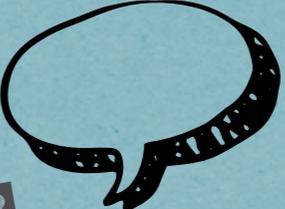


CHAPTER 12



# LANGUAGE IN SCHOOLS

Nikki Stein

# INTRODUCTION

Section 29(2) of the Constitution provides that every learner has the right to receive a basic education in the language of his or her choice, where this is reasonably practicable. This right is an important recognition of equality and diversity, and the need to depart from a history in which education – and language in education, in particular – was used as a vehicle to implement and deepen apartheid. Through this right, learners' diversity and individuality is recognised, and this can facilitate the important objective of unlocking their potential.

# KEYWORDS AND CONCEPTS

The term 'language in education' is made up of the following concepts that inform, firstly, how teachers communicate with learners, and secondly, the content of what they teach:

- **The language of learning and teaching** (often referred to as 'LOLT', 'medium of instruction' or 'language of instruction') is the language used in the classroom throughout the school day. If the language of instruction is isiZulu, for example, this means that the teacher will speak isiZulu when teaching mathematics, natural science, and economic and management studies. Learners will be evaluated on their grasp of the subject matter of that particular learning area, rather than the language of instruction itself. They will be required to complete the assessments in isiZulu. They must therefore have a good understanding of the language of instruction, so that they are able to grasp the subject matter of their learning areas.
- **The home language** (sometimes referred to as the 'mother tongue') is one of the learning areas included in the school curriculum. This is the language the learner knows best, and is most comfortable reading, writing and speaking. For this reason, the home language taught to the learner at school is often (but not always) the same as the language the learner speaks at home.
- **The first additional language** (referred to as the 'FAL') is a learning area included in the curriculum as a second language for learners. The learner is less fluent in this language than his or her home language, but will reach a stage at which he or she is comfortable to speak, read and write this first additional language.
- **A second additional language** (referred to as the 'SAL') is an additional language that forms part of the curriculum, and will be counted as a third language for learners.



The introduction of different languages as part of the school curriculum is referred to in government policies as **additive multilingualism**. What this means is that a learner's skills in his or her home language are developed and strengthened, and then other languages are introduced into the learner's curriculum once this has happened. The reasoning behind this is that the learner will be able to consolidate his or her language and other skills in their home language, and will then easily be able to acquire skills in other languages. For this reason, many experts in education support this approach.

This is different from **language immersion**, which means that the LOLT is different from a learner's home language, and so the learner learns both the language skills and the substance of the learning area at the same time. There are a number of ways in which schools can give protection to different languages in education, and particularly to the right of learners to choose their language of instruction. As we discuss below, these are

specifically recognised under Section 29(2):

- **A single-medium school** will have only one medium of instruction, and so all learners in all grades will receive their education in isiXhosa or English or whatever language of instruction the school governing body has opted for in its language policy. Other languages will be taught only as first additional languages (or second additional languages, as discussed in the draft policy for the incremental implementation of African languages).
- **At a parallel-medium school**, learners have only one medium of instruction, but the school offers more than one LOLT. This would be the case where, for example, an Afrikaans-medium school is not full to capacity, and while there are Setswana-speaking learners in the community, there is no unmet demand for Afrikaans-medium education. In these circumstances the Afrikaans-speaking learners would continue to receive Afrikaans-medium education, and the Setswana-speaking learners would receive Setswana-medium education on the same school premises. In that way, the school would accommodate more than one LOLT, but the learners would select only one medium of instruction.
- **A dual-medium school** provides education through two languages of learning and teaching, and learners receive their education in both languages (as well as a first additional language, and in terms of the draft policy on the incremental introduction of African languages, a second additional language). Therefore, at a dual-medium school, for example, learners will receive education in both Afrikaans and Setswana.

The remainder of this chapter deals primarily with the language of instruction, and the development of the law in that particular area.

