



**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**

August 2018

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A. Introduction

1. This is a joint submission made by Equal Education (EE) and Equal Education Law Centre (EELC) concerning the proposed amendments to the Regulations Relating to the Admission of Learners to Public Schools, 2018, published by the Gauteng Department of Education on 30 July 2018.¹
2. EE is a membership-based, democratic movement of learners, parents, teachers and community members. Its head office is located in Khayelitsha, Cape Town, with additional offices in both the Eastern Cape and Gauteng provinces. EE's membership base spans across various provinces including the Western Cape, the Eastern Cape, Gauteng, Limpopo and Kwazulu-Natal. Its core objective is to work towards achieving quality and equality in South Africa's education system.
3. EELC is a public interest law centre specialising in education law, and is located in Khayelitsha, Cape Town. EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.
4. In 2016, the Federation of Governing Bodies of South African Schools (FEDSAS) challenged the Gauteng Department of Education's (GDE) amendments to regulations 4(1) and 4(2) of the Regulations for the Admission of Learners to Public Schools (Government Notice 1160, dated 9 May 2012). In this case before the Constitutional Court, EE (represented by EELC), acted as amicus curiae and highlighted, amongst others, the manner in which current determinations of feeder zones reinforced racial disparities in access to education. In light of the Court order, in which the Constitutional Court obliged the GDE to determine feeder zones, EE and EELC welcome the opportunity to comment on the draft Amendments to Regulations Relating to the Admission of Learners into Public Schools, 2018, (draft Amendments) and hereby makes the following submissions.

¹ See Provincial Gazette, Extraordinary, 30 July 2018, Provincial Notice 791 of 2018 no. 209.

B. Definitions

5. No Comment

C. Amendment of regulation 1 of Regulations

6. No Comment

D. Substitution of regulation 2 of Regulations

7. No Comment.

E. Insertion of regulation 2A, 2B, and 2C into Regulations

Draft regulation 2A. - “General principles regarding admissions”

8. Draft regulation 2A.(1)(c) states that a learner may not be refused admission “to any part of the total school programme”. EE and EELC note that schools have reportedly refused learners access to various school activities, such as participating in a school play or attending a matric farewell, in cases where, for example, parents have been unable to pay school fees. EE and EELC are concerned that, if left undefined, certain activities may be argued to fall outside of the scope of the total “school programme”, and unfairly exclude learners from school activities.
9. National legislation does provide some guidance on the definition of “total school programme” or “school activity”. Within the context of the enforcement of payment of school fees, section 41(7) of the South African Schools Act 84 of 1996 (SASA) protects a learners’ right to participate in “all aspects of the programme of a public school”, and that learners may not be victimised in any way including, but not limited to, the suspension of classes, denial of access to cultural, sporting or social activities of the school, denial of access to the nutrition programme of the school for those learners who qualify in terms of

applicable policy, and the denial of the receipt of a school report or transfer certificate. In addition, section 10 of the National Admission Policy for Ordinary Public Schools states that:

“[a] learner is admitted to the total school programme and may not be suspended from classes, denied access to cultural, sporting or social activities of the school, denied a school report or transfer certificates ...”.²

10. It is also noted that section 1 of SASA defines “school activity” as “any official educational, cultural, recreational or social activity of the school within or outside the school premises”. In light of these more substantive definitions to the term “total school programme”, EE and EELC recommend that the following wording be added, either as an amendment of regulation 1 of the Regulations, or defined within draft regulation 2A.(1)(c):

“The total school programme means all aspects of the programme of a public school in line with national legislation including, but not limited to,

- (i) the educational, cultural, sporting, recreational or social activities of the school within or outside the school premises;**
- (ii) the nutrition programme of the school for those learners who qualify in terms of applicable policy; and**
- (iii) official school report or transfer certificate.”**

11. EE and EELC note that the misconduct or behaviour of a learner is not included in the grounds upon which a learner may not be refused admission in draft regulation 2A. However, we also note that in the section relating to admissions policies, particularly draft regulations 2C.(6) and (7),³ the draft Regulations prevent a governing body or any employee of a school from requesting a “confidential report” which includes, *inter alia*, information relating to a learners’ misconduct or bad behaviour. Despite this, schools have reportedly refused learners admission on the basis of past behaviour, particularly where a

² Admission Policy for Ordinary Public Schools (Government Gazette Notice 2432 in Government Gazette 19377 published in 19 October 1998).

