A permissible tool of school desegregation' (1971) 49:2 *Journal Urban Law* 420 and 421.

¹⁷¹⁶ Parliamentary Monitoring Group *Learner Transport in South Africa: HSRC briefing* (2018). Human Sciences Research Council *Access to Public Schools and Learner Transport – A Rapid Appraisal* (2018).

¹⁷¹⁷ Parliamentary Monitoring Group *Learner Transport in South Africa: HSRC briefing* (2018). Human Sciences Research Council *Access to Public Schools and Learner Transport – A Rapid Appraisal* (2018).

¹⁷¹⁸ Lemon A & Battersby-Lennard J 'Studying together, living apart: Emerging geographies of school attendance in post-apartheid Cape Town' (2011) 110:438 *African Affairs* 120.

¹⁷¹⁹ Kolasa TS *The South African Communist Party: Adapting to Thrive in a Post-Communist Age* (2016) 158 and 159. Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 535.

¹⁷²⁰ Kolasa TS *The South African Communist Party: Adapting to Thrive in a Post-Communist Age* (2016) 158 and 159. Lemon A & Battersby-Lennard J 'Overcoming the apartheid legacy in Cape Town schools' (2009) 99:4 *Geographical Review* 534 and 535.

and adolescents is endemic to South African society.¹⁷²¹ This includes the scourge of violence that ravages some South African schools. Media reports abound of sexual and physical abuse as well as gang associated activities inflicted on South African children whilst at school.¹⁷²² In some more impoverished areas, particularly the coloured townships in the Western Cape, the presence of gang violence in schools and their surrounding communities hangs heavy.¹⁷²³ It is inconceivable that white and middle class parents would allow their children to be bused into these impoverished communities and schools in the face of such dire safety threats. This is all the more so for parents with younger children. The so called ‘white flight’ observed in the US due to the implementation of busing there would pale in comparison to the mass exodus of the white and middle class from the South African public education system should such a model be adopted. An exodus of this nature would spell disaster for South Africa’s public education system. This is because most of the country’s few functioning schools are being propped up by the financial and human capital of precisely these more privileged parents. All in all, South Africa’s lack of financial resources, its already strained scholar transport provisioning scheme, its deeply inequitable public education system, and the plague of violent crime that devastate many of its impoverished communities and schools all illustrate the unfeasibility of transporting the US busing model to South African shores. As regards the pairing technique, the South African Schools Act empowers a MEC to merge two or more schools into a single one following an extensive process. Such a process includes consultation with the affected SGBs and other interested parties.¹⁷²⁴ Ensuring more racially equitable access to schooling would be a legitimate basis for such a merger. It therefore seems possible that a MEC can be similarly empowered to implement the pairing or clustering method as used in the US. However, this model would similarly be unviable for some of the same reasons as that of busing.

Regarding the use of quotas in South Africa, Jansen in an opinion piece highlighting the harsh injustices of the use of feeder zones in the school admissions process, contends for quotas in school admissions which target impoverished children. Jansen suggests that there be policy requiring that ‘every middle-class, former white school’ admit into their first or eighth grade (entry grade) classes ‘25% of talented but poor pupils who are stuck, or likely to be stuck, in

¹⁷²¹ Lake L, Shung-King M, Hendricks M et al ‘Prioritising child and adolescent health: A human rights imperative’ *The South African Child Gauge 2019: Child and Adolescent Health* (2019) 44.

¹⁷²² Mncube V and Madikizela-Madiya N ‘Gangsterism as a cause of violence in South African schools: The case of six provinces’ (2014) 5:1 *Journal of Sociology and Social Anthropology* 43.

¹⁷²³ Harbert & Mncube V *The Dynamics of Violence in South African Schools: Report 2012* (2013) 1, 42-44.

¹⁷²⁴ Section 12A of the South African Schools Act 84 of 1996.

township or rural schools'.¹⁷²⁵ Spaul, referencing Indian legislation, makes a similar suggestion for advancing equitable access to education in South Africa.¹⁷²⁶ Spaul proposes requiring, by legislation, that private schools as well as some fee charging public schools admit at least 20% of learners who are impoverished and unable to pay fees. Spaul suggests imposing this burden on all public schools charging school fees in the amount of R20 000 or more per year and explains why such an intervention is by no means a trivial one.

Given the small number of children in schools charging more than R20,000 per year (about 233,000 learners), some may argue that this is just a drop in the ocean. However, if one considers that 46,800 predominantly Black children would access these high-functioning schools (as the 20% fee-exempt), this is not a trivial number. To put this in perspective, if one thinks that the average bachelor pass rate is about 80% in high-schools charging more than R20,000 fees per year, this could potentially translate into a maximum of 40,000 students eligible for university coming from the poorest households over the next decade.¹⁷²⁷

The Indian legislation which Spaul invokes in support of his idea is the Right of Children to Free and Compulsory Education Act (the RTE Act).¹⁷²⁸ Section 12(1)(c) of the RTE Act requires that India's non state aided private schools (and other schools specified in the legislation) fill 'at least [25%] of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion'. These schools are then reimbursed at the level of per-child state expenditure (as opposed to what the private schools would have charged).¹⁷²⁹ A legal attack on this controversial provision of the RTE in so far as it relates to unaided non-minority private schools was dismissed by the Indian Supreme Court.¹⁷³⁰ However, challenges have been encountered in enforcing the 25% reservation requirement under the RTE. One audit tabled in the state assembly of India's 10th largest state, Tamil Nadu, in September 2015 revealed that a staggering 801 out of 1 866 unaided non-minority schools based in the state, had failed to provide the 25% reservation. The same audit showed that children were being enrolled under

¹⁷²⁵ Jansen J 'Catchment areas doom indigent children to a life of poverty' *TimesLive* 12 October 2017 available at <https://www.timeslive.co.za/ideas/2017-10-12-catchment-areas-doom-indigent-children-to-a-life-of-poverty/> (accessed 21 July 2023).

¹⁷²⁶ *Society for Unaided Private Schools of Rajasthan v Union of India & Another* (2012) 6 SCC; Writ Petition (C) No. 95 of 2010.

¹⁷²⁷ Spaul N 'Equity: A price too high to pay?' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 16.

¹⁷²⁸ The Right of Children to Free and Compulsory Education Act, 2009.

¹⁷²⁹ Section 12(1) (c) of the Right of Children to Free and Compulsory Education Act, 2009

¹⁷³⁰ The Right of Children to Free and Compulsory Education Act, 2009.

this reservation without being vetted for their eligibility.¹⁷³¹ The Indian experience illustrates that regular and vigorous enforcement mechanisms are required if the US, or, for that matter, any quota system aimed at furthering equity in schooling access is to be effective in the South African context.

9.6.3 Controlled choice

Controlled choice plans emerged at the start of the 1980's as mandatory reassignment plans, such as busing, came under the increasing disfavour of US courts, certain policy makers and parents of minorities alike.¹⁷³² These plans took shape largely in the North,¹⁷³³ and were intended as a means to move away from mandatory busing as a method for integration.¹⁷³⁴ Controlled choice plans are to be distinguished from freedom of choice plans through their use of racial quotas to effect racial balancing.¹⁷³⁵ In comparison with other desegregation methods used in the US, control choice was less common.¹⁷³⁶ As a desegregation technique, controlled choice plans were seen as charting a middle path between mandatory reassignment plans where parents had no agency and, voluntary reassignment plans where students could continue attending neighbourhood schools.¹⁷³⁷

Under pure controlled choice plans, attendance zones were eliminated,¹⁷³⁸ and the inequitable effects of residential segregation seemingly removed.¹⁷³⁹ Instead, student assignments were

¹⁷³¹ Open Society Justice Initiative – Open Society Foundations Education Support Program *Strategic Litigation Impacts: Equal Access to Quality Education* (2017) OSF 40.

¹⁷³² Rossell CH 'An analysis of the court decisions in *Sheff v. O'Neill* and possible remedies for racial isolation' (1997) 29:3 *Connecticut Law Review* 1225. Rossell CH 'The convergence of black and white attitudes on school desegregation issues during the four decade evolution of the plans' (1995) 36:2 *William and Mary Law Review* 628.

¹⁷³³ Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 105.

¹⁷³⁴ Yarbrough MV 'School choice and racial balance: Silver bullet or poison dart' (1992) 2:2 *Kansas Journal of Law & Public Policy* 29.

¹⁷³⁵ Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 86.

¹⁷³⁶ Ryan, JE & Heise M 'The political economy of school choice' (2002) 111:8 *Yale Law Journal* 2065.

¹⁷³⁷ Rossell CH 'The convergence of black and white attitudes on school desegregation issues during the four decade evolution of the plans' (1995) 36:2 *William and Mary Law Review* 628 and 629. Rossell CH 'An analysis of the court decisions in *Sheff v. O'Neill* and possible remedies for racial isolation' (1997) 29:3 *Connecticut Law Review* 1225.

¹⁷³⁸ Dickinson CE 'Accepting Justice Kennedy's challenge: Reviving race - conscious school assignments in the wake of *Parents Involved*' (2009) 93:4 *Minnesota Law Review* Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 90 and 93.

¹⁷³⁹ Frankenberg E & Siegel-Hawley G 'Public decisions and private choices: Reassessing the school-housing segregation link in the Post-*Parents Involved* era' (2014) 48:2 *Wake Forest Law Review* 417.

directed towards achieving socio-economically and racially diverse schools.¹⁷⁴⁰ Families were allowed to participate in the student assignment process whilst the final decision vested in the school system.¹⁷⁴¹ Families could choose from any school within the district.¹⁷⁴² Preference could be specified for the closest school or for siblings to be educated in the same school.¹⁷⁴³ The number of selections permissible was predetermined,¹⁷⁴⁴ and school picks had to be listed in order of preference.¹⁷⁴⁵ Selections had to be made before the conclusion of the previous academic year.¹⁷⁴⁶ Parental selection, although not determinative of school assignment, carried significant weight.¹⁷⁴⁷

Controlled choice plans required that districts establish specific enrolment guidelines informed by the particular community's needs. Parental choice would then be moderated through the application of these guidelines. Enrolment guidelines thus served as a mechanism to prevent uneven access to schooling opportunities.¹⁷⁴⁸ Aside from parental choice, relevant factors considered in the assignment process included the need for a more equitable racial and socio-economic spread of students (diversity), the prevention of overcrowding and, where possible, accommodating requests for geographic proximity and sibling enrolment.¹⁷⁴⁹ Controlled choice

¹⁷⁴⁰ Ryan, JE & Heise M 'The political economy of school choice' (2002) 111:8 *Yale Law Journal* 2065.

¹⁷⁴¹ Siegel-Hawley G & Frankenberg E 'Does law influence charter school diversity - An analysis of federal and state legislation' (2011) 16:2 *Michigan Journal of Race & Law* 334.

¹⁷⁴² Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 40. Dickinson CE 'Accepting Justice Kennedy's challenge: Reviving race-conscious school assignments in the wake of Parents Involved' (2009) 93:4 *Minnesota Law Review* 1432. Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 90 and 93.

¹⁷⁴³ Glenn CL & Rossell CH 'The Cambridge Controlled Choice Plan' (1988) 20:2 *The Urban Review* 84.

¹⁷⁴⁴ Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 90.

¹⁷⁴⁵ Wilson EK 'Blurred lines: Public school reforms and the privatization of public education' (2016) 51 *Washington University Journal of Law & Policy* 230. Anthony C 'Economic integration of schools: Evaluating the Wake County experiment' (2011) 6 *University of Massachusetts Roundtable Symposium Law Journal* 70. Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *A Paper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 40.

¹⁷⁴⁶ Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 90 and 91.

¹⁷⁴⁷ Ciolli A 'Economic integration of schools: Evaluating the Wake County experiment' (2011) 6 *University of Massachusetts Roundtable Symposium Law Journal* 70.

¹⁷⁴⁸ Wilson SS 'Readin', 'ritin', 'rithmetic, and responsibility: Advocating for the development of controlled-choice student-assignment plans after Parent Involved' (2008-2009) 97:1 *Kentucky Law Journal* 224.

¹⁷⁴⁹ Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 104 and 105 fn 100. Siegel-Hawley G & Frankenberg E 'Does law influence charter school diversity - An analysis of federal and state legislation' (2011) 16:2 *Michigan Journal of Race & Law* 334.

plans employed computer algorithms designed to accommodate parents' selections within the required limitations of furthering racial integration and diversity objectives.¹⁷⁵⁰

Ensuring that families were well versed on the schools on offer was chief to the success of these plans.¹⁷⁵¹ Prior to selecting their desired schools, parents were obliged to visit an information centre where they would be better appraised of their available options.¹⁷⁵² Registration usually occurred at the Parent Information Center although provision could potentially be made for student registration in neighbourhoods where parental response had been low.¹⁷⁵³ The demand for more racially equitable access to schooling meant that students could be assigned to a school other than those listed as their preferences.¹⁷⁵⁴ Where a parent had specified a preference for a child to be educated at the same school as their sibling, such child would be preferred over another child determined equally entitled to admission under the controlled process but with no sibling. That is, the presence of a sibling at the school served as a tie breaker in instances where racial balancing was not in issue. The same advantage was afforded a child living within closer proximity to the school sought.¹⁷⁵⁵

Where, after having applied the prescribed preferences, a selected school remained oversubscribed in terms of a particular category of students a lottery would be conducted. The lottery would then establish which learners in that category would be assigned to that school and which should be allocated elsewhere.¹⁷⁵⁶ After having enrolled in a school, a student would ordinarily continue attending there. The only exceptions being students who were first time entries into the public education system, those changing from elementary to secondary level or those seeking to transfer schools.¹⁷⁵⁷ School transfers were, however, required to align with the

¹⁷⁵⁰ Holtzman P 'Children in poverty' (1991) 34:1 *Howard Law Journal* 31. Wilson EK 'Blurred lines: Public school reforms and the privatization of public education' (2016) 51 *Washington University Journal of Law & Policy* 230.