# OVERVIEW

The right to receive a basic education in the language of one's choice is an important tool in making a break from apartheid, in which language in education was used to perpetuate oppression and inequality. In working towards the achievement of equality, and in giving specific recognition to African languages, learners now have a right to learn in their chosen language where this is reasonably practicable.

The right of school governing bodies to determine a school's language policy must be interpreted within this framework, so that a provincial

education department may override a school language policy to give effect to learners' rights. This is in line with the provincial education department's

obligation to provide education to learners in the language of their choice, and to take positive steps to make this reasonably practicable.

# LAW AND POLICY

## BACKGROUND: LANGUAGE IN EDUCATION IN THE CONTEXT OF OUR HISTORY

The apartheid government used education as one of its primary tools to enforce separate development and systematise the deep discrimination against the majority of our population. The government deliberately adopted a system in terms of which black children would be equipped only with what they needed to become unskilled labourers, thereby perpetuating the inequality that characterised apartheid. A key tool used to enforce discrimination in education was the apartheid government's policies on language in education.

The primary trigger for the Soweto Uprising on 16 June 1976 was the apartheid government's issue of a decree relating to language of instruction in senior primary and secondary schools. The Bantu Education Department imposed on schools a rule that English and Afrikaans would be the languages of instruction at school, on an equal basis. The learners justifiably felt that Afrikaans was being forced on them, and that their home languages were being undermined.

Resistance to this rule, and to its symbolism of the discrimination and indignity faced by the majority of South Africans on a daily basis, gave rise to one of the most significant days in our history.

Twenty thousand learners protested against this decree and were met with violence from the police. Hundreds of young South Africans lost their lives fighting for recognition of their home languages, and for the right to receive a quality basic education in those languages.

As we discuss below, there is now express constitutional recognition of that right. However, there are many obstacles to its effective implementation.

## THE CONSTITUTION

Now, arising from this context, Section 29(2) specifically protects the right to receive basic education in the language of one's choice:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single-medium institutions, taking into account:

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

As is discussed below, the national Department of Basic Education (DBE) has interpreted this provision to mean that learners may select any one of the official languages of South Africa as their LOLT. As per Section 6(1) of the Constitution, these languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

Section 6 of the Constitution sets out specific measures to promote the official languages of South Africa, against the background of the historically diminished use and status of our indigenous languages.

In line with this, Section 9(3) of the Constitution specifically prohibits unfair discrimination on one or more of the grounds listed in that section, including race and language. As we discuss below, the language policies adopted by school governing bodies, have the potential to bring about discrimination against learners on the grounds of race, culture and ethnic and social origin. For this reason, it is important that school governing bodies be held accountable to their constitutional obligations.

## NATIONAL EDUCATION POLICY ACT

The National Education Policy Act 27 of 1996 (NEPA) sets out the principles according to which the Minister of Basic Education must determine language policy.

The Act specifically empowers the Minister to determine a national policy for language in education. In terms of Section 4, the policy must be directed towards (among other things) the right of every learner to be instructed in the language of his or her choice, where this is reasonably practicable. The policy must also be directed towards the advancement and protection of the following rights:

- The right to be protected against unfair discrimination
- The right to basic education and equal access to education institutions
- The right of every person to use the language and participate in the cultural life of his or her choice within an educational institution.

## SCHOOLS ACT

Section 6 of the South African Schools Act 84 of 1996 (SASA, or the Schools Act) deals with language policy in public schools, providing as follows:

1. Subject to the Constitution and this Act, the Minister may, by notice in the Government Gazette, after consultation with the Council of Education Ministers, determine norms and standards for language policy in public schools.
2. The governing body of a public school may determine the language policy of the school subject to

the Constitution, this Act and any applicable provincial law.

3. No form of racial discrimination may be practised in implementing policy determined under this section.
4. A recognised Sign Language has the status of an official language for purposes of learning at a public school.

This section therefore deals with language policy at two levels: norms and standards for language policy to be determined by the Minister of Basic Education, and the determination of the language policy of an individual school by that school's governing body. In doing so, the school governing body is specifically required to promote the best interests of the community in which the school is situated.