³ See page 10 of the Draft Amendments to Regulations Relating to the Admission of Learners to Public Schools, 2018.

learner has been expelled from their previous school. We therefore recommend that this be included as a listed ground upon which a learner cannot be refused admission, and propose the following addition:

“2A.(1)(f) on the grounds of past misconduct or behaviour at a current and/or previous school.”

12. Draft regulation 2A.(2)(a), states that a gender-specific school may refuse admission to a learner on the grounds of gender. EE and EELC would suggest a more nuanced approach to admissions policies in gender-specific schools. Gender identity is neither fixed nor is it binary. A person’s gender identity can be the same or different from their biological sex.⁴ Provisions exist in South Africa’s laws that ensure that learners are not unfairly discriminated against. Our Constitution, for example, stipulates that no-one can be discriminated against on the basis of their gender, sex or sexual orientation. In addition, “section 5(1) of the Schools Act makes it clear that a public school must admit learners and serve their educational requirements without unfairly discriminating against them in any way.”⁵ Therefore, EE and EELC recommend that draft regulation 2A.(2) explicitly protects transgender and gender non-conforming learners from unfair discrimination, and recommend the following addition:

“2A.2(a)(i) - Despite regulation 2A.(2)(a), transgender and gender non-conforming learners may not be unfairly discriminated against in the application of gender-specific school admission policies.”

Draft regulation 2B. - Admission policies

13. Draft regulation 2B.(4) provides that an admission policy of a school or any amendment to it will only be effective after the Head of Department approves it. Unlike the current version

⁴ Nurina Ally and Tshego Phala “Gender Identity and Sexual Orientation in Schools” in Veriava et al (eds), Education Rights Handbook. An electronic version of this chapter is available at <https://eelawcentre.org.za/sexual-orientation-gender-identity-schools-authored-nurina-ally-equal-education-law-centre-tshego-phala-webber-wenztel/>

⁵ Ibid.

of the Admission Regulations (2012), no timeframe is provided within which the Head of Department must certify the admission policy to the extent that it is consistent with all relevant laws.

14. Whilst EE and EELC recognise that limitations may exist in terms of the Head of Department's capacity to certify a large influx of admissions policies within a limited period, we submit that it is in the interests of certainty and accountability that a reasonable timeframe be included. EE and EELC suggest that a 60-day time period for certification of a school's admission policy, in circumstances where it complies with all laws, is reasonable. We therefore recommend the following insertion in regulation 2B.(4):

“2B.(4) The admission policy of a school, or any amendment to it, will only be effective after the Head of Department approves it. If the admission policy of a school is consistent with national and provincial laws, including these Regulations, the Head of Department shall certify that admission policy within 60 days of its submission for certification.”

15. Draft regulation 2B.(6)(b) empowers the Head of Department to return an admissions policy to a school with recommendations as may be necessary in the circumstances. The draft Regulations are silent on the steps that the school should take following the receipt of such recommendations and the timeframe within which the admissions policy should be re-submitted for approval. EE and EELC recommend the addition of the following wording:

“2B.(6)(b) return it to a governing body with such recommendations as may be necessary in the circumstance, together with a deadline for the governing body to submit a revised policy for certification, which must be no later than 30 days after receipt of the Departments recommendations.”

16. Draft regulation 2B.(7) stipulates those factors that the Head of Department should consider in the certification of an admissions policy. This regulation is largely insufficient

to the extent that it provides very little guidance to school governing bodies in their development of progressive admissions policies. Draft regulation 2B.(7)(a) refers to compliance with “minimum standards for admission policies determined by the Department”. EE and EELC submit that, to the extent that minimum standards need to be taken into account when determining admissions policies, these standards should be included in the Regulations directly. The potential determination of further minimum standards at a later undetermined date creates undesirable uncertainty in circumstances where the Regulations seek to provide clarity and guidance to all education stakeholders on the criteria admission policies should meet. It is also unclear which authority within the Department would determine such minimum standards, and the legally binding status of such standards when so determined.

17. It is further recommended that the draft Regulation stipulate that admissions policies should promote principles of equity and redress in terms of equal access to schools for learners from disadvantaged or poor backgrounds, taking into account the discriminatory effects of apartheid spatial planning. EE and EELC therefore propose the following addition:

2B.(7)(d) promotes the principles of equity and redress in terms of equal access to schools for learners from disadvantaged or poor backgrounds, taking into account the discriminatory effects of apartheid spatial planning.