¹⁷⁵¹ Alves MJ & Willie CV 'Controlled choice assignments: A new and more effective approach to school desegregation' (1987) 19:2 *The Urban Review* 75 and 76. Yarbrough MV 'School choice and racial balance: Silver bullet or poison dart' (1992) 2:2 *Kansas Journal of Law & Public Policy* 29.

¹⁷⁵² Yarbrough MV 'School choice and racial balance: Silver bullet or poison dart' (1992) 2:2 *Kansas Journal of Law & Public Policy* 29. Anthony C 'Economic integration of schools: Evaluating the Wake County experiment' (2011) 6 *University of Massachusetts Roundtable Symposium Law Journal* 70.

¹⁷⁵³ Glenn CL & Rossell CH 'The Cambridge Controlled Choice Plan' (1988) 20:2 *The Urban Review* 84.

¹⁷⁵⁴ Marron BP 'The final reform: A centrist vision of school choice' (2001) 8:2 *Georgetown Journal on Poverty Law and Policy* 328.

¹⁷⁵⁵ Glenn CL & Rossell CH 'The Cambridge Controlled Choice Plan' (1988) 20:2 *The Urban Review* 84.

¹⁷⁵⁶ Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 91. Glenn CL & Rossell CH 'The Cambridge Controlled Choice Plan' (1988) 20:2 *The Urban Review* 84 and 85.

¹⁷⁵⁷ Fava EM 'Desegregation and parental choice in public schooling: A legal analysis of controlled choice student assignment plans' (1991) 11:1 *Boston College Third World LJ* 91.

racial balancing principle.¹⁷⁵⁸ Controlled choice plans bore some fruit in terms of integration and academic achievement within US schools.¹⁷⁵⁹ However, it is difficult to envision how the overwhelming majority of South African parents' selections could be accommodated under such a plan. In the South African context, the effect of a controlled choice plan would largely amount to student assignment by lottery. Like the busing solution, this too carries the danger of mass white and middle-class flight from the public education system.

9.7 DISSOLVING THE SPIRIT OF BROWN

By 1988 there were over one hundred school desegregation matters being adjudicated in United States federal courts.¹⁷⁶⁰ In 1991, the US Supreme Court in *Board of Education v. Dowell*, faced the question of how a supervising court ought to approach a matter where the education system concerned had already been declared a 'unitary' one in line with the *Brown II* mandate.¹⁷⁶¹ The majority ruled that judicial control over education was intended to be transient. Thus, courts could appropriately dissolve a desegregation order where the board had adhered to it for a 'reasonable period of time'.¹⁷⁶² The court explained that court orders are confined to the purpose of remedying historical intentional discrimination and should not persist beyond the period required to achieve this objective. A school board's obligation would be discharged if the board had adhered to existing desegregation orders and eradicated past discrimination.¹⁷⁶³

As school desegregation orders that relied on busing dissolved, the relationship between segregated areas and segregated schools in the US has resurfaced.¹⁷⁶⁴ Research reveals that this connection between neighbourhood and school segregation is hardening.¹⁷⁶⁵ American schools are currently more racially segregated than at any stage in the previous 40 years. This can

¹⁷⁵⁸ Glenn CL & Rossell CH 'The Cambridge Controlled Choice Plan' (1988) 20:2 *The Urban Review* 85.

¹⁷⁵⁹ Marron BP 'The final reform: A centrist vision of School Choice' (2001) 8:2 *Georgetown Journal on Poverty Law and Policy* 328.

¹⁷⁶⁰ Christopher W 'Ignoring the soul of Brown: Board of Education v Dowell' (1992) 70:2 *North Carolina Law Review* 616.

¹⁷⁶¹ *Board of Education of Oklahoma City Public Schools v. Dowell* 498 U.S. 237 (1991).

¹⁷⁶² *Board of Education of Oklahoma City Public Schools v. Dowell* 498 U.S. 248 (1991).

¹⁷⁶³ *Board of Education of Oklahoma City Public Schools v. Dowell* 498 U.S. 249 and 250 (1991).

¹⁷⁶⁴ Center for Education and Civil Rights, Penn State College Education & Virginia Commonwealth University School of Education *School Segregation by Boundary Line in Virginia: Scope, Significance and State Policy Solutions* (2020) CECR, Penn State College Education & VCU School of Education 20.

¹⁷⁶⁵ Center for Education and Civil Rights, Penn State College Education & Virginia Commonwealth University School of Education *School Segregation by Boundary Line in Virginia: Scope, Significance and State Policy Solutions* (2020) CECR, Penn State College Education & VCU School of Education 20.

primarily be ascribed to the segregated nature of the neighbourhoods in which these schools are based.¹⁷⁶⁶

9.8 GEOGRAPHY, INEQUALITY AND THE USE OF ATTENDANCE ZONES IN THE US

Public schools and local communities in the US have always been intimately intertwined.¹⁷⁶⁷ For countless years, American children attended schools specifically zoned to their residential area.¹⁷⁶⁸ This stringent residential assignment scheme was applied almost universally and continues to be the foremost approach to school assignments in the country.¹⁷⁶⁹ Statistics reveal that as of 2016, of the 90% of American children who attended public schools some 71% attended the public school to which they were zoned.¹⁷⁷⁰ The connection between place of residence and access to schooling in the US thus remains robust.¹⁷⁷¹ Neighbourhood segregation within the US has been found to be one of the major drivers of school segregation.¹⁷⁷² Schools, neighbourhoods and poverty in the country remain closely connected.¹⁷⁷³ The use of attendance zones has thus had significant consequences for social parity there.¹⁷⁷⁴ Researchers have shown a substantial association between metropolitan location within the US and educational achievement.¹⁷⁷⁵ American families of poor means have limited access to schooling opportunities due to the greater cost of housing in more well-off

¹⁷⁶⁶ Rothstein R 'The Myth of "de Facto" Segregation' (2019) 36.

¹⁷⁶⁷ Frankenberg E & Siegel-Hawley G 'Public decisions and private choices: Reassessing the school-housing segregation link in the Post-Parents Involved era' (2014) 48:2 *Wake Forest Law Review* 398.

¹⁷⁶⁸ Orfield G & Gándara P 'Housing and School Segregation and Intergenerational Inequality in the U.S.' (2009) *APaper presented at the French-American Foundation / Sciences-Po Scholar-in-Residency program, Paris* 38 and 39. This was the case in all but the seventeen states that had laws mandating segregation.

¹⁷⁶⁹ Brunner EJ 'School quality, school choice, and residential mobility' in GK Ingram & Kenyon DA (eds) *Education, Land and Location* (2014) 63.

¹⁷⁷⁰ U.S. Department of Education, National Center for Education Statistics *Digest of Education Statistics, 2017* (2019)67. See U.S. Congress: Joint Economic Committee *Zoned out: How School and Residential Zoning Limit Educational Opportunity: Social Capital Project Report no. 6-19* (2019) 2. Usually, their schools are located within just over three kilometres of their homes. See Rothwell J *Housing Costs, Zoning, and Access to High- Scoring Schools* (2012) 6.

¹⁷⁷¹ Goldring EB & Swain W 'The school attendance and residential location balancing act: Community, choice, diversity, and achievement' in Ingram GK & Kenyon DA (eds) *Education, Land, and Location* (2014) 97.

¹⁷⁷² Rothstein R 'The myth of "de Facto" segregation' (2019) 100:5 *Phi Delta Kappan* 36.

¹⁷⁷³ Deluca S & Rosenblatt P 'Does moving to better neighbourhoods lead to better schooling opportunities? Parental school choice in an experimental housing voucher program' (2010) 112:5 *Teachers College Record* 1145.

¹⁷⁷⁴ Stroub KJ & Richards MP 'School catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 670.

¹⁷⁷⁵ Logan JR, Minca E & Adar S 'The geography of inequality: Why separate means unequal in American public schools' (2012) 85:3 *Sociology of Education* 289.

areas.¹⁷⁷⁶ Residential segregation and poverty thus place non-white and disadvantaged children in many places across the US at an even further disadvantage as regards access to education.¹⁷⁷⁷

The following section considers the use of attendance zones to regulate student assignments in the US and its impact on racially equitable access to schooling there. First, this section discusses how the US Supreme Court has placed significant constraints on school boards seeking to use attendance zones as a desegregating measure. Next, this section provides a general overview of the way the school zoning process unfolds in the US. Drawing on guidance from the US Departments of Justice and Education, this chapter then considers how racially transformative zones can be formulated. Finally, this chapter considers the political backlash that has been associated with transformative zoning in the US.

9.8.1 'Race conscious' attendance zones

It is speculated that there are about 70 000 to 80 000 attendance zones throughout the US.¹⁷⁷⁸ Despite its pervasive use, the form these school boundaries may assume are not subject to federal or state regulation. These boundaries therefore do not necessarily have to be compact or contiguous.¹⁷⁷⁹ This means that school zoning can, as suggested by the US Supreme Court in *Green* and *Swann*, be used to desegregate schools.¹⁷⁸⁰ However, some districts have at times designed zones that advance rather than frustrate desegregation efforts.¹⁷⁸¹ The use of school boundary drawing as a mechanism for desegregating schools was raised by Justice Kennedy in his 2007 concurring opinion in the US Supreme Court decision of *Parents Involved in Community Schools v. Seattle School District*.¹⁷⁸² Here, the majority of the court held that using race as a factor in the school assignment process where a particular district was never subject

¹⁷⁷⁶ Deluca S & Rosenblatt P 'Does moving to better neighbourhoods lead to better schooling opportunities? Parental school choice in an experimental housing voucher program (2010) 112:5 *Teachers College Record* 1145.

¹⁷⁷⁷ Deluca S & Rosenblatt P 'Does moving to better neighbourhoods lead to better schooling opportunities? Parental school choice in an experimental housing voucher program (2010) 112:5 *Teachers College Record* 1446.

¹⁷⁷⁸ Stroub KJ & Richards MP 'School catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 670.

¹⁷⁷⁹ Monarrez T 'School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA' (2019) Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado 8.

¹⁷⁸⁰ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 27-29 read with fn 3 (1971). *Green v County School Board of New Kent County* 391 U.S. 430, 441 (1968).

¹⁷⁸¹ Hilbert J 'School desegregation 2.0: What is required to finally integrate America's public schools' (2018) 16 *Northwestern Journal of Human Rights* 110.

¹⁷⁸² *Parents Involved in Community Schools v. Seattle School District* 551 U.S. 701 (2007). See Richards MP 'The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis' (unpublished Master's thesis, University of Texas, 2012) 179.

to de jure segregation or after such district was declared a unified one amounted to a violation of the 14th amendment of the US Constitution.

Justice Kennedy, in his concurring judgment, explained that states and school boards dissatisfied with the level of racial integration in schools are free to adopt ‘race-conscious measures’ that apply generally and that are designed to further equitable access to education.¹⁷⁸³ Such measures could not, however, result in coarsely classifying students according to race. Rather, race conscious measures would entail districts consider a range of factors inclusive of race when devising a school placement scheme. Justice Kennedy lists as possible race conscious measures the ‘drawing [of] attendance zones with general recognition of the demographics of neighborhoods’.¹⁷⁸⁴ Justice Kennedy’s standard of the use of ‘race-conscious measures’ has been recognised as binding law. In fact there are districts across the country that have drawn on Justice Kennedy’s guidance when designing desegregation programs that rely on attendance zones.¹⁷⁸⁵ Experts have found a positive correlation between highly irregular shaped attendance zones in the US and the presence of more diverse schools.¹⁷⁸⁶ It has been speculated that the US Supreme Court’s rulings permitting and encouraging attendance zones to advance racial diversity may at least partially account for this connection.¹⁷⁸⁷ It seems that some US school districts, under the compulsion of court order, have responded by using irregular attendance zones to desegregate their schools.

Unlike in the US, the South African Constitution authorises the South African government to adopt targeted measures to protect or advance groups who were historically victims of unfair discrimination. This means that HoDs are empowered by the Constitution (and national policy) to adopt feeder zones that go further than the race conscious zones conceived of by Justice Kennedy in *Parents Involved*. Instead, HoDs may adopt feeder zones that exclusively target the correction of racial injustice in access to schooling. HoDs are already clearly equipped, courtesy of the National Admission Policy, to make use of the type of non-contiguous and satellite zones endorsed by the US Supreme Court in *Swann*.¹⁷⁸⁸ The National Admission

¹⁷⁸³ *Parents Involved in Community Schools v. Seattle School District* 551 U.S. (2007).

¹⁷⁸⁴ *Parents Involved in Community Schools v. Seattle School District* 551 U.S. (2007).

¹⁷⁸⁵ Brill S ‘The law of school catchment areas’ (2019) 30:2 *Stanford Law & Policy Review* 355. Frankenberg E and Siegel-Hawley G ‘Public decisions and private choices: Reassessing the school-housing segregation link in the Post-Parents Involved era’ (2013) 48:2 *Wake Forest Law Review* 422.

¹⁷⁸⁶ Van Riper D and Saporito ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 65 and 66.

¹⁷⁸⁷ Van Riper D and Saporito ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 65 and 66.

¹⁷⁸⁸ *Swann v Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 27-29 read with fn 3 (1971).

Policy explicitly provides for the establishment of zones that are not ‘geographically adjacent to the school or each other.’ However, all HoDs (except for Gauteng’s) are yet to publish any form of feeder zones.