In addition, Section 3(3) of the Schools Act requires the Member of the Executive Council (MEC) responsible for education in each province to ensure that there are sufficient places in schools so that every child of compulsory school-going age – that is, between the ages of seven and 15 years – can attend school. This means that the MEC must ensure, within reason, that every learner has a place in a school that offers his or her preferred medium of instruction.

The school governing body's power to determine language policy is therefore limited by the following:

- The language policy must be consistent with the norms and standards as determined by the Minister.
- The language policy cannot discriminate against learners on the grounds of their race, culture or ethnic or social origin (or any other grounds).

- The language policy must facilitate access to school for learners in the community (and not just the particular group of learners enrolled at the school at the relevant time), and therefore be responsive to what the community's needs and desires are in relation to the language of instruction.
- The language policy must otherwise promote the best interests of the broader community.

What this means in practice is that while the school governing body determines the language policy of the school, the MEC may intervene if the language policy is discriminatory, unduly restricts access to the school, or is unreasonable in any other way.

#### LANGUAGE IN EDUCATION POLICY AND THE NORMS AND STANDARDS REGARDING LANGUAGE POLICY

Acting in terms of Section 6(1) of the Schools Act and Section 3 of the National Education Policy Act, the Minister published norms and standards for language policy in public schools together with the Language in Education Policy. These are based on a recognition of cultural diversity and the promotion of multilingualism. As discussed above, these documents also support the additive multilingualism approach.

The Language in Education Policy specifically recognises diversity beyond language: it refers to the support of languages used for religious purposes and languages used for international trade and communication, as well as South African Sign Language and alternative and augmentative communication (that is, communication – other than oral speech – that is used to express

ideas, thoughts and feelings).

To achieve these aims, the Policy provides that:

- The language of learning and teaching, or language of instruction, must be an official language of South Africa.
- In grades 1 and 2, all learners shall learn at least one approved language.
- From grade 3, a first additional language is introduced in addition to the language of instruction.
- All language subjects must receive equitable time and resource allocation.

The Language in Education Policy was published together with the norms and standards regarding language policy, which emphasises diversity in line with the Constitution.

The norms and standards set out the rights and duties of all of the relevant actors in the protection of individual language rights. A learner (or if the learner is still a minor, his or her parent) is required to choose a language of instruction on applying for admission to a particular school. If the school offers that language of instruction and has the capacity to take the learner, then the school must admit the learner.

If there is no school in the school district that offers the learner's preferred language of instruction, the learner may request the provincial education department to make provision for that learner:

- If there are at least 40 learners in the same grade (in grades 1 to 6), or at least 35 learners in the same grade (in grades 7 to 12), seeking a particular language of instruction, the norms and standards provide that it will be reasonably practicable to provide education in that language and the provincial education department must facilitate this.

- If a smaller group of learners seeks a particular language of instruction, it may not be reasonably practicable to offer that language. However, the head of the provincial education department must still consider how the learners' needs may be met, and must consult the school governing bodies and the principals of the public schools concerned to make this determination.

Even if the school cannot offer education in a particular language, and the learner must therefore learn in a language that differs from his or her home language, the head of the provincial education department must still consider how it can provide additional support to that learner.

In this way, the power of the school governing body to determine a school's language policy is limited by the demands of the community. This ties in with the governing body's obligations to consult with the members of the community in which the school is situated, just as any other democratically elected body would be required to do.

In terms of the norms and standards, the school governing body is also required to promote multilingualism in the school. This can be through the adoption of more than one language as the medium of instruction, through teaching different languages as the first additional language and the second additional language, through language immersion programmes, or through any other means approved by the head of the provincial education department.

The emphasis on diversity – which in turn forms a good foundation for respect and dignity – in the norms and standards and the Language in Education Policy marks a break from the historical unequal treatment of languages in South Africa. It also serves

as a foundation for the draft policy on the incremental introduction of African languages in South African schools.