18. Draft regulation 2B.(8) requires a governing body to review its admission policy every three years or “*whenever circumstances so require or at the request of the Head of Department*”. In order to ensure that admission policies that operate adversely are brought to the attention of the Head of Department, EE and EELC recommend that the draft Regulations specifically provide a mechanism whereby members of the school community and the broader public may request that an admission policy be reviewed. The following insertion is therefore recommended:

“2B. (9) Any learner, parent, teacher or member of the public may submit a complaint to the Head of Department regarding any provision of a school’s admission policy. Following consideration of such a complaint, or on his/her own accord in terms of subregulation (8), the Head of Department may request the governing body to review the admission policy to ensure that the policy reflects the requirements referred to in subregulation (7).”

Draft regulation 2C. - Admission and placement tests

19. It is unclear whether draft regulation 2C. draws a distinction between ordinary schools and focus schools in relation to admission and placement tests. For the sake of clarity, EE and EELC therefore recommend the following changes to regulations 2C.(2), (3) and (4):

“2C.(2) The principal of a focus school may administer an admission test to determine a learners suitability in relation to the specific focus of that school, provided that the test takes place on the instruction or with the prior written approval of the Head of Department.

Replacing regulation 2C.(3) with the following wording:

2C.(3) The governing body or principal of a school or a focus school may administer a test to determine the placement of a learner within an appropriate programme or in a specific course provided that -

- (i) a placement test may only be administered after a learner has been admitted to a school;**
- (ii) there is prior written approval from the Head of Department authorising an admission test to be conducted; and**
- (iii) any special placement of a learner made as a result of a placement test is in the best interests of the learner.**

To the extent that our proposed amendments to draft regulation 2C.(2) and (3) are accepted, that draft regulation 2C.(4) accordingly be deleted.

20. Draft regulations 2C.(6) and (7) do not indicate whether or not a parent can be asked for a confidential report, or any of the information that would be contained in such a report. The Regulations also open up some ambiguity regarding what information can be requested from a learner's current school if it is requested in a format other than a confidential report. EE and EELC therefore propose that draft regulation 2C.(6) be amended to include the following:

“2C. (6) When a learner has applied for admission to a school, neither the governing body of that school nor any person employed at that school may request the learners’ parent, current school or any person employed at that school, to furnish it with a confidential report in relation to that learner **or any information that may be used to unfairly discriminate against that learner, including**

(i) the financial status of a parent;

(ii) whether the parent can afford school fees;

(iii) employment details of a parent

(iv) the health, misconduct or behaviour of a learner”

21. EE and EELC also recommend that, to the extent that our proposed amendments to draft regulation 2C.(6) are accepted, that draft regulation 2C.(7) accordingly be deleted.

F. Repeal of regulation 3 of Regulations

22. No Comment

G. Substitution of regulation 4 of Regulations

Paragraph 6 (Draft regulation 4) - Feeder Zones for Admission of [entry phase] learners

23. EE and EELC note that the proposed amendment requires the Head of Department to consider a range of factors in the determination of feeder zones, and no longer bases such a delimitation solely on the basis of proximity. EE and EELC welcome this approach, which allows for a more in depth consideration of the circumstances in which learners are accessing schools, and highlights, amongst others, the need for “geographical and spatial transformation”.
24. This is particularly important for learners from township schools, who are especially affected by the delimitation of feeder zones which reinforces spatial inequality and unequal access to quality education.
25. We recommend that the following additional factors be considered:

“4(3)(e) the diversity of the school”

4(3)(f) the need for equitable access to education for all learners”

26. In relation to the criteria “geographical and spatial transformation”, included in draft regulation 4(3)(d), EE and EELC note that the proposed amendment makes no reference to the role of the GDE’s Policy for the Delimitation of Feeder Zones for Schools. It therefore remains unclear how the Draft Regulations Relating to the Admission of Learners to Public Schools interact and respond to the Policy for the Delimitation of Feeder Zones. We note further that the Policy for the Delimitation of Feeder Zones for Schools has not yet been published, and wish to emphasise that the finalisation and publication of this document would support the successful implementation of the proposed Admission Regulations. We therefore recommend the following addition to the draft Regulations:

“4.C. The MEC is required to publish a Policy for the Delimitation of Feeder Zones for Schools within [x] months (EE and EELC recommend three months) following publication of the Regulations, which must be reviewed at least every three years.”

