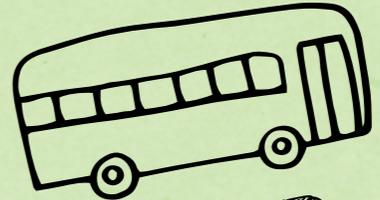


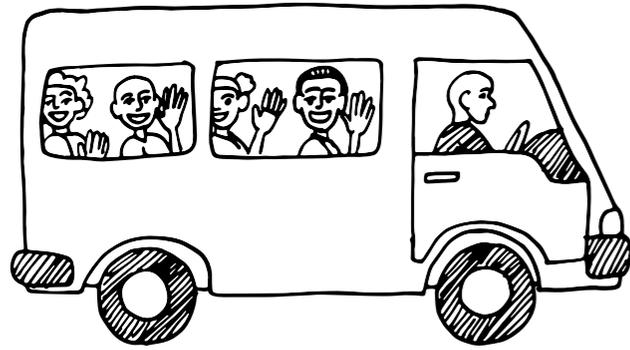
**CHAPTER 17**



# **SCHOLAR TRANSPORT**

Demichelle Petherbridge

This chapter is an update of an earlier version by Solminic Joseph and Julian Carpenter



## OVERVIEW

Access to education is about more than having a place in school. It is also about having safe, reliable, physical access to your school, your educators and educational materials so that you are able to attend school and engage in class.

Our Constitutional Court recognised the important link between the right to a basic education and access to school in *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*. In this case, the Constitutional Court held that:

... basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic Education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.

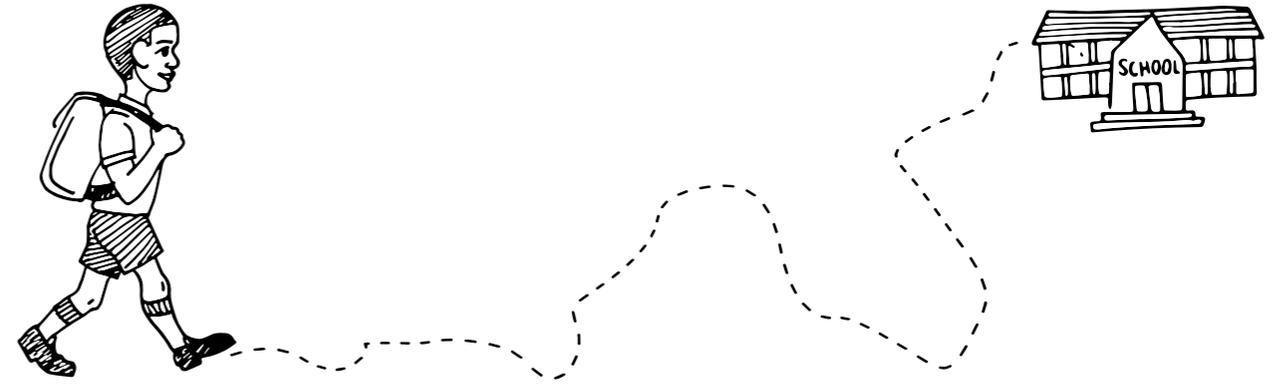
For thousands of learners across the country, the availability of state-subsidised

scholar transport is the only way they can get to school. Sadly, the demand for scholar transport in South Africa far exceeds the budget allocated to this service. In March 2021, the Minister of Basic Education indicated that 751 318 learners were in need of scholar transport nationally. Of these learners, 616 126 were being transported, while the remaining 135 192 were not able to benefit due to insufficient funding. However, the number of learners still in need of scholar transport may be far higher than this, as some schools don't always apply for scholar transport, and their learners may not be accounted for.

Many learners are therefore forced to make alternative arrangements to get to school, which includes walking. According to the 2020 National Household travel survey published by Statistics South

Africa, around 8.8 million school-going learners across the country walked to school in 2020, with the largest numbers of learners found in KwaZulu-Natal (KZN) (21.4 per cent), Gauteng (16.2 per cent), Eastern Cape (15 per cent) and Limpopo (14.6 per cent).

In many places, these difficulties remain the result of discriminatory apartheid laws that saw many black learners forced to attend schools in inaccessible areas that did not receive the financial resources or support received by white schools and areas. These places, many of which are rural, still struggle with inappropriate infrastructure such as bad roads, inadequate facilities, poverty and poor service delivery, and require deliberate and significant investment to ensure that services such as scholar transport can operate efficiently.



## WHY IS WALKING TO SCHOOL UNSAFE FOR LEARNERS?

Many learners across the country choose to walk to school because it is close to their home, and the pathway to school may be easy to find, short, safe, and away from traffic.