9.8.2 A general overview of the school zoning process in the US

There are no common procedures for establishing attendance zones in the US.¹⁷⁸⁹ The following general processes involving zone determinations can be ascertained from the few scholarly works that could be sourced on this topic. Not all zoning models adhere to these processes. The procedure in terms of which attendance zones are established is usually a participatory one.¹⁷⁹⁰ The process typically commences with school district staff recommending a new school zoning map which is then made publicly available.¹⁷⁹¹ Parents, the community and the public at large have an opportunity to consider the map and provide input thereon.¹⁷⁹² Public meetings are then held to provide a platform for individuals to share their views.¹⁷⁹³ According to Stroub and Richards, parental input and preferences play a significant part in school zoning.¹⁷⁹⁴

Brown and Knight researched several large urban school districts in the US.¹⁷⁹⁵ Their work identified some of the variables employed by districts when establishing attendance zones. These include:

- Capacity/enrollment/overcrowding of schools;
- Natural boundaries/physical barriers (examples railroads or highways);
- Neighborhood population and size of residential buildings;
- Expected growth; and

¹⁷⁸⁹ Brown AK & Knight KW ‘School boundary and student assignment procedures in large, urban, public school systems’ (2005) 37:4 *Education and Urban Society* 402.

¹⁷⁹⁰ Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master’s thesis, University of Texas, 2012) 22.

¹⁷⁹¹ Monarrez T ‘School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA’ (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8.

¹⁷⁹² Richards MP ‘Gerrymandering educational opportunity’ (2017) 99:3 *Phi Delta Kappan* 66. Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master’s thesis, University of Texas, 2012) 22 and 182.

¹⁷⁹³ Monarrez T ‘School Attendance Boundary Gerrymandering and the Segregation of schools in the USA’ (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8.

¹⁷⁹⁴ Stroub KJ & Richards MP ‘School catchment zones, politically defined school boundaries’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁷⁹⁵ Brown AK & Knight KW ‘School boundary and student assignment procedures in large, urban, public school systems’ (2005) 37:4 *Education and Urban Society* 401 and 402.

- Geographical proximity.¹⁷⁹⁶

Hamilton asserts that the school boundary decision making process should be influenced by the need to nurture ties between communities and schools.¹⁷⁹⁷ Hamilton explains how districts frequently experience a clash between attempting to form attendance zones which boards can manage efficiently and trying to accommodate the individual conveniences of parents and learners.¹⁷⁹⁸ According to Stroubs and Richards, districts may consider how to ‘balance enrolment among the schools in the district’ or how to tailor enrolment levels at respective schools to best fit the available space and resources at those schools.¹⁷⁹⁹

It is school boards who are charged with giving final approval of proposed attendance zones.¹⁸⁰⁰ Prior to finalising these zones school boards must listen to the recommendations of district superintendents and demographers.¹⁸⁰¹ The latter’s expertise deriving from their statistical studying of human populations, particularly as it concerns proportions and density.¹⁸⁰² A proposed attendance zone must be signed off by the school board via vote.¹⁸⁰³ Attendance zones are not cast in stone. Instead, these zones are fairly malleable.¹⁸⁰⁴ Once established by school boards these zones may be subject to public evaluation.¹⁸⁰⁵ It falls on school boards to review and adjust attendance zones where needed.¹⁸⁰⁶ Reviews ought to take place via a series of public

¹⁷⁹⁶ Brown AK & Knight KW ‘School boundary and student assignment procedures in large, urban, public school systems’ (2005) 37:4 *Education and Urban Society* 402 and 403.

¹⁷⁹⁷ Hamilton C ‘Feeder patterns/catchment zones’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 275.

¹⁷⁹⁸ Hamilton C ‘Feeder patterns/catchment zones’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 275.

¹⁷⁹⁹ Stroub KJ & Richards MP ‘School catchment zones, politically defined school boundaries’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸⁰⁰ Stroub KJ & Richards MP ‘School catchment zones, politically defined school boundaries’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671. Richards MP ‘Gerrymandering educational opportunity’ (2017) 99:3 *Phi Delta Kappan* 66. Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master’s thesis, University of Texas, 2012)182.

¹⁸⁰¹ Richards MP ‘Gerrymandering educational opportunity’ (2017) 99:3 *Phi Delta Kappan* 66.

¹⁸⁰² Merriam-Webster Online Dictionary available at <https://www.merriam-webster.com/dictionary/demography#other-words> (accessed 16 June 2020).

¹⁸⁰³ Monarrez T ‘School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA’ (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8. In New York city any rezoning exercise requires the approval of the mayor and institutions termed ‘Community District Education Councils’. In Washington DC, the authority for establishing attendance zones vests entirely in the mayor. See Brill S ‘The law of school catchment areas’ (2019) 30:2 *Stanford Law & Policy Review*) 365, 366 and 371.

¹⁸⁰⁴ Stroub KJ & Richards MP ‘School catchment zones, politically defined school boundaries’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸⁰⁵ Stroub KJ & Richards MP ‘School catchment zones, politically defined school boundaries’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸⁰⁶ Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master’s thesis, University of Texas, 2012) 11 and 80. Monarrez T ‘School

hearings.¹⁸⁰⁷ Boards review attendance zones frequently, as circumstances often call for this.¹⁸⁰⁸ Attendance zones may, for instance, be revised where schools upgrade or expand their existing amenities in a manner that creates further school capacity within the district. A further instance is where new schools in the district are established or existing ones closed thus triggering adjustment to allow for the fair distribution of students across all schools.¹⁸⁰⁹ Attendance zones can also be adapted to accommodate demographic shifts within communities as well as changes in enrolment patterns.¹⁸¹⁰ As the number of students enrolled in the district fluctuate, so too then may the school boundaries.¹⁸¹¹ Notwithstanding its widespread use, district officials determine (and, for that matter revise) attendance zones with little state or federal government supervision.¹⁸¹² District officials therefore wield significant influence over the school zoning agenda by virtue of spearheading the process.¹⁸¹³ Their broad influence over the establishment of attendance zones has rendered the process highly susceptible to manipulation of school demographics. School districts may wish to appease more well-off families in the district lest they decide to move to another district which would negatively impact district funding. Such deference will likely reflect in the shape of finalised attendance

Attendance Boundary Gerrymandering and the Segregation of Schools in the USA' (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8.

¹⁸⁰⁷ Stroub KJ & Richards MP 'School Catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸⁰⁸ Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master's thesis, University of Texas, 2012) 11 and 80. Monarrez T 'School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA' (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8. Attendance Zones can be altered as often as once a year see Stroub KJ & Richards MP 'School catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸⁰⁹ Siegel-Hawley G 'Educational gerrymandering? Race and attendance boundaries in a demographically changing suburb' (2013) 83:4 *Harvard Educational Review* 581. Stroub KJ & Richards MP 'School catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸¹⁰ Stroub KJ & Richards MP 'School catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 670.

¹⁸¹¹ Stroub KJ & Richards MP 'School catchment zones, politically defined school boundaries' in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 671.

¹⁸¹² Monarrez T 'School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA' (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8.

¹⁸¹³ Richards MP 'The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis' (2014) 51:6 *American Educational Research Journal* 1152. Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master's thesis, University of Texas, 2012) 182. According to Stroub and Richards it is plausible that the lifting of school desegregation orders by American courts combined with declining state and federal focus on achieving equitable education may have enabled gerrymandering practices, through diminishing oversight over the creation of attendance zones. See Stroub KJ & Richards MP 'An accident of geography? Assessing the gerrymandering of school attendance zones' (2015) 117(7) *Teachers College Record* 17.

zones. Similar manipulation of feeder zones by some SGBs in the absence of provincial regulation can be seen in South Africa.¹⁸¹⁴

9.8.3 A ‘how to’ on transformative zoning

Attendance zones have enormous ramifications for social equity within the US.¹⁸¹⁵ These zones bear much potential as a mechanism with which to address desegregated schooling. In 2011 the United States Departments of Justice and Education issued a joint guiding document which officially endorsed the use of attendance zones to further diversity and achieve more racially equitable access to schools.¹⁸¹⁶ In the document, districts are advised of various factors they may contemplate when drawing or re-drawing school boundary lines to realise these objectives. Certain factors are standalone, and others are required to be considered in conjunction. These factors include:

- the relative racial make-up of neighbourhoods;
- the socio-economic circumstances of neighbourhoods;
- the socio-economic status of households in a neighbourhood (median household income within the area);
- the nature of housing within neighbourhoods (example, high density, rental or public housing);
- ‘household status’ (whether students are from single parent households, etc);
- the median levels of parental education in certain areas within the district;
- the socio-economic circumstances of students; and
- attaining equilibrium of enrolment numbers.

Although this document appears to have been withdrawn about seven years later,¹⁸¹⁷ its contents are nevertheless enlightening and may be of use in the South African context. HoDs intent on shaping transformative zones would, despite contextual differences, do well to draw on these guiding factors.

¹⁸¹⁴ See sections 2.2 to 2.4 above.

¹⁸¹⁵ Stroub KJ & Richards MP ‘School catchment zones, politically defined school boundaries’ in Ainsworth J (ed) *Sociology of Education: An A-to-Z Guide* (2013) 670.

¹⁸¹⁶ U.S. Department of Justice & U.S. Department of Education *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (2011).

¹⁸¹⁷ Marcus KL & Gore JM ‘Updates to Department of Education and Department of Justice Guidance on Title VI’ *U.S. Department of Education Bulletin* 7 March 2018 available at <https://content.govdelivery.com/accounts/USED/bulletins/1fbc0e1> (accessed 18 April 2020).

9.8.4 Transformative zoning and political backlash

Reshaping attendance zones in the US has proved extremely controversial.¹⁸¹⁸ Ciolfi and Ryan describe the school boundary adjustment process as an ‘unavoidably messy, inherently political, and inevitably emotional exercise’.¹⁸¹⁹ When school boards attempt to adjust attendance zones they often encounter resistance.¹⁸²⁰ This is especially so where the purpose of rezoning is to facilitate better racial integration through unconventionally shaped attendance zones.¹⁸²¹ Such adjustments are viewed by homeowners as adversely impacting property values. Upper and middle class white homeowners appear more likely to oppose rezoning in this context.¹⁸²² As stakeholders, this category of homeowners wield especially powerful political clout. This is because representatives on school boards in affluent areas are elected by the local residents who live there,¹⁸²³ and thus serve at the mercy of these wealthy constituents. Moreover, in most states school districts are primarily funded through local property taxes.¹⁸²⁴ It is therefore the pockets of these wealthy constituents that largely bankroll these districts. Thus, the exodus of these home owners from the district would undermine local school financing. Affluent homeowners can therefore channel their political muscle to influence the rezoning process. Flannery explains that some school boards are ‘more responsive to the political clout of their affluent constituents [and] will adopt plans that “protect” selected schools from desegregation.’¹⁸²⁵ Given the powerful influence these affluent homeowners enjoy it is little surprise that attendance zones, once finalised, are more likely to place

¹⁸¹⁸ Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 300.

¹⁸¹⁹ Ciolfi A & Ryan J ‘Socioeconomic Integration: It’s Legal, and It Makes Sense’ 15 June 2008 *Education Week* available at <https://www.edweek.org/policy-politics/opinion-socioeconomic-integration-its-legal-and-it-makes-sense/2008/0> (accessed 13 January 2023). As to the politically charged nature of amending school attendance boundaries see also Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s public schools’ (2018) 16 *Northwestern Journal of Human Rights* 111. Monarrez T ‘School Attendance Boundary Gerrymandering and the Segregation of Schools in the USA’ (2019) *Paper presented at the Association for Public Policy Analysis and Management Fall Research Conference, Denver, Colorado* 8.

¹⁸²⁰ Richards MP ‘Gerrymandering educational opportunity’ (2017) 99:3 *Phi Delta Kappan* 65-70.

¹⁸²¹ Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 300.

¹⁸²² Siegel-Hawley G ‘Educational gerrymandering? Race and attendance boundaries in a demographically changing suburb’ (2013) 83:4 *Harvard Educational Review* 588.

¹⁸²³ Mashu TS, Kone LR & Mutshaeni HN ‘Improving participation in quality education in South Africa: Who are the stakeholders?’ (2014) 7:3 *International Journal of Education Science* 563 and Björk LG, Kowalski TJ & Tricia Browne-Ferrigno ‘The school district superintendent in the United States of America’ (2014) *Paper 13 Educational Leadership Faculty Publications* 7.

¹⁸²⁴ U.S. Department of Housing and Urban Development | Office of Policy Development and Research ‘Insights into Housing and Community Development Policy - Breaking Down Barriers: Housing, Neighborhoods, and Schools of Opportunity’ (2016) PD&R 5.

¹⁸²⁵ Flannery JH, ‘De Jure desegregation: The quest for adequacy’ (1975) 4:1 *Journal of Law & Education* 150 and 151.

privileged American families at a further advantage.¹⁸²⁶ It is the white and more well-off families that frequently become immersed in deliberations around rezoning to leverage the process for their children's gain.¹⁸²⁷ Minority communities in the US have, however, not sat passively by. This is evidenced by the legal claims which minority communities have filed against school boards.¹⁸²⁸

Siegel-Hawley, Bridges and Shields contend that the political fallout over school zoning in the US has been worse where rezoning processes lacked effective planning and the buy in of various stakeholders had not been secured.¹⁸²⁹ These scholars recommend that an improved process include:

- transparency;
- principled governance;
- meticulously collated information;
- external experts;
- internal specialists;
- mutual goals; and
- good faith engagement with diverse communities.¹⁸³⁰

Siegel-Hawley, Bridges and Shields suggest that school management especially ensure that all segments within the community participate in the zoning process and that all voices receive equal credence.¹⁸³¹ Hyland stresses that it is essential for school leaders to bring as many people as feasible into the rezoning process 'from beginning to end'.¹⁸³² Creighton and Hamlin state that it is important that school leaders ensure that communities stay in the know at every step of the rezoning process.¹⁸³³

¹⁸²⁶ Siegel-Hawley G 'Educational gerrymandering? Race and attendance boundaries in a demographically changing suburb' (2013) 83:4 *Harvard Educational Review* 588.