#### DRAFT POLICY ON THE INCREMENTAL INTRODUCTION OF AFRICAN LANGUAGES IN SOUTH AFRICAN SCHOOLS

In September 2013, the national Department of Basic Education released a draft policy on the incremental introduction of African languages in schools. The purpose of this draft policy is to give specific protection to African languages, for learners who speak an African language at home and for learners who do not. Not only does this promote languages that historically have been marginalised, it is also aimed at promoting the culture and heritage of which these languages are a part.

The draft policy provides that learners in all grades should learn one language at the home language level, and two on the first additional language level. This would require additional teaching time every week for learners in all grades. It would also require that the necessary learning materials are available in all of the African languages, and that appropriately qualified teachers are available to teach these languages.

For reasons of practicality, the draft policy envisages that access to teachers proficient in African languages may need to be provided through:

- Multi-grade language classes
- Teachers shared between more than one school in an area.

At the time of publication of this handbook, this policy had not yet been finalised. However, the national Department of Basic Education has confirmed its intention to ensure that

schools implement the incremental introduction of African languages, and has taken several policy steps to facilitate this implementation. One of these, namely the Fundza Lushaka Bursary Scheme, is discussed below.

It seems therefore that the policy is being treated as though it has been made final.

In the course of implementing the policy, it is important to keep in mind that the introduction of African languages to schools will not ensure transformation on its own. It is an unfortunate reality that learners at schools across South Africa continue to experience racism on a daily basis. They report negative comments from teachers and fellow learners about their appearance, their hair and the languages they speak.

For example, in May 2021 the learners at Cornwall Hill College in Pretoria, together with their parents, protested against the lack of transformation at the school, including pupils' daily experiences of racism. While this protest was well-publicised, it must be kept in mind that those learners are not alone in their experiences. Ongoing racism is an unfortunate reality that many learners experience, in all parts of our country.

One of the ways that this racism may play out is through the manner in which African languages are given fewer resources than other languages at school. It is important that the teaching of these languages is taken seriously, including the sufficient allocation of resources including teachers and textbooks, to ensure that learners appreciate the role of all languages in our democracy and are equipped with the skills to communicate with their fellow South Africans.

#### SOME EXAMPLES OF THE RIGHT TO RECEIVE AN EDUCATION IN THE LANGUAGE OF YOUR CHOICE

- 15 learners in grade 8 seeking isiXhosa-medium instruction may not be entitled to receive it because it would not be reasonably practicable for such a small group.
- 43 learners in grade 2 seeking French-medium instruction will not receive it because the LOLT must be one of our official languages.
- 36 learners in grade 12 seeking Venda-medium instruction will be entitled to this because it is deemed to be reasonably practicable.



## RELEVANT CASE LAW

Our courts have had a number of opportunities to consider the right to receive a basic education in the language of one's choice. These cases focus on the right of learners to choose their language of instruction, rather than on the protection of any specific languages. This is in line with the policies discussed above, which promote diversity.

### EARLY CASES DEALING WITH LANGUAGE IN EDUCATION

The cases dealing with language in education illustrate clearly the intersection between race, language and culture, usually with regard to unfair discrimination on any or all of these grounds.

The principles demonstrated by case law, arise in the context of the powers of school governing bodies regarding the content of the language policies they adopt, and to what extent provincial education departments may override these policies.

In *Matukane and others v Laerskool Potgietersrus*, the school governing body tried to exclude black learners seeking English-medium instruction from a parallel-medium school. It relied on its desire to maintain the culture and ethos of the school, which was closely connected to the Afrikaans language and would be diluted

if the school was 'swamped by English-speaking pupils'. The Court found that this constituted unfair discrimination and directed the school to admit the learners, even though this was inconsistent with the school governing body's language policy.

That the powers of a school governing body to adopt a language policy are not without qualification was confirmed in *Laerskool Middelburg v Departmentshoof, Mpumalanga Department van Onderwys*. In this case, the provincial education department instructed an Afrikaans-medium school to admit twenty learners seeking English-medium instruction, and the school governing body asserted that the education department did not have such a power. The Court recognised its duty in all cases to hold paramount the best interests of the children concerned. Considering the meaning of the right to

receive education in the language of one's choice against the claim of a right to a single-medium school and the emotional, cultural, religious and social-psychological security that accompanies single-medium education, the Court held that the learners' right to choose their medium of instruction took precedence, and could not be undermined where there was a need to share the school facilities with other language and cultural groups.