However, for thousands of learners, especially in rural areas in South Africa, schools are located very far from their homes. Public transport may not always be accessible, and private transport, such as taxis, may be unavailable, unsafe, or too expensive to use. In these cases, learners have no choice but to walk in order to receive an education, and often face serious challenges on their journey to and from school.

### EXTREMELY LONG DISTANCES

Some learners must walk extremely long distances to get to school and back.

Learners in KZN reportedly walk up to 10 kilometres one way just to get to school, while learners in the Eastern Cape walk up to 18 kilometres one way. In order to arrive on time, these learners, some of whom are still in primary school, must wake up very early in the morning to prepare and often leave home before sunrise to ensure they make it before the bell rings.

### DIFFICULT TERRAIN

The journeys learners take to school vary widely. Some learners have no choice but to walk along roads near oncoming traffic, while others walk across long, difficult

stretches of land with hills and valleys, and no clear path to guide them. Some learners must even cross rivers to get to school, and learners have drowned because of this.

### EXPOSURE TO EXTREME WEATHER CONDITIONS

The learners who take these difficult journeys have no shelter to protect them and are exposed to the weather for the entire journey to school and back. They must walk in extreme heat, cold, and rainy weather, and must sometimes make their way through lightning and thunderstorms. These trips can severely affect their



health, as learners arrive at school wet and cold. Often, these downpours can also damage school textbooks, as they become wet and ruined, and some learners have resorted to walking with their textbooks wrapped in plastic bags in their backpacks, or hiding their textbooks under their clothes. Bad weather also causes high rates of absenteeism, and late arrivals at schools in the morning.

#### **VIOLENCE**

Apart from environmental conditions, learners walking far distances to school are not protected from criminal activity. Learners have reportedly been chased, kidnapped, assaulted and raped on their journey to school, with little protection along roads and through open fields.

#### **POOR CONCENTRATION AND ACADEMIC PERFORMANCE**

When learners are forced to wake up early, and walk extremely long distances to school, it affects their energy levels and

physical well-being. Many learners report that they arrive at school tired, hungry, and unable to concentrate. This has a direct effect on how well a learner listens and participates in class, and negatively affects their academic performance. If schools have extra classes in the morning or after school, learners coming from far away miss these classes and don't receive the extra opportunity to learn. When learners finally get home, many are too tired to do homework or study properly, which is detrimental to their schoolwork and academic performance. In rainy or bad weather conditions there are higher rates of absenteeism, which means learners also miss out on lessons when they cannot make the journey to school.

#### **LIMITED TIME TO STUDY AND DO HOMEWORK**

Some learners must attend to their household responsibilities in the morning before walking to school, as well as in the evenings when they return home. This may include washing clothes (including their

school uniform), fetching water or herding cattle. These chores take time, leaving little time or energy to do homework or study. Many learners must face all of the above challenges on a daily basis just to get to school, and these difficult conditions have a tragic effect on learning. They may cause some learners to start school at an older age, underperform, or drop out entirely. These are obstacles that learners don't have to overcome in richer, urban areas, and highlight the vast inequalities that still exist in how learners access basic education in South Africa.

The lack of safe, state-subsidised scholar transport has not only forced thousands of learners to walk to school every day. It has also increased learners' use of taxis, or more informal modes of transport such as bakkies or delivery vans, to get to school. Taxis and bakkies sometimes operate without the proper authorisation or licences, are overcrowded, and are not roadworthy. Sadly, every year, incidents are reported of learners being injured and even killed in taxi and bakkie accidents.



## **INTERNATIONAL LAW AND POLICY**

Several international human rights instruments protect the right to an education. However, some instruments go further, and recognise that State Parties (i.e. countries) who have signed and ratified an international treaty or covenant have a responsibility to provide scholar transport. A number of international instruments also recognise other important related rights, including a learner's right to be treated equally; and State Parties have a responsibility to ensure learner safety, uphold the best interests of the child, and prevent learner absenteeism and high learner dropout rates.

#### **THE PROVISION OF SCHOLAR TRANSPORT**

Article 13 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) protects everyone's right to an education. The Committee on Economic, Social and Cultural Rights (the Committee) is the body responsible for clarifying the nature and scope of the rights in the ICESCR, and has adopted so-called 'General Comments' to assist State Parties in understanding their responsibilities. In article 6 of

General Comment 13, the Committee makes use of the '4-A' approach to describe essential features of the right to education, and states that (depending on the conditions found in each State Party) education must exhibit four essential features: availability, accessibility, acceptability, and adaptability.