27. Draft regulation 4(4) requires a process of notification and participation to be instituted prior to the determination of a school’s feeder zone. While this is commendable, EE and EELC are concerned that draft regulation 4(4)(b) refers only to “governing bodies of affected schools and any parent of a learner at an affected school” as the relevant stakeholders who must be granted an opportunity to make representations on the proposed feeder zones. EE and EELC submit that the pool of stakeholders who must be afforded an opportunity to make representations on the proposed feeder zone of a school is unjustifiably narrow. In particular, the following bears emphasis:

- a. Teachers and staff at a school have a self-evident interest in making representations on the proposed feeder zone of the school wherein they are employed, which representations may differ from the governing body;
- b. Current and prospective learners of a school have a right to be directly heard on any issues impacting on their education and to have their best interests taken into account;
- c. Prospective parents who may seek admission of their children to a school have a direct interest in the delimitation of a school’s feeder zone;
- d. Members of the community within which the school is located, as well as the broader public, have an interest in the effects of the determination of a feeder zone of a school. As was recognised by the Constitutional Court in *Hoërskool Ermelo*:
*“The governing body of a public school must . . . recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our Constitution.”*⁶

⁶ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 at para 80.

28. EE and EELC therefore recommend that draft regulation 4(4)(b) be amended to read as follows:

“4. (4) ...

(b) granted any interested party the opportunity to make written representations within 30 days regarding the proposed feeder zones.”

H. Insertion of regulation 4A. and 4B. into Regulations

Draft regulation 4B. - Appeal against a feeder zone determination

29. In line with EE and EELC’s comments in relation to draft regulation 4(4)(b), we submit that the right to appeal a feeder zone determination should not be restricted to governing bodies and parents. This would be an arbitrary and unjustifiable narrowing of the pool of stakeholders who may be affected by a feeder zone determination. Rather, we recommend that any person who is affected by a feeder zone determination should have the right of appeal, including learners. EE and the EELC recommend wording to this effect at paragraph 32 below.

30. Furthermore, draft regulation 4B.(3) currently provides that reasons will be provided for the MEC’s decision “where necessary”. The current wording results in an entirely subjective discretion being afforded to the MEC as to when to provide reasons, which has the potential to result in arbitrariness. EE and EELC recommend that reasons be required to be provided in all circumstances so as to advance the right to just administrative action and efficiency.

31. Finally, the draft Regulations do not stipulate that reasons must be provided in writing, which we recommend be stipulated for clarity and the avoidance of doubt.

32. Accordingly, we recommend that draft regulation 4B. be amended as follows:

- “4B. (1) Any person 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 person who lodges an appeal must do so in a form similar to Annexure F to these Regulations.**
- (3) Within 30 days of receiving the appeal, the MEC must determine the appeal and provide reasons for the decision in writing.”**

I. Substitution of regulation 5 of Regulations

33. Draft Regulation 5(2) states that the application for the admission of a learner may only be done through the online application system available on the Department’s website. EE and EELC note that such an online application process may pose several challenges to parents and learners who, for example, may not have frequent access to the internet, or be familiar with online platforms. We therefore recommend that the draft Regulations place an obligation on the MEC to ensure that this online admission process is accessible to learners and parents, through interventions such as well-resourced application centres and other avenues for accessing support. Parents and learners must also be made aware of where these centres are located. We propose the insertion of an additional regulation as follows:

- “5A. The Department must take steps to ensure that the on-line application system is accessible to all potential applicants, which steps may include, amongst others, the establishment and resourcing of on-line application centres and ensuring awareness of the location of such centres.”**

34. Draft regulations 5(6) & (7) stipulate factors to be considered in the placement of a learner who has not been placed within a school 30 days following the close of the admission period. However, this section is significantly limited in that it only lists two factors to be taken into consideration in the placement of learners by the GDE in these circumstances.

35. It is imperative that this draft regulation also promotes the redress of discrimination in terms of access to schools, particularly for learners from a poor background, and that factors such as spatial inequality, redress and transformation be included in such considerations. EE and EELC therefore recommend the following addition:

“5(7)(c) the principles of spatial inequality, redress and transformation”

J. Amendment of regulation 6 of Regulations

36. EE and EELC note with concern that draft regulation 6(5) requires that principals report undocumented learners to the Department (responsible for provincial education matters) by (a) submitting a list of undocumented learners to the Provincial Director in charge of admissions, and (b) maintaining a database of undocumented learners. The Provincial Director in charge of admissions is then, in turn, required to submit a composite list of learners to the Department of Home Affairs.