The procedures to be followed by a provincial education department in overriding a school governing body's powers were set out in *Minister of Education, Western Cape, and others v Governing Body, Mikro Primary School and another*. In this case, the provincial education department directed an Afrikaans-medium school to operate as a parallel-medium school, offering education in both English

and Afrikaans. In deciding whether the education department had the power to issue such a directive, the Supreme Court of Appeal held as follows:

- The right in Section 29(2) of the Constitution is a right enforceable against the state, and not against a particular school. In other words, a learner demanding education in a particular language cannot choose the school that will offer this instruction; it is up to the state to take that request into account and find a school for the learner to attend.
- If the language policy adopted by the school governing body is consistent with the Constitution, the norms and standards and any other national or provincial education legislation or policy, the provincial education department may not ordinarily intervene.
- If it does not comply with these – for example, if the language policy is discriminatory on the grounds of race – then the head of the provincial education department or any other person may apply to court to have it set aside.
- In exceptional circumstances, the head of the provincial education department may withdraw the school governing body's power to determine the language policy, and appoint someone else to perform this function.

Because the education department in this case had not followed the prescribed procedures, the court upheld the language policy adopted by the school governing body.

### HEAD OF DEPARTMENT: MPUMALANGA DEPARTMENT OF EDUCATION AND ANOTHER V HOËRSKOOL ERMELO AND ANOTHER

In this case, the Constitutional Court clearly defined the relationship between the national Department of Basic Education, the provincial education departments and school governing bodies. The case involved the validity of the provincial education department's decision to revoke the school governing body's powers to determine its language policy and to appoint an interim committee to do so instead. This would allow an English-medium class to be accommodated at an Afrikaans-medium school.

The Court's decision was based on a fundamental starting point: the deep inequality in our public schools in South Africa. This extends to the quality of education and resource allocation, and undermines the importance of education as a vehicle for social change. The school in this case was well resourced and offered a high quality of education, and the effect of its language policy was to restrict access to these benefits for black learners who sought English-medium instruction. The Court also noted a further effect of apartheid: the fact that indigenous languages, because of the way that they were oppressed and undermined during apartheid, do not occupy the role that they should as media of instruction in education, particularly at secondary-school level. As such, the learners' fight was not for instruction in their home languages, but rather for English-medium instruction. Although this was not an issue directly

before the Court, the Court did suggest that more needed to be done to develop these languages and their role in education.

Turning to the right to receive basic education in the language of one's choice, the Court held as follows:

The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however, is internally modified because the choice is available only when it is 'reasonably practicable'. When it is reasonably practicable to receive tuition in a language of one's choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices the learners and their parents make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice, the state bears the negative duty not to take away or diminish the right without appropriate justification. The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one's choice. It is an injunction on the state to consider all reasonable educational alternatives, which are not limited to, but include, single-medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices.

Against this background, the Court held that the head of the provincial education department does have the authority to withdraw the school governing body's power to determine the school's language policy. The Court expressed the importance of this principle in the light of the state's obligation to ensure that every learner has a place in school, and a reasonable opportunity to learn in the language of his or her choice. If the school governing body had unfettered powers to determine the school's language policy and could use this power to discriminate against learners and to limit access to basic education, this would undermine the transformative purpose of our Constitution.

Therefore, where a school governing body exercises its powers unreasonably – that is, not in the best interests of the community in which the school is situated – the provincial education department is not only permitted but required to intervene.

#### **GOVERNING BODY, HOËRSKOOLOVERVAAL AND ANOTHER V HEAD OF DEPARTMENT OF EDUCATION, GAUTENG PROVINCE**

The Pretoria High Court adopted a different approach when faced with an urgent application by Overvaal Hoërskool, an Afrikaans-medium school, to set aside an instruction issued by the Gauteng Department of Education (GDE) to admit 55 learners seeking English-medium instruction. The GDE relied on the fact that the learners had not yet been placed, and the school had the capacity to accommodate them. The GDE also sought to transform the school by directing it to introduce English as a LOLT. The school argued that the instruction was procedurally flawed and unlawful, and that the instruction from the GDE was contrary to its language and admissions policies.