The Committee's definition of 'accessibility' is extremely important in the context of scholar transport. In particular, section 6(b) of General Comment 13 highlights that "[e]ducational institutions

and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party".

The Committee also states that accessibility has overlapping dimensions, which include (among others) physical accessibility. This means that education must be within safe physical reach of learners, either by attending at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme).

### NON-DISCRIMINATION IN THE PROVISION OF EDUCATION

When learners have to walk long distances to school, they are forced to overcome challenges that other learners do not experience, and in this way are treated unequally. Certain international instruments recognise the importance of equal treatment and highlight the need for non-discrimination, specifically when providing education to learners. This aims to ensure that all learners have the same opportunity to access and enjoy their right to education.

For example, article 11(3)(e) of the African Charter on the Rights and Welfare of the Child requires State Parties to “take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community”.

In addition, the Committee on Economic, Social and Cultural Rights states in article 6(b) of General Comment 13 that non-discrimination is an

important part of making education accessible, and highlights that “education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds”.

### LEARNER SAFETY AND THE BEST INTERESTS OF THE CHILD

Article 3(1) of the Convention on the Rights of the Child (CRC) states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In addition, article 19(1) of the CRC aims to protect the safety of children in all circumstances, and states that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence,

injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

A similar provision is found in article 16(1) of the African Charter on the Rights and Welfare of the Child.

### IRREGULAR SCHOOL ATTENDANCE AND HIGH DROPOUT RATES

Article 11(3)(d) of the African Charter on the Rights and Welfare of the Child states that:

State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

(d) take measures to encourage regular attendance at schools and the reduction of drop out-rates; ...

A similar provision is found in article 28(1)(e) of the CRC.

Section 6(b) of General Comment 13 highlights that “[e]ducational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.”



## DOMESTIC LAWS AND POLICIES

### THE SOUTH AFRICAN CONSTITUTION

Section 29(1)(a) of the Constitution protects everyone’s right to a basic education. Our courts have recognised that scholar transport is an important component of this right, and have held the State responsible for its provision to ensure the realisation of Section 29(1)(a).

For instance, in 2015, the Eastern Cape High Court considered the State’s responsibility to provide scholar transport to learners walking long distances to school in the Eastern Cape. In the case *Tripartite Steering Committee and Another v Minister of Basic Education and Others*, Justice Plasket held that:

The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn and transport to and from school at State expense in appropriate cases.

In addition, Justice Plasket wrote that:

... in instances where scholars’ access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education.

Section 12 of the Constitution also protects everyone’s right – including that of learners – to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources.

Lastly, Section 28(1)(d) of the Constitution states that every child has the right to be protected from maltreatment, neglect, abuse or degradation, while Section 28(2) provides that “A child’s best interests are of paramount importance in every matter concerning the child”.

### THE SOUTH AFRICAN SCHOOLS ACT

Section 3(1) of the South African Schools Act (SASA) states that learners between the ages of seven and fifteen are of compulsory school-going age. Section 3(3) of SASA adds that Members of the Executive Council must ensure that there are enough school places for every child in their province. In addition, Section 3(6)(b) of SASA states that without just cause, no person may prevent a learner who is subject to compulsory attendance from attending school.

The ‘National Policy for the Equitable Provision of an Enabling School Physical

Teaching and Learning Environment’ (2010) submits that these three provisions in SASA, read together with Section 29(1) of the Constitution, demand that education, training and skills development opportunities be extended to all South Africans in an equitable and non-discriminatory manner. This policy adds that these provisions are violated when physical access to education and training are affected, as in cases where schools are not in walking distance from learners, transportation and hostel accommodation are not available, or when learners with physical challenges do not have real access to facilities.

### THE NATIONAL LEARNER TRANSPORT POLICY

For many years, there was no national policy in place to govern the management and implementation of scholar transport across the country, and its provision occurred differently in each province. This caused many problems, including poor coordination between state departments, confusion around responsibilities and differing funding and management systems. However, in October 2015, the national Department

of Transport (DoT) finally published a National Learner Transport Policy (the National Policy), together with the Department of Education (DoE) and various stakeholders, in response to the urgent need for a more uniform approach towards the planning, management, and provision of scholar transport.

The National Policy introduced a number of important changes, including some of these new features:

- That both the DoT and the DoE are jointly responsible for providing scholar transport. It therefore places a strong emphasis on the need for coordination between all relevant stakeholders, as well as inter-governmental cooperation and collaboration.
- The National Policy sets out the criteria to be used to determine which learners benefit from government-subsidised learner transport. In particular:
  - Beneficiaries must be needy learners from grade R to 12
  - Learner transport will be subsidised to the nearest appropriate school only and not to a school of parental choice (parental choice means parents may prefer to enrol their children at schools other than the nearest suitable school)
  - Priority must be given to learners with disabilities, taking into consideration the nature of the disability
  - Priority must be given to primary school learners who walk long distances to schools
  - Existing learner transport services

must be taken into account when identifying beneficiaries, as no learner transport services will be provided in areas where public transport is available, in order to avoid duplication of services and resources

- That selection criteria must not discriminate on the basis of gender or race and must not deny access to learners from disadvantaged communities.