¹⁸²⁷ Castro AJ, Siegel-Hawley G, Bridges K et al 'Narratives of race in school rezoning: How the politics of whiteness shape belonging, leadership decisions, and school attendance boundaries' (2022) 8:1 *AERA Open* 2. Bartels B & Donato R 'Unmasking the school re-zoning process: Race and class in a northern Colorado community' (2009) 7:2 *Latino Studies* 245-246.

¹⁸²⁸ Siegel-Hawley G 'Educational gerrymandering? Race and attendance boundaries in a demographically changing suburb' (2013) 83:4 *Harvard Educational Review* 588. Examples, *Everett v. Pitt County Board of Education*, 788 F.3d 132 (2015). *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013).

¹⁸²⁹ Siegel-Hawley G, Bridges K & Shields TJ 'Solidifying segregation or promoting diversity?: School closure and rezoning in an urban district' (2017) 53:1 *Educational Administration Quarterly* 1.

¹⁸³⁰ Siegel-Hawley G, Bridges K & Shields TJ 'Solidifying segregation or promoting diversity?: School closure and rezoning in an urban district' (2017) 53:1 *Educational Administration Quarterly* 28.

¹⁸³¹ Siegel-Hawley G, Bridges K & Shields TJ 'Solidifying segregation or promoting diversity?: School closure and rezoning in an urban district' (2017) 53:1 *Educational Administration Quarterly* 28 and 29.

¹⁸³² Hyland TF 'Seven factors you'd better not forget when changing attendance boundaries' (1989) 176 *The American School Board Journal* 29-30.

¹⁸³³ Creighton RL & Hamlin DM 'Crossing the redistricting minefield' (1995) 52 *School Administrator* 18-22.

A few research studies have fixated on the manner in which attendance zones relate to segregation inside school districts. The following section discusses the findings of some of these experts.

9.9 THE IMPACT OF SCHOOL ZONING ON THE INTEGRATION LEVELS OF US SCHOOLS – LESSONS FROM THE EXPERTS

The US has a long history of manipulation of attendance zones to further racial segregation.¹⁸³⁴ This history is particularly palpable in the era immediately following the US Supreme Court's order in *Brown II* mandating racial desegregation in schools. School districts responded to this ruling by establishing schools and designing their attendance zones to destabilise attempts at desegregation and to deepen racial separation instead.¹⁸³⁵ Some scholars claim that in present day US school boundaries continue to be gerrymandered in a racially segregated way.¹⁸³⁶ Stroubs and Richards analysed over 20 000 school boundaries across 1 721 education districts in the US to provide tentative evidence of such gerrymandering. Their findings align with the contention that gerrymandered boundaries in the US may serve largely as a mechanism to exclude non-white and less financially well-off children from more prosperous schools.¹⁸³⁷ In a separate work, Richards sought to determine the impact of attendance zone manipulation on the levels of ethnic/racial integration of US schools. To do so Richards analysed a sample of 15 290 school boundaries in 663 education districts across 43 states in accordance with their ethnic/racial composition. These school boundaries were compared with what Richards postulates are their 'natural zones' (the attendance zones as it would appear in the absence of deliberate gerrymandering).¹⁸³⁸ Richards concludes that the manipulation of school boundaries

¹⁸³⁴ Benjamin K 'Suburbanizing Jim Crow: The impact of school policy on residential segregation' (2012) 38:2 *Journal of Urban History*. Orfield M 'Milliken, Meredith and metropolitan segregation' (2015) 62:2 *UCLA Law Review* 379. Munroe ME 'Unamerican tail: Of segregation and multicultural education' (2000) 64:1 *Albany Law Review* 275.

¹⁸³⁵ Richards MP 'The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis' (2014) 51:6 *American Educational Research Journal* 1122. Stroub KJ & Richards MP 'An accident of geography? Assessing the gerrymandering of school attendance zones' (2015) 117(7) *Teachers College Record* 3.

¹⁸³⁶ Orfield M 'Milliken, Meredith and metropolitan segregation' (2015) 62:2 *UCLA Law Review* 435. Richards MP 'The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis' (2014) 51:6 *American Educational Research Journal* 1137. Richards MP *The gerrymandering of educational boundaries and the segregation of American schools: A geospatial analysis* (unpublished Master's thesis, University of Texas, 2012)179.

¹⁸³⁷ Stroub KJ & Richards MP 'An accident of geography? Assessing the gerrymandering of school attendance zones' (2015) 117(7) *Teachers College Record* 21.

¹⁸³⁸ Richards MP 'The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis' (2014) 51:6 *American Educational Research Journal* 1190 and 1134.

in the US largely intensify segregation.¹⁸³⁹ Gerrymandering of this nature, argues Richards, promotes inequitable access to educational prospects. Richards warns that such manipulation of school boundaries in the US may exacerbate over time.¹⁸⁴⁰ However, Richards concludes that in a ‘substantial minority of school districts’ the gerrymandering of attendance zones is linked to a reduction in segregation within schools and . . . ‘a large proportion of the districts with integrative attendance zones are currently subject to court-ordered desegregation.’¹⁸⁴¹ This, Richards states, implies that court ordered desegregation remains effective in expanding integration in the few school districts still subject to these orders. However, districts previously subject to court orders but who have since been released are inclined to be more gerrymandered in a segregative way than those still under court supervision. Richards concludes that ‘more stringent oversight and monitoring of local zoning practices may be an important policy lever for suppressing the creation of segregatively gerrymandered attendance zone boundaries.’¹⁸⁴²

Van Riper and Saporito make an interesting contribution on this topic which stands in contrast with that of Richards.¹⁸⁴³ Van Riper and Saporito scrutinised 13 169 first grade attendance zones from 307 school districts together with US 2010 census data to determine whether, and to what extent, these zones further segregated schooling. Van Riper and Saporito’s findings suggest that the average attendance zone in the US is not significantly irregular in design. That is, attendance zones in the country commonly take on a fairly compact (non-gerrymandered) form.¹⁸⁴⁴ The most ‘irregularly’ designed zones, Van Riper and Saporito contend, virtually always have racially diverse student bodies.¹⁸⁴⁵ Van Riper and Saporito conclude that the more distorted in shape school boundary lines have become in the US the more likely it encompasses

¹⁸³⁹ Richards MP ‘The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis’ (2014) 51:6 *American Educational Research Journal* 1149 and 1150.

¹⁸⁴⁰ Richards MP ‘The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis’ (2014) 51:6 *American Educational Research Journal* 1123. Richards MP ‘Gerrymandering educational opportunity’ (2017) 99:3 *Phi Delta Kappan* 65-70. See also Stroub KJ & Richards MP ‘An accident of geography? Assessing the gerrymandering of school attendance zones’ (2015) 117(7) *Teachers College Record* 11 and 25.

¹⁸⁴¹ Richards MP ‘The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis’ (2014) 51:6 *American Educational Research Journal* 1143 and 1151.

¹⁸⁴² Richards MP ‘The gerrymandering of school attendance zones and the segregation of public schools: A geospatial analysis’ (2014) 51:6 *American Educational Research Journal* 1151.

¹⁸⁴³ Saporito S & Van Riper D ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents*.

¹⁸⁴⁴ Saporito S & Van Riper D ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 65. See also Saporito S ‘Shaping income segregation in schools: The role of school attendance zone geography’ (2017) 54:6 *American Educational Research Journal* December 1350. Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 304 and 299.

¹⁸⁴⁵ Saporito S & Van Riper D ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 65, 78, 79 and 80.

racially integrated schools.¹⁸⁴⁶ Conversely, they find where these zones are more compact they are also, on average, less diverse.¹⁸⁴⁷ This seems a given because areas nearby schools are usually more racially homogenous whereas highly irregular shaped zones typically attract students from more racially diverse areas further away.¹⁸⁴⁸ Saporito cautions that officials who manage residentially segregated school districts can easily ensure racially segregated schools simply by creating compact school zones.¹⁸⁴⁹ Van Riper and Saporito suggest that it ordinarily be required that school districts fashion irregular attendance zones so as to eliminate racial segregation.¹⁸⁵⁰ In his later work, Saporito explains that such irregular zones are, in addition, ‘associated with lower levels of income segregation in attendance zones,’¹⁸⁵¹ thus also facilitating economic integration within schools.¹⁸⁵² Bryant’s research on attendance zones in the US supports Van Riper and Saporito’s work.¹⁸⁵³ Bryant’s research involved 129 US education districts and 8 462 school boundary lines inside them. Bryant’s findings indicate that most school boundary lines in the US are not presently manipulated to deviate drastically from the zoning model that assigns all children to their most nearby school.¹⁸⁵⁴ According to Bryant, evidence shows that the drawing of irregular attendance zones appears to foster economic integration and lessen segregation in US schools.¹⁸⁵⁵ Bryant contends that achieving more socio-economically diverse schools is possible if more districts engage in vigorous

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¹⁸⁴⁶ Saporito S & Van Riper D ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 78. See also Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 299. Here Saporito analyses the attendance zone maps of 304 urban school districts together with coinciding census data to determine the extent to which the shape of school catchment areas influence the levels of racial segregation within that catchment area.

¹⁸⁴⁷ Saporito S & Van Riper D ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 74.

¹⁸⁴⁸ Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 299. Richards MP ‘Gerrymandering educational opportunity’ (2017) 64 *Social Science Research* 312.

¹⁸⁴⁹ Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 299. Richards MP ‘Gerrymandering educational opportunity’ (2017) 64 *Social Science Research* 312.

¹⁸⁵⁰ Saporito S & Van Riper D ‘Do irregularly shaped school attendance zones contribute to racial segregation or integration?’ (2016) 3:1 *Social Currents* 66.

¹⁸⁵¹ Saporito S ‘Shaping income segregation in schools: The role of school attendance zone geography’ (2017) 54:6 *American Educational Research Journal* December 1361 and 1346.

¹⁸⁵² Saporito S ‘Shaping income segregation in schools: The role of school attendance zone geography’ (2017) 54:6 *American Educational Research Journal* December 1367.

¹⁸⁵³ Bryant K *Income segregation across schools and the shapes of school attendance zones* (unpublished Honours thesis, College of William and Mary, 2018) 47.

¹⁸⁵⁴ Bryant K *Income segregation across schools and the shapes of school attendance zones* (unpublished Honours thesis, College of William and Mary, 2018) 47. See Saporito S ‘Irregularly-shaped school attendance zones and racial integration’ (2017) 64 *Social Science Research* 299.

¹⁸⁵⁵ Bryant K *Income segregation across schools and the shapes of school attendance zones* (unpublished Honours thesis, College of William and Mary, 2018) 47 and 48.

gerrymandering that cuts through residentially segregated areas.¹⁸⁵⁶ Some school districts in the US have actually used zoning as a desegregation technique.¹⁸⁵⁷

9.10 CONCLUSION

One of the key objects of this thesis is to determine whether feeder zones can be established in a manner that will realise and further equitable access to schooling in South Africa. Tentative evidence from US on the successful use of attendance zones to achieve the same objective there suggests that this is indeed possible. This chapter reveals how attempts at transformative rezoning in the US are highly contentious. This discovery is important as it shows why any attempts at transformative zoning in South Africa should include measures to guard against and mitigate similar political backlash. This chapter explored various alternatives to the use or exclusive use of geographic proximity in the school admissions process. The US experience in introducing alternative solutions of this nature is useful in that it shows what interventions South Africa should steer clear of. The US experience around free choice further underscores that simply dispensing with feeder zones is likely to advance racial inequalities in access to schooling in South Africa as opposed to dismantling it. This chapter has also shown that the US model of state sponsored scholar transport to achieve transformative zoning is unlikely to be a viable one in the South African context. This chapter has further revealed why a ‘school lottery system’ such as that used in the control choice plans in the US would fail to advance racially equitable access to schooling in South Africa. The unviability of the alternative solutions explored herein further highlights the need for South Africa’s HoDs to engage in transformative zoning. These lessons from the US and the recommendations that flow from them are discussed in more depth in the concluding chapter.

¹⁸⁵⁶ Bryant K *Income segregation across schools and the shapes of school attendance zones* (unpublished Honours thesis, College of William and Mary, 2018) 48.

¹⁸⁵⁷ Hilbert J ‘School desegregation 2.0: What is required to finally integrate America’s public schools’ (2018) 16 *Northwestern Journal of Human Rights* 110.

CHAPTER 10

RECOMMENDATIONS AND CONCLUSION

10.1 INTRODUCTION

Two of the most palpable indicators of South Africa's shameful history of racialised oppression can be observed in the persistent spatial and educational inequalities that continue to define the country. In the context of education provisioning these spatial and educational injustices coalesce to entrench racially unequal access to education. This can be observed where historically white schools (HWS) employ feeder zones moulded purely on geographic nearness as an admission criterion. The use of such feeder zones by former whites-only schools based in former whites-only areas effectively serve to block out the vast majority of black children who, for historical reasons, do not reside in these areas.