The Court found that the GDE was not entitled to override the school's language and admission policies, particularly as there were other English-medium schools in the area with capacity to accommodate the learners seeking English-medium instruction. The Court also criticised the GDE officials for the procedure followed in issuing the instruction and its failure to engage meaningfully with the school governing body and other stakeholders.

The result of this was that the learners seeking English-medium instruction, most of whom were black, were forced to attend overcrowded and under-resourced schools, and Hoërskool Overvaal was permitted to operate under capacity and in line with policies that had the effect of discriminating against learners in the community on the grounds of their race.

The GDE applied for leave to appeal against this decision to the Constitutional Court. Although this appeal would have given the Constitutional Court an opportunity to develop the principles regarding the transformation obligations of our schools, and the role that transformation plays in the duty to engage meaningfully with all stakeholders, the Court dismissed the application for leave to appeal on the basis that the GDE had no prospect of success.

It follows that the duty to act reasonably falls not only on school governing bodies, but on provincial education departments as well. While the decisions of the Constitutional Court described above confirmed that the provincial education departments do have the power to override language and admissions policies, the judgment in Overvaal establishes that they are required to follow fair and appropriate procedures in doing so, including meaningful engagement with all relevant stakeholders.

#### **SOLIDARITEIT HELPENDE HAND NPC AND ANOTHER V MINISTER OF BASIC EDUCATION AND ANOTHER**

This case involved a challenge to the national Department of Basic Education's Fundza Lushaka Bursary Scheme to facilitate the implementation of the Incremental Introduction of African Languages Policy, by awarding bursaries to students from rural areas who intend to specialise in an indigenous African language in the foundation phase, and to return to rural areas once qualified to teach in public schools. The applicants argued that this bursary scheme discriminated against white students, most of whom do not come from rural areas or speak an indigenous African language.

The Court found that the right to be educated in the language of one's choice in terms of Section 29(2) of the Constitution imposes a positive obligation on the state to take steps to ensure that learners have access to suitable and well-qualified teachers able to educate them in the language of their choice. The Court held as follows:

'The inequality in the enjoyment of the right to basic education, perforce, obliges the department to take positive steps to realise the right in full and immediately, as enjoined by section 29(1)(a) of the Constitution. It also imposes a duty on the department to close the gap created by apartheid and perpetuated through an unequal schooling system. In discharging its obligation to provide quality basic education, the State is also enjoined to promote the best interests of the children as enshrined in section 28 of the Constitution. Thus, the right to quality basic education, in this instance the provision of mother-tongue tuition in the foundation phase as a component of that right, forms part of that obligation.'

The Bursary Scheme therefore operated to give effect to the right to basic education, so as to ensure that the right to be educated in the language of one's choice is available to learners in practice. The applicants' challenge to the scheme was therefore dismissed.

## **LEGAL AND PHILOSOPHICAL DEBATES**

#### **THE DANGERS OF LANGUAGE AS A SUBSTITUTE FOR RACE DISCRIMINATION**

In dealing with language policy, Section 6 of the Schools Act expressly prohibits a policy that would have the effect of racial discrimination.

As we address elsewhere in this handbook, our laws specifically prohibit discrimination on the grounds of race or ethnicity. This includes, for example, an admission policy adopted by a school governing body that excludes a particular racial or ethnic group. This provides very clear guidelines to school governing bodies as to what they may and may not do.

However, the close association between race and language creates a more complex situation. While the Schools Act allows a school governing body the power to determine a school's language policy, it is not permitted to exercise that power in a way that unfairly excludes learners on the grounds of their race or ethnicity.

The cases above deal with language policies that exclude learners seeking English-medium instruction. On the facts of these cases, however, the majority of these learners were black, and the majority of the learners receiving Afrikaans-

medium instruction were white. This being the case, it is necessary to dig deeper than the language issues, to determine if the language policy in question in each case is being used as a proxy for discrimination on the grounds of race.