- Lastly, the National Policy allows for the monitoring of scholar transport provisioning at different levels. For example, the DoT and DoE are both responsible for overseeing the implementation of the National Policy. However, relevant stakeholders such as provincial departments of transport and education, municipalities and school governing bodies also have a role to play in monitoring and evaluating the implementation of the National Policy in their province.

These are just some of the changes introduced by the National Policy to ensure a more uniform approach to scholar transport provisioning. However, the National Policy is not a flawless document; and in January 2016, shortly after the National Policy's publication, Equal Education (EE) and Equal Education Law Centre (EELC) made submissions to the DoE and DoT regarding some of its deficiencies, and highlighted their concerns. These included, for example, concerns that the policy requires certain structures to be put in place, such as 'institutional mechanisms' at both a national and provincial level, but fails to properly detail what the powers and

purposes of these structures are. In addition, while the National Policy obliges provinces to produce plans showing how they will provide scholar transport to their learners, it fails to mention who is responsible for producing these, and whether (for example) this would be the role of DoT or DoE officials, or both, and by when these plans should be submitted. The policy also fails to indicate who at national, provincial and local level should be responsible for monitoring the provision of scholar transport services to learners, and whether, for example, this should be a school principal's role or that of an official from the DoE or DoT, and whether it should be a district or provincial official who does this.

In addition, the policy also fails to indicate whether the DoE or the DoT is responsible for requesting more funding for scholar transport, who within these departments would be responsible for the request, and how they should undertake this. Lastly, EE and EELC also raised concerns about the National Policy's criteria used to identify learners who qualify for scholar transport. Among other concerns, EE and EELC warned that the criteria gave too much power to school principals and school governing bodies in the application process, and left too much of the decision-making to them. They also failed to indicate how parents or learners could challenge the DoE or DoT if a decision was made to refuse a learner access to scholar transport.

The National Policy has not been reviewed since its publication in 2015. However, the Minister of Transport is authorised to do this after consultation with relevant stakeholders.



#### PROVINCIAL LEARNER TRANSPORT POLICIES

Every province is obliged to develop a provincial scholar transport plan that is consistent with the National Policy. While the National Policy was published by the DoT, provinces have used different departments to do this. For example, the scholar transport policy in Gauteng was published by the DoE, while the scholar transport policy in Mpumalanga was published by the Department of Public Works, Roads and Transport.

Every province must tailor their policy according to their own specific context, and learner transport policies are therefore not all the same. For example, some provincial policies – such as those used in Mpumalanga and the Western Cape – apply a more restrictive approach than others to scholar transport provisioning, and state that a minimum of ten learners are required before scholar transport will be provided for a particular route.

While the National Policy identifies criteria that must be used across the country to determine who qualifies

for learner transport, unfortunately it fails to indicate how far a learner should have to walk in order to qualify for transport. As a result, provinces have developed their own measures; and in most provinces, learners who walk five kilometres or more per trip to school would qualify for scholar transport. The draft KZN scholar transport policy is an exception to this, and requires that learners walking three kilometres or more one way to the nearest appropriate school would qualify for scholar transport. While each province must develop a policy according to its own context, the National Policy is clear that priority must be given to learners with disabilities, taking into consideration the nature of the disability, and that priority must be given to primary school learners who walk long distances.

Unfortunately, scholar transport policies in provinces such as Gauteng and the Western Cape only prioritise Grade R learners, while Mpumalanga's policy makes no express reference at all to the prioritisation of primary school learners.

#### IMPORTANT!

Provincial learner transport policies must align with the National Learner Transport Policy, and must prioritise the needs of primary school learners and learners with disabilities.

## CASE STUDY: KZN SCHOLAR TRANSPORT POLICY

### EQUAL EDUCATION V MINISTER OF BASIC EDUCATION AND OTHERS

In 2017, EE challenged the KZN DoE and KZN Department of Transport, Community Safety and Liaison (KZN DoT) for their refusal to provide seven schools in a rural village called Nquthu with scholar transport because of a lack of funds, despite the fact that these learners qualified for scholar transport.