This thesis sought to determine the effect of feeder zones on equitable access to schools in South Africa and, how can feeder zones be used to promote such access? This thesis has established that the use of feeder zones based purely on geographical proximity by HWS in South Africa serves to perpetuate racial inequities in access to schooling. However, this thesis concludes that feeder zones nevertheless have the potential to serve as one modest tool in the armoury of interventions required to transform South Africa's public education system and ensure equitable access to a basic education for all learners. This is achievable through the use of transformative zoning. That is, a school zoning process that intentionally captures at least some traditional feeder areas together with areas housing impoverished black communities and thus the children that live therein. This chapter summarises the findings of this thesis and provides recommendations.

Chapter 2 provided insight into the school zoning issues that this thesis sought to address. This chapter documented various abusive school zoning practices which some HWS have engaged in to frustrate the ability of impoverished black children to gain access to these good schools. The nefarious practices highlighted include race based gerrymandering of feeder zones, and the arbitrary implementation of such zones as well as the use of zoning in conjunction with

school fees to close off space to poor black learners.¹⁸⁵⁸ Chapter 2 revealed the need for urgent intervention in the school zoning process.

Chapter 3 provided an analysis of the content and reach of the constitutional right to basic education in section 29(1)(a) of the Constitution in an effort to understand whether it includes the right to equal access to a quality basic education. This thesis established that such a right to equal access to a quality basic education indeed exists. This conclusion is based on, amongst others, the significant purposes which the right to basic education is aimed at both at an individual and societal level. Racially uneven access to education undermines impoverished black children's ability to enjoy their fundamental rights and evolve as human beings. It also thwarts the constitutional project of transforming South Africa into a more egalitarian society given the role of education in facilitating such transformation. Access to education must therefore occur in such a manner that all children are capable of having their dignity affirmed and of successfully contributing towards South Africa's transition to a more egalitarian society. Unequal education provisioning renders white and privileged children's futures more important than that of impoverished black children's and thus directly conflicts with South Africa's constitutional aims.¹⁸⁵⁹ An interpretation of section 29(1)(a) which includes equal access to a quality basic education is supported by a number of international instruments which South Africa has ratified.¹⁸⁶⁰ In accordance with Constitutional Court jurisprudence, section 29(1)(a) must be read to harmonise with the right to equality under section 9 of the Constitution. This includes section 9(1) which provides for equal benefit of the law. Consequently, section 29(1)(a) must be understood as conferring an equal opportunity to enjoy the constitutionally legislated right to a basic education.¹⁸⁶¹

Having established that section 29(1)(a) confers a right to equal access to a quality basic education, Chapter 4 explored how the duty to provide equal access to quality education is to be understood. This thesis finds that equal access to a quality basic education should be understood as guaranteeing that all learners obtain access to an adequate education. Children therefore have an immediately realisable right, to an adequate basic education. Adequacy as a standard requires that every child is furnished with the the necessary oral, written and numeracy skills to successfully navigate a dynamic modern world. Children should be provided with

¹⁸⁵⁸ See sections 2.2 to 2.5 above.

¹⁸⁵⁹ See section 3.3 above.

¹⁸⁶⁰ See section 3.5 above.

¹⁸⁶¹ See section 3.6 above.

adequate insight into economic, political, and social systems. They should also be provided with a sufficient appreciation of their own mental and physical health and well-being as well as social ethics. An adequate education further involves exposure to recreational activities, sufficient appreciation of the arts and adequate preparation for academic and working life. Finally, an adequate education is an ever-evolving concept that must be adapted to ensure that it remains capable of serving these objectives.¹⁸⁶² Transformative zoning can be used as a mechanism to ensure that at least some impoverished black children can access an adequate education where feeder zones based purely on geographical proximity would otherwise have barred them from enjoying as much. That is, transformative zoning can be used to advance the achievement of equitable access to an adequate basic education as demanded by section 29(1)(a) of the Constitution.

Chapter 5 analysed the relevant legal and policy framework regarding school zoning. This framework was analysed to determine whether any legislative or policy reforms are required ensure transformative zoning. Chapter 5 examined section 5(5) of the South African Schools Act (the Schools Act). Under this provision, school governing bodies (SGBs) enjoy the power to determine admission policy subject to the Schools Act itself and any applicable provincial laws.¹⁸⁶³ Chapter 5 also examined the Admission Policy for Ordinary Public Schools (the National Admission Policy). Section 33 of this policy provides that heads of department (HoDs) may establish feeder zones and contemplates the use of non-contiguous zoning. The National Admission Policy was published by the Minister of Basic Education (Minister) in terms of the National Education Policy Act (NEPA). The Schools Act dovetails NEPA which together form the main national legislative instruments governing education provisioning in South Africa. As such, these two legal instruments must be read together. The Minister has published the National Admission Policy pursuant to her obligation to ‘set uniform norms and standards for public schools’. This obligation has been described by the Constitutional Court as flowing from the ‘overarching design of the [Schools] Act.’ Section 33 of the National Admission Policy must therefore be understood as conferring a power on HoDs to set feeder zones that would apply at a provincial level and thus oust any SGB determined feeder zones under section 5(5) of the Schools Act.¹⁸⁶⁴ The National Admission Policy therefore bears the potential to be used by HoDs as a tool for transformative zoning.

¹⁸⁶² See section 4.4 above.

¹⁸⁶³ See section 5.3.1 above.

¹⁸⁶⁴ See section 5.3.2 above.

Chapter 6 focused on the relationship between SGBs and the provincial education departments (PEDs) (in the form of the various HoDs) as this relationship has significant consequences for the design and implementation of any transformative zoning model. Chapter 6 analysed some of the central Constitutional Court judgments concerning the intersection between HoD and SGBs' authority and responsibilities. The Constitutional Court has emphasised that these two role players together with the Minister form a partnership tasked with ensuring that the public education system function effectively. The Constitutional Court has also emphasised good faith engagement, co-operative governance, and procedural fairness as some of the principles that must characterise the relationship between HoDs and SGBs. The Constitutional Court has further made clear that SGBs obligations extend beyond preserving the best interests of learners enrolled at the particular school. SGBs also have a wider responsibility towards the broader community.¹⁸⁶⁵ What the Constitutional Court's jurisprudence on education has made plain is that privileged schools cannot operate as islands unto themselves removed from the realities of the extreme racialised inequalities that contaminates South Africa's public education system. Rather they are legally obliged to support the state in ensuring universal and non-discriminatory access to basic education of adequate quality for all children. These judgments, however, assume that SGBs will willingly consider the needs of the broader community when devising their school admission policies. SGBs, however, have a vested interest in preserving and advancing the quality of education provisioning of learners enrolled at the school they govern to the exclusion of others. These objectives conflict with the broader goal of ensuring equitable access to an adequate education. Chapter 6 thus highlights the need for feeder zone determinations to be unequivocally removed from the purview of individual SGBs and the narrow motivations that underly them.

This inherent conflict between the limited agenda of SGBs and the broader objective of equitable access to education is likely to manifest in any transformative zoning process. For transformative zoning to work it must occur in a manner that does not undermine the quality of education delivery at HWS. Such a delicate balancing exercise when processing admission applications is necessary, lest parents of existing learners at these HWS choose to exit the public education system altogether. Such an exodus would cast a heavy blow against the functional part of the public education system that is being propped up by the financial and human capital of these very parents. A mass exodus of this nature can therefore spell the total

¹⁸⁶⁵ See section 6.3.1 above.

collapse of South Africa's public education system. South Africa should therefore guard against this threat when engaging in transformative zoning.

Chapter 7 considered the current approaches to school zoning in KwaZulu-Natal (KZN), the Western Cape and Gauteng in an attempt to determine if any of these models are worthy of replication countrywide. The KwaZulu-Natal Department of Education (KZNDoe) made efforts to abolish feeder zones altogether but subsequently backtracked. It is doubtful whether eliminating feeder zones altogether would have had the effect of eradicating spatial inequalities in the province's school admission process, as the KZNDoe proclaimed it had intended. Simply abolishing feeder zones would have resulted in a 'first-come, first-served' system. Such an approach simply provides more well-off families with better opportunities to secure a spot in more sought after schools. First, it increases the size of the selection pool from which more privileged schools can draw their learners and thus creates space for the clandestine sorting of learners according to socio-economic, racial, and other attributes. Secondly, white, and privileged families often have strong historical links to these more affluent schools. These families are therefore better capable of navigating particular schools' admissions application processes and are thus more likely to cross the admission 'finishing line' first.¹⁸⁶⁶ Chapter 9 illustrates how similar attempts in the US to simply do away with attendance zones in an effort to facilitate racially integrated schooling there resulted in the opposite effect. Both the KZN and US experiences suggest that abolishing feeder zones altogether is unlikely to advance racially equitable access to schooling and may, in fact, further entrench racial inequalities.

The Western Cape Education Department's (WCED's) official policy is that the province has not established feeder zones and that the '[a]dmission of learners to all public schools should be within the prescripts of the law'. Essentially, the WCED appears to have simply deferred to SGBs regarding whether and how to zone. Chapter 7 documents how the WCED's approach to feeder zones has allowed some Western Cape schools to engage in abusive zoning practices. Chapter 7 explained the WCED's approach of placing the onus on parents to appeal an admission decision where they are disgruntled with the application of a feeder zone, be it for discriminatory reasons or otherwise. However, it is unfair to place such a responsibility foremost on parents. This is because the appeal process can be a drawn out one often requiring the exhaustion of much time and resources. Moreover, most parents are unlikely to be aware of the option of an admission appeal. Most would also not possess the skills and knowledge

¹⁸⁶⁶ See section 7.4.1 above.

required to formulate a solid appeal. Relying on individual parents to address racially discriminatory zoning practices is a non-systematic and reactive approach by the WCED to the racially discriminatory impact of feeder zones.¹⁸⁶⁷ Although the WCED claims not to apply feeder zones, it seems that the MEC is not complying with the department's own policy when pronouncing on internal appeals against admission decisions. The outcome of an admission appeal to the Western Cape MEC routinely turns on geographical proximity of the learner's place of residence to the sought after school, leading to racial exclusion.¹⁸⁶⁸ The WCED example therefore underscores the need for both a transparent and central school zoning process.

The Gauteng Department of Education (GDoE) regulates the implementation of feeder zones through legislation and devoted policy. The department's feeder zone policy establishes certain principles which the GDoE must take into consideration when designing feeder zones. However, this policy strongly favours the notion of neighbourhood schools and makes little mention of employing feeder zones to advance social transformation. Under the province's current (2019) admission regulations, a HoD undertaking a zoning exercise must consider all relevant information including the 'need for geographical and spatial transformation'. However, no real guidance is provided on how this is to be accounted for. The regulations lay out a sequence for determining preferential admission. Learners who live nearest to the school within the feeder zone receive first preference. Thereafter, siblings of children already enrolled. Next are those learners with at least one parent employed within the feeder zone. If space still remains, children who live within a 30 km radius of the school (30km application zone) are preferred over those who live beyond this radius. Learners' applications are rated in line with this hierarchy and in the sequence in which they are received.¹⁸⁶⁹ Contrary to what has been reported in the press and recorded by practitioners, scholars, and even some in government, the 30km application zone of a school does not equate to a feeder zone. Learners can fall within the 30km application zone but still be beyond the borders of the actual feeder zone. The regulations strongly favour those learners who live both nearest to the desired school and within the feeder zone. This invariably amounts to giving preference to white and more privileged Gauteng families over impoverished and black families who, for historical causes, reside further away from Gauteng's desirable schools. Given the fierce competition for space in these

¹⁸⁶⁷ See section 7.4.2.3.2 above.

¹⁸⁶⁸ See section 7.4.2.3.5 above.

¹⁸⁶⁹ See section 7.4.3.5 above.

few sought after schools, learners beyond the feeder zone but within the 30km application radius would likely never reap the benefits of preferential admission under the province's admission regulations. These learners' admission applications would simply be crowded out by the applications of those residing within the feeder zone and those with a sibling already enrolled there. Thus, the GDoE's zoning model operates to entrench racially inequitable access to schooling within Gauteng.¹⁸⁷⁰ Consequently, the GDoE's approach to feeder zones is far from the racially transformative zoning process it has been lauded to be. The GDoE experience amplifies why it is necessary not only to compel PEDs to establish feeder zones but also to firmly require that this occurs in a racially transformative manner. This thesis has established that neither the KZNDoE, the WCED or the GDoE have successfully tackled the racial inequities that emanate from the establishment and application of feeder zones by HWS in these provinces. A new school zoning method is therefore required that can help confront these racial inequalities. A transformative zoning model presents a potential alternative.

Chapter 8 further established how feeder zones based purely on proximity are vulnerable to an unfair discrimination challenge on the basis of race and the intersecting analogous ground of poverty. This is due to its indirect and disparate impact on poor black children and their opportunities to access an adequate basic education.¹⁸⁷¹ Chapter 8 also revealed how the Minister and PEDs' failure to intervene in the area of school zoning constitutes a failure of their constitutional and statutory responsibilities twice over. First, it constitutes a failure to advance racially equitable access to schooling as required by section 9 of the Constitution and the relevant provisions of Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). Secondly, it amounts to a failure to safeguard impoverished black children from unfair discrimination as required under this same legislative framework. The Minister and PEDs are therefore constitutionally and statutorily obliged to address feeder zone related unfair discrimination within the public education system.¹⁸⁷²

Chapter 8 established that transformative zoning can be employed as an affirmative action measure under section 9(2) of the Constitution to advance historically disadvantaged poor black learners whose rights to basic education are undermined by South Africa's spatial and educational legacies. Consequently, PEDs can legitimately undertake a transformative zoning scheme without such scheme being open to legal challenge on the basis that it unfairly

¹⁸⁷⁰ See section 7.4.3.5 above.

¹⁸⁷¹ See sections 8.2.1 and 8.2.2 above.