37. The reporting of undocumented learners to government departments involved with immigration control is a complex and important issue. Incidents of schools threatening undocumented learners and their parents have been reported on, and formed the subject of recent litigation.⁷ The South African Human Rights Commission (SAHRC) has produced a Draft Position Paper on Access to Basic Education for Undocumented Learners in South Africa (Draft Position Paper). With the permission of the SAHRC, we have attached this draft position paper to our submission for a more complete picture of the issue, as well as the SAHRC’s finding and directives.

The Right to Education

38. It is well established in both international and domestic law that all children, including undocumented children, have a right to basic education. Section 29(1)(a) of the Constitution of South Africa provides that “**everyone** has a right to a basic education.” This

⁷ *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 ALL SA 21 (SCA).

right is to be read in line with the right of non-discrimination contained in section 9 and section 28(2) of the Constitution, which holds the best interest of the child to be of paramount importance in all matters concerning the child.⁸

39. The SASA makes attendance at school compulsory for children between the ages of 7 and 15, or ninth grade, whichever comes first,⁹ and this compulsory attendance is not dependent on the learner's documentation. Learners falling outside the category of compulsory attendance still have a constitutionally guaranteed right to basic education. According to the SAHRC, in its draft position paper, "[d]ocumentation is not a prerequisite for access to basic education".¹⁰

40. Section 44 of the Immigration Act¹¹ explicitly states that undocumented persons, or any persons whose status or citizenship could not be ascertained, cannot be prevented from receiving services or performance "to which illegal foreigners and foreigners are entitled under the Constitution or any law".

41. The right to education in South African law is therefore compulsory, universal and immediately realisable,¹² regardless of a learner's documentation or status, and any restriction thereto must be by way of a law of general application and reasonable and justifiable in an open and democratic society, in line with section 36 of the Constitution.

42. This interpretation has been confirmed by a number of international law bodies. In its General Comment No. 13 on the Right to Education, the Committee on Economic, Social and Cultural Rights (CESCR) held that the principle of non-discrimination "extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status".¹³ The Committee also noted, in its General Comment No.

⁸ Moreover, various international bodies require States to promote the realisation of rights without discrimination of any kind, including on the basis of national, ethnic or social origin, or other status.

⁹ Section 3 of SASA.

¹⁰ SAHRC Draft Position Paper, at p. 6.

¹¹ Act 13 of 2002.

¹² *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC), at para 37.

¹³ General comment No. 13 (1999), at para 34.

20 on Non-discrimination in Economic, Social and Cultural Rights, that “all children within a State, including those with an undocumented status, have a right to receive education.”¹⁴ It must be emphasised that South Africa has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), and that these General Comments are of persuasive value, and an important source in guiding South Africa’s domestic implementation of the ICESCR.

43. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) has stated that “States parties shall ensure that all migrant children, **independently of their migration status**, have access to free and compulsory primary education as well as to secondary education on the basis of equality of treatment with nationals of the State concerned ...”¹⁵

44. Finally, the Committee on the Rights of the Child, in its General Comment No. 6¹⁶ holds that “[e]very unaccompanied and separated child, irrespective of status, shall have full access to education in the country that they have entered in”.

Cooperation and information sharing between state organs

45. EE and EELC recognise that Section 45 of the Immigration Act requires organs of state (including public schools) to endeavour to ascertain the status or citizenship of persons, and to report any “illegal foreigner” or person whose status or citizenship cannot be ascertained. In addition, the Intergovernmental Protocol Agreements concluded between the Department of Basic Education and the South African Social Security Agency and the Departments of Social Development and Home Affairs allow for the sharing of information between the departments. The SAHRC has recognised that positive benefits can be obtained through collaboration amongst and between government departments. However,

¹⁴ General Comment No. 20 (2009), at para 30.

¹⁵ General Comment No.1 (2011), at para 57. While South Africa has not ratified the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the comments of the CMW nevertheless are persuasive insofar as they provide insight into the international position on Migrant workers.