EE also challenged these departments for their refusal to provide a further five schools in Nquthu with scholar transport because the departments claimed that learners chose to attend schools further away from their homes, and therefore did not qualify. At that time, the status of KZN's scholar transport policy was also unclear, which further confused how learners were being identified for scholar transport and which department was responsible for providing it. To address this gap, and effect systemic change that would ensure that all learners in the province qualifying for scholar transport would benefit from the court case, EE also requested information on crucial issues related to the policy, as well as to the planning and budgeting of scholar transport in the province.

Importantly, the lack of scholar transport in KZN not only affected learners from public ordinary schools, but also severely impacted learners with disabilities and their ability to access school. In order to raise this particular issue, an organisation called Siphilisa Isizwe (represented by SECTION27) intervened in the case as a friend of the court (*amicus curiae*). Siphilisa Isizwe is a Disabled People's Organisation located in Mnguzi, a small town in the Umkhanyakude District of KZN; and in their submissions, they relied on evidence documented in SECTION27's report 'Too Many Children Left Behind'. This report explained the difficulties faced by learners with disabilities in the Umkhanyakude district, which have caused learners to miss school, travel in unsafe transport, or drop out of school entirely.

Based on this evidence, Siphilisa Isizwe argued that the KZN DoE and KZN

DoT have a responsibility to develop a comprehensive plan for scholar transport that must also make provision for the diverse range of scholar transport needs of learners with disabilities in KZN.

Moments before the court hearing, the KZN DoE agreed to provide all twelve schools with buses by 1 April 2018. In addition, the department undertook to provide information on the following five issues by the same date:

1. The status of KZN's scholar transport policy
2. How provincial and national departments would cooperate with each other in terms of planning, provisioning, implementing, monitoring and evaluating scholar transport in KZN
3. Whether alternative modes of transport were being considered (apart from buses)
4. The plans to address the need for scholar transport throughout the province
5. How learners with disabilities would be provided with scholar transport throughout the province.

The agreement was made an order of court, and signalled a significant victory for learners in Nquthu, and in the province generally. Importantly, as a direct result of Siphilisa Isizwe's intervention, the needs of learners with disabilities were also highlighted in the court order; and as stated above, the KZN DoE and KZN DoT also had to provide information on how scholar transport for learners with disabilities would be planned and provided for in the province.

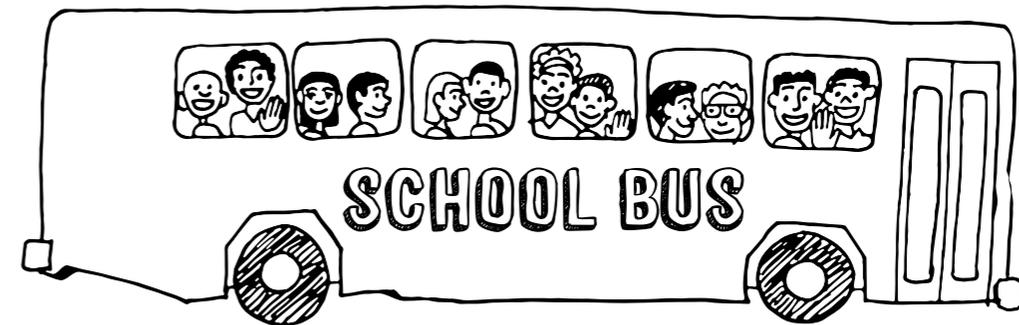
In April 2018, buses were provided to the twelve schools in Nquthu, and from April 2018, the KZN DoE and DoT provided

reports with information on the issues highlighted in the court order.

Among other issues, these reports highlighted the serious gaps in the KZN DoE and KZN DoT's data collection processes, and revealed that the number of learners in Nquthu requiring transport on the DBE's database was severely inaccurate. One of the significant victories brought about by the case was the revision of these numbers, which were amended from 90 000 to 360 000 learners.

The KZN DoE also undertook to produce a provincial scholar transport policy by 31 December 2018. Unfortunately the KZN DoE failed to meet this deadline, and EE took the matter back to court in October 2019 to request that the policy be finalised within strict timeframes. Again, moments before the hearing, the KZN DoE undertook to take certain steps, which were subsequently made an order of court. These included, among others, that the KZN DoE publish a draft scholar transport policy by 30 January 2020, failing which it would provide a copy of the draft policy to EE (that would not be made public), as well as reasons why it was not published for public comment.

On 6 February 2020 the KZN DoT mistakenly published an annexure to the draft KZN scholar transport policy, which it later withdrew, and only circulated the draft policy for public comment on 16 April 2020. After the KZN DoE received submissions regarding the draft policy, it requested additional time to publish the final policy, due to the need to attend to COVID-19-related matters. In July 2021, the policy finally came into effect.