¹⁸⁷² See section 8.2.3 above.

discriminates against white learners who reside within traditional feeder areas.¹⁸⁷³ Transformative zoning opens up the possibility for some impoverished black children to enrol in schools that they would otherwise stand little chance of accessing. It serves as a modest measure that can ameliorate some of the racialised injustices that define South Africa's public education system and thus advance the constitutional goal of equality. The achievement of this objective is precisely what is envisaged by section 9(2) of the Constitution.

Chapter 9 looked to the US for potential direction on how to address school zoning related racial inequities in schooling access. This chapter examined some of the different methods of schooling integration adopted by the US in the wake of the famous 1954 *Brown v Board of Education of Topeka (Brown 1)* decision finding segregated schooling in the US unconstitutional.¹⁸⁷⁴ One mechanism which the US has adopted with some success involves the use of school boundaries to facilitate integration. In the US the school zoning exercise is spearheaded by education district officials who have significant power over the process. However, there is very little state or federal government oversight in this regard. This lack of proper regulation at a more central level has rendered the school zoning process vulnerable to misuse through the manipulation of learner demographics.¹⁸⁷⁵ The US example underscores the need for government regulation of school zoning. Reformulating school boundaries in the US is described as 'unavoidably messy, inherently political, and inevitably emotional exercise'. Attempts at reconfiguring school boundaries in the US are often met with resistance. Such resistance is particularly fierce when the objective is to facilitate racial integration via the drawing of unorthodox school boundaries. It is white and privileged American families that frequently dominate these rezoning deliberations and leverage the process for the benefit of their own children. US scholars have stressed the significance of ensuring that all segments within the community participate in the zoning process and that all voices receive equal credence if the process is to succeed.¹⁸⁷⁶ Any attempts at transformative zoning in South Africa are likely to encounter similar backlash by white and privileged families who benefit from the school zoning status quo. Such backlash should, to the best extent possible, be guarded against.

¹⁸⁷³ See section 8.3 above.

¹⁸⁷⁴ See section 9.5 above.

¹⁸⁷⁵ See section 9.7.2 above.

¹⁸⁷⁶ See section 9.7.4 above.

10.2 RECOMMENDATIONS

Having reached the above findings, the following section contains recommendations on how to address the racial inequalities stemming from the application of feeder zones. First, proposals are made as regards possible policy and legal reforms at both the provincial and national level that would require the establishment of transformative feeder zones. Thereafter, this section briefly considers potential legal arguments that can be raised to achieve such policy and/or legal reforms should the relevant role players fail to act in this regard. Next, this section recommends possible transformative zoning designs that may be pursued. Possible criteria that can be employed when engaging with transformative zoning is also considered. This section makes certain proposals regarding consultation processes which should be followed when establishing transformative feeder zones. Finally, this section considers how a transformative zoning model can best address the geographical and economic barriers to quality education that impoverished black learners encounter.

10.2.1 Compelling HoDs to establish transformative feeder zones

Chapter 5 revealed that HoDs are best positioned within the legislative and policy framework to set feeder zones provincially. This is because the Schools Act tasks HoDs with administering the admission process. In addition, the National Admission Policy (established under NEPA) authorises HoDs to establish feeder zones and makes clear that such zones may assume a non-contiguous form. The Minister of Basic Education therefore envisaged HoDs fulfilling this role. It is therefore recommended that HoDs undertake transformative zoning in their respective provinces. However, based on the discussions in Chapter 7, it seems a call for transformative zoning is likely to go unanswered should it simply be left to the will of individual HoDs. Different avenues should therefore be explored on how to ensure that HoDs establish and implement racially transformative feeder zones. This section considers potential legislative and/or policy reforms that can be adopted in this regard. Also considered is the possible use of litigation to compel HoDs to adopt transformative feeder zones.

10.2.1.1 Amending the National Admission Policy

Based on the conclusions made in Chapter 5, one possible avenue for guaranteeing that HoDs engage in transformative zoning is for the Minister to introduce an amendment to section 33 of the National Admission Policy, unequivocally requiring that HoDs establish feeder zones. The current policy states that HoDs ‘may’ do so. However, the interpretation to be placed on ‘may’

and whether this power is coupled with a duty on the side of HoDs to engage in school zoning is open to debate. Nevertheless, such an amendment to replace the discretionary language in section 33 is recommended to seal off any doubt that HoDs must establish feeder zones. Such an amendment should also compel HoDs to undertake the zoning process in a manner that advances racially equitable access to schooling. If not, the process would suffer the same consequences as the Gauteng example, discussed in Chapter 7. Unhindered by the requirement to set transformative zones, the zones set by the GDoE led to nothing more than prioritisation based on proximity, thereby entrenching educational and spatial injustice.

As discussed in Chapter 5, section 33 of the National Admission Policy does make provision for addressing spatial injustices in the admission process to ensure more equitable access to schooling. Replacing the discretionary language in section 33 would give effect to South Africa's international obligations, discussed in Chapter 3. This includes the obligation under article 4 of the UNESCO Convention Against Discrimination in Education (CADE) to establish and execute national policy that is inclined to promote 'equality of opportunity and of treatment in the matter of education'. It would also, as concluded in Chapter 8, fulfil the obligation imposed on the Minister by section 25(4) of PEPUDA. This section requires that '[a]ll Ministers' implement measures aimed at 'eliminating any form of unfair discrimination or the perpetuation of inequality in any law, policy or practice for which those Ministers are responsible'. This would include implementing an amendment to national policy to eliminate unfair race and poverty based discrimination arising from the use of feeder zones in the school admissions process. Effecting this adjustment to the language of section 33 of the National Admission Policy appears to be the least exacting approach for ensuring that HoDs undertake transformative zoning. This is because the National Education Policy Act empowers the Minister alone (albeit through consultation) to establish national admission policy setting out the parameters within which the other actors within the education system must operate. A change to the National Admission Policy, whilst requiring consultation, does not require the go ahead of a multitude of individuals as would be the case with legislative reform through Parliament.

The National Admission Policy is currently under review and there have been some in civil society advocating precisely for policy reform to compel HoDs to establish feeder zones. EE and EELC in their joint submission on the proposed amendments to the National Admission Policy have also called for the inclusion of criterion that will directly address how HoDs are to

combat spatial injustices when undertaking school zoning. This recommendation is strongly supported given that it will ensure that HoDs do not pay mere lip service to the requirement that they factor in ‘the need for geographical and spatial transformation’ when establishing feeder zones.

10.2.1.2 Amending the Schools Act

The Schools Act is in the process of being amended. This process of legislative reform presents the perfect opportunity for Parliament to effect changes to the Act that oblige HoDs to establish racially transformative feeder zones. Such amendments would be in line with South Africa’s responsibilities under article 3(a) of CADE, (discussed in Chapter 3) to ‘ensure by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions’. As concluded in Chapter 8, such an approach also accords with section 25 of PEPUDA. This section requires the state to ‘where necessary or appropriate enact further legislation that seeks to promote equality.’ This would include the amendment of legislation such as the Schools Act where necessary to address race and poverty based discrimination arising from the use of feeder zones.

Legislative reform is preferable (though not mutually exclusive with change to the National Admission Policy) as it seals off the possibility that HoDs can attempt to abscond from a transformative zoning process under the claim that they cannot be obliged by policy (as opposed to law) to do so. It is therefore recommended that Parliament amend the Schools Act through the inclusion of a provision compelling HoDs to establish feeder zones that further the goal of racially equitable access to schooling. There does not appear to be a push by civil society or other stakeholders in this direction and it is suggested that these groups lobby on this point to achieve such legislative change. It is, however, noted that such attempts at legislative reform is likely to be a hotly contested and drawn out process. This is well evidenced from the controversial and on-going attempts to finalise the current proposed amendments to the Schools Act, which is intended to, amongst others, constrain the powers of SGBs.¹⁸⁷⁷

10.2.1.3 Publishing admission regulations under the Schools Act

Section 61 of the Schools Act read with its preamble provides the Minister with the power to determine regulations aimed at achieving educational redress. This would of course be subject

¹⁸⁷⁷ The Basic Education Laws Amendment Bill GN 705 GG 45601 of 6 December 2021.

to consultation with other stakeholders. As concluded in Chapters 5 and 8, a possibility exists that the Minister could compel HoDs to engage in transformative zoning through her power to establish admission regulations. As found in Chapter 5, such an approach would align with an idea first flighted in White Paper 1 which informed the passing of the Schools Act. White Paper 1 suggested the adoption of measures such as ‘special admissions regulations designed to remedy’ historical injustices in educational access. Regulations of this nature could impose an obligation on HoDs to designate feeder zones to remedy spatial injustices in the context of educational access. Like with an amendment to national policy, publishing regulations on school admissions which require the establishment of feeder zones would be quicker and less cumbersome than achieving legal reform through Parliament.

10.2.1.4 Legislative change at the provincial level

As discussed in Chapter 7, basic education is a concurrent legislative function under the Constitution. The Schools Act specifically contemplates as much, as it makes a SGB’s power to determine admission policy under section 5(5) subject to provincial law. Chapter 7 concludes that the various MECs are not powerless should the Minister and Parliament fail to step in to ensure regulatory reform on school zoning. Instead, MECs are empowered to amend existing provincial regulations on school admissions (or to create new regulations) to require HoD’s to establish transformative feeder zones. Such amendments to provincial regulations (or the introduction of new ones) must, as is with Gauteng, oblige HoDs to establish feeder zones. It should also (as is lacking in Gauteng) demand that any zoning process advance the goal of racially equitable access to schooling. However, this option is complicated as it would require action on the side of all nine MECs. The inertia, reluctance or straight out unwillingness by PEDs to engage in transformative zoning to date (as highlighted in Chapter 7) reveals that such a voluntary exercise by all nine MECs is most unlikely to materialise.

10.2.1.5 Compelling transformative zoning through litigation

Should, Parliament, the Minister and the MECs fail to effect the proposed changes to the national/provincial regulatory framework on school admissions and/or the HoDs fail to establish transformative zones the litigious route may prove an effective strategy by stakeholders to secure the establishment of racially transformative feeder zones. This is especially given Justice Moseneke’s utterances in *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another (FEDSAS)*, discussed in Chapter 6. Responding to an argument by the amicus that feeder zones

shaped purely on geographical nearness to place of residence or work has, due to South Africa's incessant spatialised inequalities, the result of entrenching racially inequitable access to schooling, the justice comments

'The gut of the objection is that default feeder zones [under the Gauteng's 2019 admission regulations] are defined in spatial terms of place of residence or of work. Since the apartheid residential and workplace lines remain firm, the impact of the criteria of the MEC is to prolong and legalise racial exclusion. There is traction in the contention of the amicus.'

The fact that justice Moseneke found 'traction' with these arguments, bodes especially well for any potential future litigation aimed at compelling HoDs to determine feeder zones in a spatially transformative way. Chapter 8 sets out some potential legal arguments that can be made in this regard. This chapter has illustrated how the Minister, MECs and HoDs failure to regulate the issue of feeder zones has resulted in impoverished black children suffering unfair race and poverty based discrimination at the hands of some historically white SGBs. The Minister, MECs and HoDs can be found to have breached their responsibilities under the equality clause of the Constitution and the relevant provisions of PEPUDA. Of particular interest is section 29 of PEPUDA requiring the state to address 'unfair practices in certain sectors'. In this regard, the schedule to PEPUDA identifies examples of unfair practices 'which are or may be unfair, that are widespread and that need to be addressed.' One such practice identified is '[u]nfairly excluding learners from educational institutions'. Educational interest groups seeking to use litigation as a tool to secure transformative feeder zones would do well to latch onto these provisions.

Furthermore, as found in Chapter 5, a contention could be made that where executive policies (such as the National Admissions Policy) aimed at giving effect to socio-economic rights are established in terms of delegated legislative authority (here, NEPA) such policies are binding if they align with the Constitution and the applicable delegated legislation. Should the National Admission Policy be considered binding, a possible argument that presents itself is that section 33 should be interpreted as mandatory. That is, this section confers a power on HoDs to establish feeder zones together with a duty to exercise this power. Such an interpretation is based on, amongst other reasons, that section 33 of the National Admission Policy is aimed at giving effect to the constitutional right to a basic education. This legal argument is attractive to the extent that it is merely focused on the interpretation and enforcement of existing policy

as opposed to asking the court for a more far reaching remedy. Notably though, the National Admission Policy whilst making provision for spatially transformative zoning does not specifically require a HoD to do so. However, as concluded in Chapter 5, this is ameliorated by the fact that the preamble of NEPA (under which the National Admission Policy was published) explains that the legislation was adopted because it was ‘necessary. . . to facilitate the democratic transformation of the national system of education system into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights’. Moreover, section 4 of NEPA requires any policy published under it to be aimed at particular objectives. These include furthering and safeguarding the rights of everyone to ‘be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever’, and ‘of every person to basic education and equal access to education institutions’. However, as a policy, even if section 33 is interpreted as mandatory, it might still not be legally binding.

Having looked at various ways in which to compel HoDs to establish transformative feeder zones, the following section now turns to consider possible models for designing such zones.