¹⁶ General Comment No. 6 (2005), at para 41

the SAHRC highlights that some forms of collaboration may “simultaneously negate the ability of undocumented learners, and migrant learners in particular, to fully access their rights. This includes the conducting of immigration enforcement activities, which may be conducted through direct, as well as indirect means.”¹⁷

46. The requirement of principals to report to the Provincial Director in charge of admissions, who in turn is required to report to the Department of Home Affairs, constitutes an indirect means of immigration enforcement.
47. The State has a positive obligation in respect of the right to basic education, meaning that it is also required to remove any barriers to the realisation of the right. Immigration control is fraught with feelings of fear and insecurity for undocumented persons and the sharing of information between public schools and the Department of Home Affairs, albeit indirectly, could constitute just such a barrier as learners may be prevented from seeking a place at a school, or from attending school, for fear of being reported.
48. The principle of cooperative governance should not be allowed to take preference over the fundamental rights contained in the Bill of Rights, including the right to basic education. The sharing of information that may be helpful for immigration control must therefore be kept separate from the provision of basic services and fundamental rights, which serve different objectives.¹⁸ Even if the reporting requirement is designed with the intention of protection, it may have the unintended consequence of preventing undocumented learners from accessing their right to education, which in turn impacts on other fundamental rights including the right to dignity, equal treatment, and the best interests of the child. The impact of this section is therefore of such significance that it cannot be proportionate to the aims it seeks to achieve, particularly given that it can be achieved through other means.

¹⁷ SAHRC Draft Position Paper, at p. 15

¹⁸ SAHRC Draft Position Paper, at p. 16.

49. In its draft position paper the SAHRC goes so far as to direct the Department of Basic Education to “revise the Intergovernmental Protocol Agreement to establish clear rules and procedures governing the collection, utilisation, retention and sharing of data between and amongst state departments, which procedure must explicitly exclude the ability to use such data for the purpose of immigration control, in line with international standards.”¹⁹
50. EE and the EELC therefore recommend that **draft regulations 6(5) and 6(6) be removed in their entirety** until such time as the Department of Basic Education has established clear rules and procedures, in line with international standards, governing the sharing of information relating to undocumented learners amongst state departments, which explicitly excludes the use of such information for the purposes of immigration control.

K. Substitution of regulation 7 of Regulations

Preferential rights to admission as an entry phase learner to schools whose feeder zones have been determined by the Department in terms of regulation 4

51. EE and EELC note that learners from disadvantaged or poor backgrounds are often unable to access well-resourced schools, as these schools tend to be situated in historically privileged, urban areas, and that better performing, or well-resourced schools do not necessarily fall within the feeder zones of such learners.
52. The feeder zone determination process as well as the “ranking” of criteria to determine admissions once a feeder zone has been determined should therefore aim to address these inequalities, particularly for learners from disadvantaged backgrounds.
53. Draft regulation 7(5) states that “entry phase learners who do not apply within the application period have no right to preferential treatment.” EE and EELC are concerned that the effect of this section will be that learners from disadvantaged or poor backgrounds may be unfairly affected by this section, as they may be more likely to miss the deadline

¹⁹ SAHRC Draft Position Paper, at p. 21.

for the application period. Therefore EE and EELC recommend the addition of the following wording:

“7(5)(a) In determining the placement of entry phase learners who have not applied within the application period, the Department must nevertheless consider all the criteria applicable to the placement of learners that did apply within the application period.”

L. Amendment of regulation 12 of Regulations

54. EE and EELC understands regulation 12(1) and (2) to refer specifically to learners who are not citizens of the Republic of South Africa but (1) whose parents are in possession of a valid residence permit or (2) who are present in the country on a study permit. For the sake of clarity, the Regulations should make explicit that this regulation in no way affects the fundamental rights applicable to all learners regardless of their status. We therefore recommend the inclusion of the following wording:

“12(3) Despite regulation 12(1) and (2), no child may be refused admission to a school or access to education on the basis of their or their parents’ immigration, citizenship or residence status.”

M. Amendment of regulation 13 of Regulations

55. No Comment.

N. Amendment of regulation 16 of Regulations

56. No Comment.

O. Amendment of regulation 17 of Regulations

57. No Comment.

P. Delegations

58. No Comment.

Q. Short title

59. No Comment.

R. General Comments - Learners with Special Education Needs

60. EE and EELC note that the Draft Regulations are silent on the issue of the admission of special needs learners to public schools. We would like to highlight that an admission policy should aim to advance inclusive education and promote the inclusion of special needs learners into public, ordinary schools as far as possible. To the extent that special needs learners need to be accommodated in public, full service, special needs schools, an admission policy should also aim to support such learners in finding the appropriate school. Finally, to the extent that these draft Regulations do not address the admission of special needs learners' admission to public, ordinary schools, we request that the GDE clarify, and make express reference to, the manner in which such admissions are regulated, and the policy documents governing these.

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