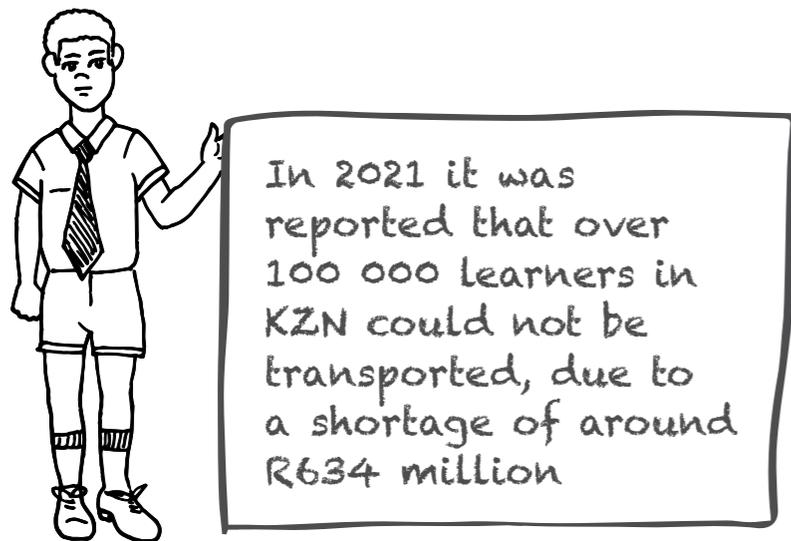
## HOW DO YOU APPLY FOR LEARNER TRANSPORT?

The National Policy states that a school principal, after consultation with the school governing body, must identify learners in line with the National Policy's criteria explained above. These names are then given to the relevant provincial department, who will select the learners who will receive learner transport.

Some provincial policies have added more detail to this process, explaining additional steps and role players involved in determining who qualifies for learner transport. For example, according to the Mpumalanga scholar transport policy, learners qualifying for scholar transport must be identified by the

school, including the school governing body, as well as the circuit and district. In Gauteng, the principal, the School Management Team and the educators help to identify learners. In the Western Cape, a principal and the chairperson of the school governing body must identify the learners in need of learner

transport, and an application form must be signed by both the parent and the principal authorising the learner to make use of the transport. The Western Cape policy is also one of the few policies to allow learners or parents to appeal a decision to refuse a learner transport after an application has been made.



## HOW IS SCHOLAR TRANSPORT FUNDED?

Each provincial education department receives an Equitable Share allocation from National Treasury, which they may spend as they see fit. Provincial departments are not obligated to allocate a prescribed amount of money towards scholar transport; and as provinces prioritise scholar transport differently, each province dedicates a different amount to it.

Unfortunately, some provinces allocate too little funding to scholar transport, or decide to use the money elsewhere during the year. For example, in 2021 it was reported that over 100 000 learners in KZN could not be transported, due to a shortage of around R634 million.

Civil society groups, such as EE, have advocated before Parliament that scholar transport must receive 'ring-fenced' funding in the form of a conditional grant from

National Treasury, so that fixed amounts of money are allocated specifically to the provision of scholar transport and cannot be spent on anything else. If the money is allocated in the form of a conditional grant, it also helps to strengthen accountability and transparency, as the money may only be spent under very strict and clear conditions.

However, National Treasury – which is responsible for deciding whether to allocate ring-fenced funding or

not – has indicated that it cannot assist with a conditional grant until provinces can uniformly decide which department should be responsible for scholar transport. For example, some provinces have made the DoE the main department responsible for scholar transport provisioning, while others are using the DoT, and these differences make it impossible to allocate a conditional grant for scholar transport.



## LEARNERS WITH DISABILITIES

Both international and domestic laws oblige the state to ensure that learners with disabilities are afforded equal access to education. This includes making adequate scholar transport available to them that takes into account their specific needs, so that they can access schools safely and regularly.

### INTERNATIONAL LAW

Article 13(2) of the African Charter on the Rights and Welfare of the Child states that subject to available resources, State Parties must ensure that a learner with disabilities has:

... effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development, and his or her cultural and moral development.

Article 9(1)(a) of the Convention on the Rights of Persons with Disabilities (CRPD) also states that State Parties must ensure that persons with disabilities have:

access, on an equal basis with others, to the physical environment, to transportation, to information and communications, ... and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; ...

In addition, article 24(2)(b) of the CRPD obliges State Parties to recognise the right of persons with disabilities to education, and in realising this right, ensure that:

"[p]ersons with disabilities can access inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live..."