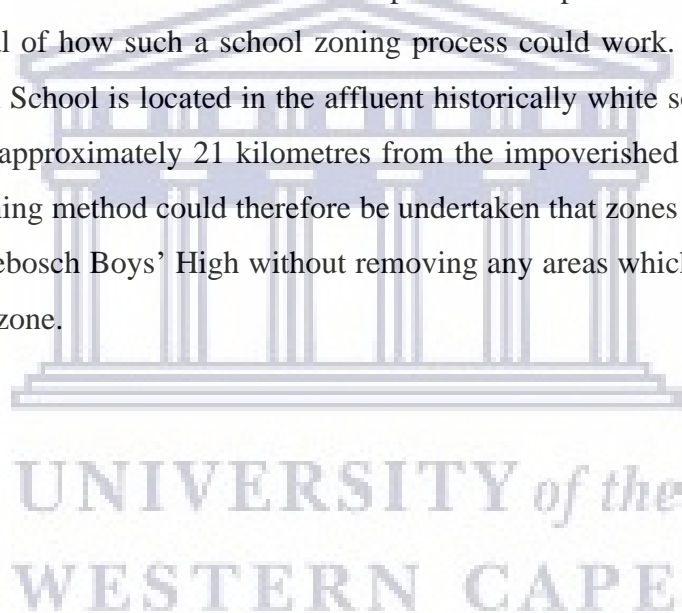
10.2.2 A suggested model for designing transformative feeder zones

A transformative zoning model refers to a school zoning model shaped to ensure that more socio-economically deprived black neighbourhoods and townships fall within the feeder areas of more desirable schools. That is, a zoning model aimed specifically at advancing the right to a basic education for poor black children with the ultimate objective of achieving more racially equitable access to schooling. This section recommends different transformative zoning designs that could potentially be adopted in this regard. The best transformative zoning model to be adopted would always be context specific in relation to the individual school to be zoned. Thus, any of these models or a combination of these models or a different model which best serves the objective of realising racial equity withing schooling access could be pursued. This section also considers potential criteria that can be used when engaging in transformative zoning.

10.2.2.1 Shaping a transformative feeder zone

As concluded in Chapter 9, one possible model for transformative zoning would be satellite zoning. This method involves the establishment of feeder zones that capture non-contiguous marginalised black communities either nearby or at much lengthier distances from the school

to be zoned. It could include merely expanding the school's existing feeder area through the incorporation of a satellite zone. It could also involve shrinking the school's current feeder area and then adding a satellite zone. The former method would most likely be the less controversial, given that it would still allow all children who fall within the existing feeder area preferential admission on this basis. As explained in Chapter 8, more privileged families who live within the existing feeder zone cannot claim prejudice on the grounds of such an extension to the extent that they are still within the zone. This is particularly important given the US experience around rezoning as discussed in Chapter 9. Where US districts have attempted to reconfigure school boundaries, they have often encountered fierce resistance from more privileged white American families living within existing attendance zones. Merely expanding an existing feeder zone whether by satellite or otherwise would help ameliorate potential backlash of this nature. Below is a visual of how such a school zoning process could work. The prestigious Rondebosch Boys' High School is located in the affluent historically white southern suburbs of Cape Town at about approximately 21 kilometres from the impoverished Mitchells Plain township. A satellite zoning method could therefore be undertaken that zones the township of Mitchells Plain to Rondebosch Boys' High without removing any areas which fall within the school's existing feeder zone.



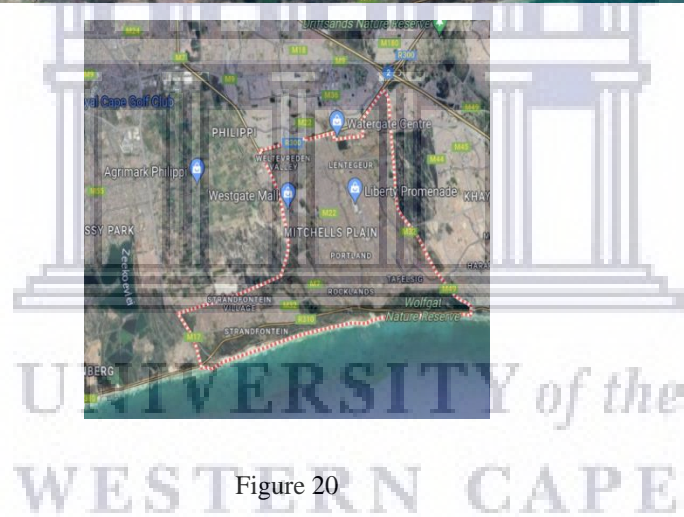
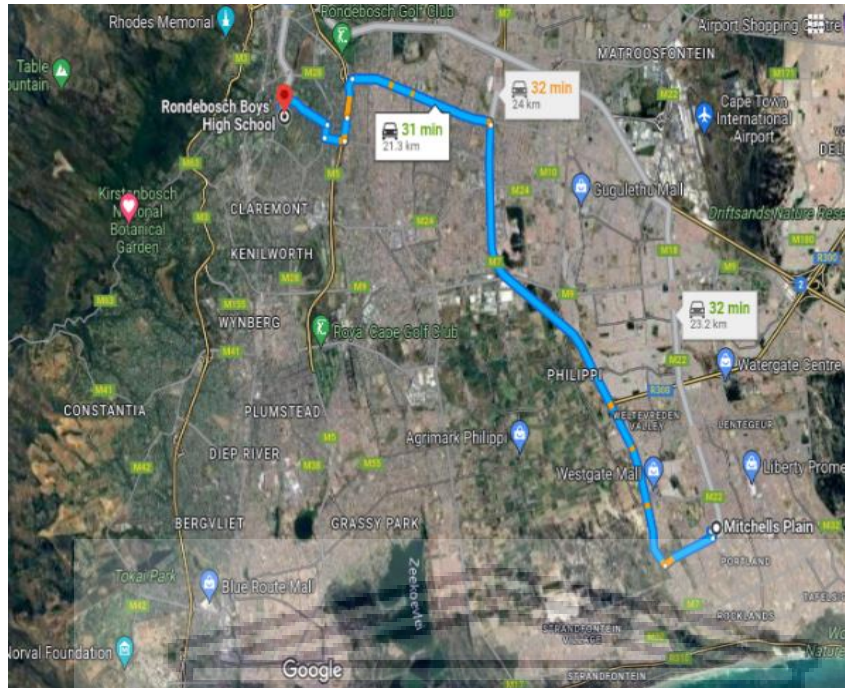


Figure 20

Transformative zoning could possibly take the shape of a reconfigured feeder zone which is adjusted to include an impoverished black area within close proximity of the particular school without the need for non-contiguous zoning. Again, this can either be with or without excluding portions of the existing feeder area. The latter, it is suggested, should be preferred for the same reasons provided above. The examples of Rivonia Primary in Johannesburg and its close proximity (about 9km) to the Alexander Township as well as Fish Hoek High and the nearby township (about 5.2 km) of Masiphumelele in Cape Town, discussed in Chapters 7 and 1 respectively, would lend itself to such a model. Admittedly there will be disenfranchised poor black areas who remain excluded from the feeder zone even after re-design. However, as concluded in Chapter 8, this will not detract from the legitimacy of transformative zoning as

an affirmative action measure to achieve more racially equitable access to schooling under section 9(2) of the Constitution and PEPUDA.

10.2.2.2 Criteria for creating feeder zones: Provincial feeder zone policy

It is recommended that each PED establish its own feeder zone policy to align with their province's unique circumstances and needs. This is particularly important given the differing challenges around educational access in urban versus rural areas. Provincial feeder zone policies should provide direction on how to engage in spatially transformative zoning. In this regard, provinces could (as concluded in Chapter 9) rely on guidance previously provided by the US Departments of Justice and Education to school districts seeking to achieve more racially diverse student bodies through rezoning. Factors recommended by these US departments include the racial and socio-economic composition of neighbourhoods as well as the nature of housing within these neighbourhoods (examples are public, high density, rental). Other factors endorsed by these US departments include median household income and parental education levels, household status (if learners stem from single parent households, etc) and achieving equilibrium of enrolment numbers. As discussed in Chapter 6, the historical status of the school to be zoned (whether formerly reserved as white or black) and its particular quintile (school poverty classification) should also be factored.

Any provincial feeder zone policy should also set out certain standards which PEDs must adhere to when creating their province's own feeder zone policy. This would include requirements regarding the tabulation of timeframes within which the zoning process must unfold, and feeder zones reviewed.

10.2.3 The process for establishing transformative feeder zones: the need for consultation

Demarcating and amending feeder zones, especially in the case of transformative feeder zoning, can be a highly contentious issue, as seen repeatedly in the United States, and as has manifested in South Africa. A failure to adequately involve parents and SGBs in the mapping of feeder areas has a real likelihood to result in litigation against PEDs. This is clear from discussion of the Constitutional Court cases in Chapter 6. Whenever PEDs acted without sufficiently involving SGBs litigation ensued. The case of *Gerrit Maritz Secondary School vs. Gauteng Department of Education* shows that this has, in fact, been the case in the establishment of a feeder area for a secondary school in Gauteng. For any transformative zoning process to be legitimate and well informed, simply consulting with the parent body and

SGB will not suffice. Consultation for mere sake of may result in white and more affluent parents simply exiting the school, taking with them the wealth and other accompanying resources they bring. The following section addresses the need to ensure a comprehensive consultation process when establishing feeder zones. As found in Chapter 6, such consultation should take the form of meaningful engagement from the outset. The recommendations that follow draws from the lessons learnt from the case analyses in Chapter 6.

10.2.3.1 Meaningful engagement with SGBs

Under the National Admission Policy, a HoD who wishes to establish feeder zones must first consult with SGBs before doing so. The HoD's obligation to consult with SGBs on admissions related matters is clear from the discussion in Chapter 6 of the Constitutional Court's decisions in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another (Ermelo)* in the context of school language policies, and *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others (Rivonia)* as regards admissions policies. This obligation is grounded in the statutorily designed partnership model, highlighted in that chapter, as first enunciated by the Constitutional Court in *Ermelo*, and later expanded on in *Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another (Welkom)*, and *Rivonia*. This partnership demands that HoDs when engaging SGBs on proposed feeder zones must listen intently and be receptive to what these bodies have to say. The consultation process must be defined by good faith and co-operation. The respective PEDs and SGBs must work hand in hand in finalising the school zoning process. In *Ermelo*, *Welkom*, and *Rivonia* the Constitutional Court places a high premium on the intimate knowledge that SGBs possess regarding the functioning of the schools they govern. HoDs lack this detailed perspective in relation to individual schools. It is therefore this same intimate knowledge that HoDs must draw from to ensure the effectiveness of any transformative zoning scheme.

In *Ermelo* the Constitutional Court, in the context of language policy, explained that where an issue affects every facet of school operations then procedural fairness and adequate time for implementation is of even more consequence. This is due to its impact on a school's ability to adequately arrange its affairs and, in the end, ensure its institutional excellence. Feeder zone determinations are akin to language policies as they both concern qualifying criteria for admission to schools. Like language policies, feeder zone determinations influence the daily

operations of every facet of a school. It impacts upon a SGB's ability to properly plan its admissions process, finalise enrolment, settle class lists and adequately manage its resources, amongst others. The materiality of the impact of zoning on schools is, in fact, recognised by the Constitutional Court in *FEDSAS*. From *Ermelo*, one can extrapolate that the issues which should be discussed during the consultation process include the SGB's view on how the proposed feeder zones will potentially impact upon the quality of schooling the school is able to offer, and how workable the implementation of the proposed feeder zone would be.

Consultation on its own is insufficient if it does not occur timeously. We know from *Ermelo* and *Welkom* that timeous planning is essential in relation to admissions related issues. It is key to a constructive relationship between the parties and to avert potential disputes concerning learners' access to education. Justices Froneman and Skweyiya in *Welkom* particularly stressed the need for open and sustained channels of communication between SGBs and PEDs on admission related issues. It is therefore of the utmost importance that planning, and preparations occur early, and that any significant developments around the school zoning process are communicated to SGBs timeously. HoDs must, in accordance with *Ermelo*, ensure that proactive zoning occur way ahead of the school year for which it is intended. Entrenched timelines for the establishment, review and adjustments to feeder zones is therefore essential to ensure that the school zoning process unfolds in a disciplined and structured manner.

From *Welkom*, *Rivonia*, and *FEDSAS* it is clear that PEDs and SGBs as organs of state must follow the statutory and constitutional dictates of co-operative governance. This too would require that these role players work closely together in good faith and with mutual trust in the establishment of feeder zones. It also requires that all avenues are exhausted before either party resorts to the courts for a resolution on any feeder zone related disputes that arise between them. In light of these several legal principles on the manner in which PEDs and SGBs must engage, it is recommended that the Minister publish national policy regarding the process for the establishment of feeder zones by HoDs. This policy should, amongst others, guide the PEDs on the ways in which to engage with SGBs when establishing feeder zones to ensure that the various PEDs do not fall foul of what is legally required from them in this regard.

10.2.3.2 Broader stakeholder participation

The Constitutional Court has explained that South Africa's democracy is a participatory one. *Welkom* illustrates the significance of participatory democracy in the process of education provisioning. Such participatory democracy demands the substantive involvement of people in

education related matters that impact their lives. It requires the state to go beyond simply opening up opportunities for meaningful engagement. Rather the state should facilitate a process that will ensure that a range of voices have the opportunity to be heard and to influence decision-making. In the context of school zoning this would require that the HoD devise a process which provides a platform for a diversity of voices to provide their input on the zoning process. This would entail going further than consulting with SGBs. Broader consultation on the issue of school zoning is vital for at least two reasons. First, not all stakeholders' voices find representation on SGBs. Conspicuously absent are the voices of what the scholars have termed the so called 'outsiders'. This refers to those who do not form part of the school body at the implicated school. Second, a basic conflict of interest exists between SGBs whose primary goal concerns safeguarding the interests of the school and its learners versus PEDs who must protect the educational interests of all learners within the system. This conflict was alluded to by the Constitutional Court in *Rivonia* and is also red flagged by scholars in the literature. The HoD must therefore ensure that whatever zoning method is adopted provides opportunity for non-enrolled learners and their parents as well as other 'outsiders' to have a meaningful say where school zoning has a material impact upon them.