## UNIVERSAL DESIGN

The National Policy defines universal design as:

the design of infrastructure, products, environments, programmes and service to be usable by all people and address the diversity of people, including those with functional limitations.

### DOMESTIC LAW AND POLICY

In terms of Section 12(4) of SASA, MECs of each province must provide learners with special education needs with education, where reasonably practicable, at ordinary public schools, as well as provide relevant educational support for these learners. Section 12(5) of SASA also requires MECs to take all reasonable steps to ensure that the physical facilities at public schools are accessible to persons with disabilities.

In addition to SASA, the National Policy – which admits that the current scholar transport system does not make sufficient provision for the transportation of learners with physical disabilities – requires that:

- Vehicles transporting learners, especially learners with disabilities, must comply with the requirements and principles of universal design, and
- All processes involved, from planning to implementation, must consider the needs of learners with disabilities and meet their support needs.

As mentioned earlier, the National Policy also expressly provides that when identifying learners who qualify for learner transport, learners with disabilities must be prioritised. Lastly, the National Policy emphasises the use of ‘universal design’.

These requirements have translated into some (but not all) provincial policies. For example, the Mpumalanga scholar transport policy states that “[e]very attempt should be made to cater for learners with special needs”. Unfortunately, the Gauteng scholar transport policy makes no specific mention of learners with disabilities, and only adds that “[i]n cases where other compelling matters prevail, fully motivated requests must be provided for consideration”. Similarly, the Western Cape scholar transport policy does not mention the prioritisation of learners with disabilities specifically, but also merely states that “[t]he Head of Department may, under exceptional

The National Policy expressly provides that when identifying learners who qualify for learner transport, learners with disabilities must be prioritised.



circumstances, authorise the provision of a learner transport scheme where he or she deems fit, subject to the merits of each case”. These policies may place heavier burdens on parents applying for scholar transport for learners with disabilities that are not consistent with the National Policy, and may lead to exclusionary practices.

In addition to these policies, the ‘Guidelines for Full-service/ Inclusive Schools’ (2010) highlight the importance of accessibility to Full Service and Inclusive Schools, and the steps schools must take to ensure transport for learners with disabilities.

Lastly, the ‘Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres’ (2014) obliges special schools to provide transport for all learners requiring it to and from school, and sets out the standards such transport must meet, when it should be provided, and which learners will benefit from it.

Despite the National Policy’s call for the prioritisation of learners with disabilities, and the above-mentioned guidelines requesting the transportation of learners to Full Service and Inclusive Schools, Special Schools, and Special School Resource Centres, physical access to school remains one of the biggest barriers affecting learners with disabilities. In a report titled ‘Too Many Children Left Behind: Exclusion in the South African Education System’ (2016), SECTION27 highlights the challenges faced by learners with disabilities in a rural part of KZN called uMkhanyakude. These include buses not being properly equipped to cater for learners with physical disabilities; buses breaking down; buses dropping off learners with disabilities at a central place and forcing them to walk home for the remainder of the journey; learners with disabilities being forced to make use of private transport, which is sometimes merely a car or bakkie loading as many learners on as possible; and children

requiring wheelchairs in deeply rural areas with inadequate roads and transport simply not attending school.

In 2019, the South African Commission on Human Rights (SAHRC) also compiled an investigative report titled ‘Report of the North West Provincial Investigative Hearing into the lack of Safety and Security measures in Schools for Children with Disabilities’. Among other things, this report revealed that the lack of appropriate transport restricted learners’ access to education. In its recommendations, the SAHRC requested the North West Provincial DoE to produce a full audit report of every Special School in the North West, and provide information on (among other issues) whether there is an appropriate scholar transport plan for children with disabilities in the Province. The SAHRC also requested that provincial scholar transport policies be aligned with the National Policy, which requires the prioritisation of learners with disabilities.

## CASE STUDY

### WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA, AND GOVERNMENT OF THE PROVINCE OF THE WESTERN CAPE

In 2010, the Western Cape Forum for Intellectual Disability (the Forum) took the national and Western Cape provincial government to court, arguing that the state made no direct provision for the education of learners with severe to profound disabilities, and that the Western Cape did not provide any schools for such learners, apart from Special Care Centres. The Forum noted that the number of Special Care Centres to accommodate all those in need is tragically insufficient, and children who are unable to obtain access to these have no access to education at all.

The Forum explained that the state makes only a small contribution to these children, in the form of a subsidy from the Department of Health – which is far less than the amount the State allocates to children without disabilities. The presiding judge, Justice Cleaver, held that even though the state cooperates and relies on organisations such as the Forum to provide education to children with intellectual disabilities, it is not relieved of its constitutional obligation. In addition, the state cannot claim that it is unable to afford further expenses for education. This case was not about the state providing more money to children with intellectual disabilities, but that these children should not be excluded from financial support, and that no justification exists for the state's violation of these children's right to basic education, equality, dignity and the right to

be protected from neglect and degradation. Justice Cleaver explained further that:

The failure to provide children with education places them at risk of neglect that they often have to be educated by parents who do not have the skills to do so and are already under strain. The inability of children to develop their own potential, however limited that may be, is a form of degradation.

In terms of relief, Justice Cleaver granted a structural interdict in terms of which the state would have to provide a programme explaining how they would remedy this violation, and report back periodically on their plans and progress. As part of its very comprehensive order, Justice Cleaver directed the state to take reasonable measures to give effect to the rights of children with severe to profound disabilities in the Western Cape.

Among other measures, this includes ensuring that every child in the Western Cape with severe to profound intellectual disabilities has affordable access to a basic education of an adequate quality. Recognising that this also includes assisting learners with physical access to education, Justice Cleaver obliged the state to provide proper transport for these children to and from special care centres, among other responsibilities.

In response to the court order, the state established a conditional grant for learners with severe to profound disabilities that was meant to assist with the court order's implementation. Unfortunately, the Forum has recently raised concerns in Parliament that the conditional grant does not adequately cater for the transport needs of learners, and is not fulfilling the court order properly.



## THE IMPACT OF COVID-19 ON LEARNER TRANSPORT

The outbreak of COVID-19 had a severe impact on the provision of learner transport across the country. Since March 2020, the DoT has issued directives in terms of regulations made under the Disaster Management Act to prevent the spread of COVID-19 on public transport, which also applied to public learner transport such as buses. These directives aimed to guide owners of public transport facilities on disinfecting and sanitising procedures, mask wearing, social distancing procedures, and the number of passengers allowed to be transported during different stages of lockdown.

Unfortunately these restrictions have caused financial strain on many transport operators, who have not been allowed to operate at full capacity at times in order to prevent the spread of COVID-19. In addition to this, provincial departments

needed to reallocate money to assist with COVID-19-related needs. This reallocation may also have affected the provision of scholar transport; and by February 2021 it had already been reported that 37 000 learners in the Eastern Cape were left

without transport due to budget cuts. The failure to provide scholar transport leaves many learners without any easy, safe access to school, and this lack of provision may lead to devastatingly high drop-out rates in the wake of the pandemic.

## CONCLUSION

It can no longer be denied that scholar transport is a critical component of the right to a basic education. Without it, thousands of learners will continue to struggle to gain access to school in a safe and dignified way. Only through the proper planning, budgeting and implementation of scholar transport programmes can all learners can be catered for. It is therefore vital that learners, parents and school communities alike enquire at schools about the school transport programme, ensure that the criteria used to identify learners are consistent with the National Policy and Constitution, and hold provinces accountable for the way they budget and plan for scholar transport.

**Demichelle Petherbridge** is an attorney at SECTION27, working in the Education Rights Programme.

### CASES

*Equal Education v Minister of Basic Education and Others* KwaZulu-Natal High Court, Pietermaritzburg Case, Case No 3662/17P.

*Governing Body of the Juma Masjid Primary School v Essay* NO 2011 (8) BCLR 761 (CC).

*Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG).

*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* 2011 (5) SA 87 (WCC).

### LEGISLATION, POLICY AND GUIDELINES

Constitution of the Republic of South Africa, 1996.

Department of Basic Education 'Guidelines for Full-service/Inclusive Schools', 2010.

Department of Education 'Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres', 2014.

Department of Transport 'National Learner Transport Policy', 2015.

Department of Basic Education 'National Policy on an Equitable Provision of an Enabling School Physical Teaching and Learning Environment', 2010.

KZN Department of Education & KZN Department of Transport 'KwaZulu-Natal Learner Transport Policy' 2021.

South African Schools Act 84 of 1996.

### INTERNATIONAL AND REGIONAL INSTRUMENTS

African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

United Nations Convention on the Rights of People with Disabilities (UNCRDP), 2006.

United Nations Convention on the Rights of the Child (UNCRC), 1989.

### FURTHER READING

Kaveel Singh 'Over 100 000 KZN pupils will not receive transport due to R634m budget shortfall', News24 (9 February 2021).

Malibongwe Dayimani "'Budget cuts' the cause of over 37 000 Eastern Cape pupils left with no scholar transport", News24 (17 February 2021).

SECTION27 'Too Many Children Left Behind: Exclusion in the South African Education System', 2016.

SAHRC 'Report of the North West Provincial Investigative Hearing into the Lack of Safety and Security Measures in Schools for Children with Disabilities', 2019.