It is therefore essential that HoDs in the process of school zoning undertake the type of wide-ranging and thorough community and stakeholder engagement as contemplated by Liebenberg in her criticisms of the Constitutional Court's meaningful engagement orders in *Ermelo*, and *Welkom*. This would include requiring the applicable PED to conduct a broad ranging investigation to obtain the relevant information needed to establish feasible feeder zones and to revise them effectively where required. It is therefore suggested that PEDs conduct public hearings as a component of the school zoning process to allow all these stakeholders to participate and for PEDs to reap maximum benefit of their feedback. The idea of requiring public hearings before creating feeder zones is not novel. As established in Chapter 7, this idea was raised during official talks in the design of the GDoE feeder zoning model. However, this suggestion was not taken up by the GDoE. Based on Chapter 9, it can be seen how public meetings have, at times, formed part of the school zoning processes in the US and have been labelled essential by some US scholars.

10.2.3.3 Working closely with the experts

As concluded in Chapter 6, it is important when consulting with broader stakeholders, that the PEDs work closely with specialists who possess relevant information and expertise within the

field of urban geography and town and regional architecture and spatial planning. Geographers are particularly well placed to assist PEDs to anticipate and ready itself for potential modification to existing feeder zones as a result of shifting spatial conditions or location-centred issues. The role of experts of this nature is therefore vital to school zoning. Chapter 6 further concludes that the expertise of municipal demarcation boards and civil society (especially those who have worked on school zoning related issues), and SGB umbrella organisations should also be drawn on. Meaningful engagement with these actors is essential to ensuring more feasible and better calibre decisions.

10.2.4 Overcoming economic, geographical and other barriers to access

Some SGBs have engaged in manipulative practices to exclude impoverished black learners through criteria around geographical proximity and/or financing. Addressing the issue of racially exclusionary feeder zones alone does not seal off the space for such abusive practices. This does not mean that transformative zoning should not be applied. Ideally, a transformative zoning model should be finely tuned to ensure that the impoverished black children who are the intended beneficiaries in fact reap the benefits of reconfigured zones. While this is the ultimate aim of transformative zoning, the more rudimentary aim is simply to prevent zoning practices that are discriminatory. As found in Chapters 7 and 9, simply removing zoning completely is not the answer. Hence feeder zones should be set, and they should, at the most basic level, not be the cause of discrimination. At the more ideal level feeder zones should enhance equitable access to basic education.

Moreover, as is clear from the section below, transformative zoning is just one tool to be used to ensure equitable access to education. This tool can be used in conjunction with other tools. For any transformative zoning model to be effective it must also tackle the economic and geographical barriers experienced by impoverished black learners seeking to access HWS. The recommendations in this section are therefore targeted at addressing these barriers in conjunction with transformative zoning.

10.2.4.1 Imposing Quotas

A quota system is a tool for ensuring equitable access to education in and of itself. This thesis does not focus on this tool, since it has already been canvassed by other authors.¹⁸⁷⁸ The thesis,

¹⁸⁷⁸ See section 9.5.2 above. Spaul N 'Equity: A price too high to pay?' in Spaul N & Jansen J (eds) *South African Schooling: The Enigma of Inequality* (2019) 16. Jansen J 'Catchment areas doom indigent children to a life of

does, however, acknowledge that a quota system could be used in conjunction with transformative feeder zones.

Taking the race and socio-economic circumstances of individual learners into account when processing admissions could assist transformative zoning to achieve its objectives. This is because even if feeder zones are constructed to capture impoverished black communities there remains the danger that a particular school may draw its entire or almost entire learner intake largely from the white and/or privileged demographic who also form part of the reconfigured feeder zone and who have the capacity to pay fees. It is therefore recommended that quotas based on a combination of both race and socio-economic circumstances be imposed to ensure that at the very minimum a specific number of seats are reserved for poor black learners within the transformed feeder zones of HWS. The application of such quotas would of necessity entail the use of a means test to ensure that only those most vulnerable black children (in terms of socio-economic circumstances) are the true beneficiaries of this scheme. Alternatively, the state could require that a certain percentage of students come from the impoverished area. Any quota system needs to be alive to the danger of white flight. HWS are able to maintain their privilege as a result of being propped up by the financial resources of their parent body. A quota system that threatens to significantly undermine a school's ability to deliver quality education could simply see these more well-off parents exit the public education system altogether. A quota system should therefore not overwhelm the fee generating capacity of HWS if it is to be effective.

The idea of using quotas to achieve racially equitable access to schooling is not a novel one. As discussed in Chapter 9, race based quotas to further racial diversity within access to schooling was used with some success in the US through its busing school reintegration initiatives. As discussed in Chapter 7, the notion of quotas to ensure enrolment possibilities for learners beyond a feeder zone appeared in the Gauteng Department of Education's Task Team Framework for the Determination of Feeder Zones. This framework informed the drafting of the GDoE's feeder zone policy and the 2019 Gauteng admission regulations. The proposal to use quotas was, though, ultimately not followed through on.

As discussed in Chapter 9, professor of education Jonathan Jansen and educational economist professor Nic Spaull have both proposed the use of quotas as a mechanism to ensure more

poverty' *TimesLive* 12 October 2017 available at <https://www.timeslive.co.za/ideas/2017-10-12-catchment-areas-doom-indigent-children-to-a-life-of-poverty/> (accessed 21 July 2023).

equitable access to schooling in South Africa. In this regard, Jansen suggests policy reform. Spaull flights the idea of imposing quotas targeted at impoverished learners on private schools and all public schools charging schools fees of R20 000 or beyond per annum via law. The above authors offer a quota system as a standalone tool for effecting equitable access. The purpose of this thesis is not to criticise this. This thesis purely suggests a further tool for effecting equitable access.

While a standalone quota system can be used to effect equitable access, this thesis recommends that it be used in combination with transformative feeder zones. This is because a standalone quota system fails to account for the value of neighbourhood friendships and its positive impact on the academic setting. Transformative zoning will ensure that impoverished black learners enrolled by a HWS all stem from the same disenfranchised area thus facilitating the creation of neighbourhood friendships. These friendships create a sense of community identity and foster a sense of security. In the transformative zoning context, it would allow for impoverished black learners to help each other with homework where in need. It would also facilitate collaboration on school projects and allow for the setting up of after school hours study groups. These benefits of transformative zoning are by no means trivial. This is particularly because learners transitioning from rural and township schools to HWS generally experience a lack of academic support after making the jump. Where impoverished black learners live close together, they can also travel to and from school together. The importance of such travel companionship cannot be underestimated given the high crime rates that plague South Africa's impoverished black communities. This would especially be the case when dealing with younger primary school learners who have to journey between their homes in crime ridden areas and HWS.

Moreover, transformative feeder zones could simplify the quota issue by merely requiring that a certain percentage of students are taken from the impoverished area within the feeder zone. This negates the need for race and means tests. Furthermore, as indicated above, the aim of transformative zoning is not, at its most basic level to advance equity, but to prevent discrimination. As was shown, this cannot be achieved by simply removing zones, rather it requires creating equitable ones.

10.2.4.2 Exemption of school fees

Many poor black children may remain trapped in dysfunctional schools because they simply cannot afford the fees of HWS. A transformative zoning process will fall flat if it fails to account for this reality. As discussed in Chapter 5, under the current legislative framework those who cannot afford to pay fees are entitled to either a partial or complete fee waiver. However, research shows that only about 0.3% of learners in South Africa actually receive fee exemptions. This is in part because parents are unaware of the existence of such exemptions. For transformative zoning to work, an affirmative obligation needs to be placed on schools to determine the need for a fee exemption and to facilitate the exemption application process at their own instance when enrolling learners from historically disenfranchised areas within their feeder zone. It is recommended that the Minister amend the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools to provide for as much.

10.2.4.3 Enforcement mechanisms

The danger persists that some HWS will nevertheless circumvent their obligations to fill their quotas with the targeted group and/or to grant the required fee exemptions. As concluded in Chapter 9, the Indian experience in attempting to enforce statutorily imposed quotas to achieve more equity in schooling access reveals that such a system is likely to fall flat absent strong mechanisms for enforcement. It is for this reason that it is recommended that it be legislated or, at the least made policy, that all schools who are subject to quotas be required to file an annual report with the South African Human Rights Commission (SAHRC) confirming that the school has met its required enrolment quotas and that the necessary fee exemptions have been granted (annual school reports). These annual school reports must detail, amongst others, the school's total enrolment per grade, the number of learners appointed under the quota system per grade, the race of these learners and whether they have qualified for and received an automatic fee exemption. The SAHRC should conduct an annual audit of this information and should further release the outcomes of these audits and its general findings to the public. Annual school reports should also be made readily accessible to the public so that researchers and civil society are empowered with the information required to hold HWS accountable for meeting their quota and fee exemption obligations.

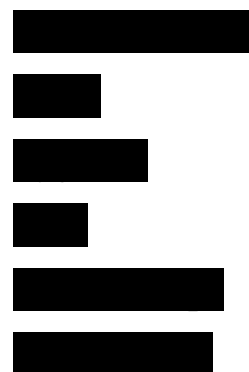
10.2.4.4 Transport

Even with school fees waived, transport costs will likely constitute an insurmountable barrier for most qualifying impoverished black learners under the transformative zoning system. As concluded in Chapter 9, a state sponsored school busing model such as that in the US would prove an unworkable intervention in the current South African context. This is because of, amongst others, South Africa's already strained scholar transport scheme. To overcome the transport barrier, it is suggested that eligible learners under the quota system receive state subsidies that permit them to ride for free using public transport, more particularly trains and buses.

10.3 CONCLUDING REMARKS

Transformative zoning, if established and implemented correctly, offers a unique measure which HoDs can employ to achieve more racial equity within South Africa's public education system. Given the sheer number of dysfunctional schools, transformative zoning has only a small role to play in remedying racially inequitable access to education in South Africa. However, racial inequalities within the country's education system run deep and must be addressed on all fronts. Turning dysfunctional schools into functional ones take time whereas the right to basic education is immediate. In the meantime, for those who cannot access it, a decent education delayed is simply an education denied. A process of schooling reform in which underperforming schools are properly capacitated to deliver a quality education is not only a necessary and lengthy one but is also complex. Transformative zoning represents a route within which to ensure that at least some impoverished black learners in South Africa can have immediate access to quality education. Such impact is anything but negligible on the lives of these black learners who would otherwise have the gates of quality education slammed on them simply because of where they, for historical reasons, reside.

ANNEXURE A



TO: HEAD OF EDUCATION & INFORMATION OFFICER
WESTERN CAPE EDUCATION DEPARTMENT (WCED)
MR BRIAN SCHREUDER

PER EMAIL: edumin.edumin@westerncape.gov.za

Dear Mr Schreuder,



**RE: REQUEST FOR ACCESS TO INFORMATION UNDER S 11 OF
THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000**

Please find enclosed the following documentation in relation to the requester's access to information request:

- (1) A completed form 2 as per regulation 7 of the Regulations Relating to the Promotion of Access to Information Act, 2021 dated 16 June 2022.
- (2) Folio 1 (Further Description of record/relevant part of the record on 'separate page') dated 16 June 2022.
- (3) Identity document of requester (both front and back).

Kindly note that the requester requests access to the below documentation for purposes of doctoral research.

- (1) **Copies of all internal admission appeals** lodged by learners or/and parents/guardians of learners in terms of section 5(9) of the Schools Act 84 of 1996 in relation to the **academic years 2019-2022**. Section 5(9) of the Schools Act provides that

Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council.

(2) Copies of **all the MEC's letters communicating the outcome of such appeals** referred to in (1) above.

Kindly also note that the requester does not require access to the names and personal details of parents/guardians and learners reflected in the requested documentation. The requester accepts that this personal information may potentially be severed as per section 28(1) of the Promotion of Access to Information Act 2 of 2000.

In light of the academic purposes for which this information is sought, the requester asks that any fees associated with the preparation of this documentation be waived by the Western Cape Education Department (WCED). Should this not be possible the requester asks that the academic purposes underlying this request result in a significant deduction of any access fees to be determined.

Should any further information be required in relation to this application the requester may be reached by cell - [REDACTED] or email - [REDACTED]

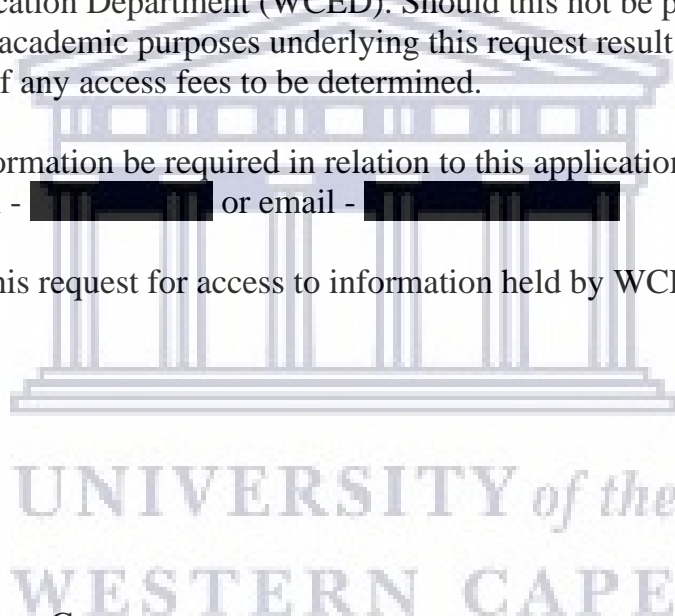
Your assistance with this request for access to information held by WCED is much appreciated.

Yours faithfully,

Lisa Draga

LLD Candidate

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