Of course, this will depend on the facts of each case; and the problem is not confined to schools with any particular medium of instruction. However, it is important to be aware of this to ensure that no indirect unfair discrimination occurs.

#### **LANGUAGE IN EDUCATION AND A MEANINGFUL RIGHT OF ACCESS TO EDUCATION**

The availability of education in a particular language must take into account the demand for that language of instruction, and the availability of education in that language at other schools in the area.

These were important considerations in the case of Hoërskool Fochville, in which the school governing body adopted a language policy in terms of which the language of instruction would be Afrikaans. However, the school was operating under capacity,

and there were no more Afrikaans-speaking learners in the community who needed to be accommodated there.

However, there were many learners living in Fochville and in the adjacent township of Kokosi who wanted English-medium instruction. Because there was no school in Fochville or Kokosi that had the capacity to accommodate learners wanting English-medium instruction, they had to attend school in Carletonville, approximately 30 kilometres away. They were required to travel by bus to school and back each day, and had complained that the roads were unsafe and the buses unreliable. When the buses broke down, learners would sometimes miss school for days on end. Similarly, when the transport companies stopped providing services because of late payment by the department of education, learners missed school.

They also could not participate in extramural activities or stay after school for extra lessons and other activities, because they relied on public transport, which left straight after the end of the school day. They felt that they could not integrate properly into the school community because of this.

The Gauteng Department of Education therefore instructed the school governing body of Hoërskool Fochville to amend its language policy so that the school would operate as a parallel-medium school.

The school refused, and referred the matter to the courts. The learners seeking English-medium instruction and their parents supported the Department's stance because of their difficulties in accessing education in the areas in which they lived.

The matter was settled out of court, on the following basis:

- The department of education undertook to build a new school offering English-medium instruction in Kokosi, close to where the learners lived.
- Until construction of this new school was completed, the department would closely monitor the transport to Carletonville, and provide different shifts to enable learners to participate in after-school activities.

As a result, there is no court pronouncement on whether the school could be compelled to admit these learners and operate as a parallel-medium school. However, the cases discussed

above that deal with this issue suggest that as long as the department follows the correct procedure, it may compel a school to admit learners and to offer them education in the language of their choice and close to where they live.

#### MOTHER-TONGUE EDUCATION AND ENGLISH-MEDIUM INSTRUCTION

There is a lot of debate around which language learners should select as their LOLT, home language and first additional language. The considerations that parents need to take into account include the following:

- Because learners need to be very comfortable with their language of instruction, to enable them to grasp concepts in other learning areas, many people favour choosing the learner's home language as the language of instruction. Not only does this enable learners to pick up concepts in other learning areas more easily, it also enables parents to assist with homework, participate in parent meetings, and communicate with teachers in a language in which they are comfortable.

- Many learners and their parents recognise the benefits of becoming fluent in English, as this is a language commonly used in further education, as well as being necessary for most types of future employment. For this reason, many learners select English as their LOLT, so that they are forced to become fluent in English.
- Because of the widespread use of English in further education and in the job market, those learners whose language of instruction is not English will often select English as their first additional language. This enables them to achieve a high level of proficiency in English, without compromising their ability to grasp the subject matter in their other learning areas, or their parents' ability to participate in their education.

There seems to be widespread appreciation in our laws and policies of the benefits of home-language instruction. However, this does not replace the right of learners, as guaranteed in Section 29(2) of the Constitution, to choose the language in which they receive their education.



#### PRACTICAL CONSIDERATIONS IN LANGUAGE IN EDUCATION

The constitutional protection of language in education is expressly limited by considerations of practicability: if it is not possible to offer education in the particular language that a learner prefers, then the learner will not be immediately entitled to education in that language.

We discussed above the Language in Education Policy and the norms and standards on language in schools, which provide considerations to use in deciding whether there are sufficient learners seeking a particular language of instruction to justify providing education in that language. If there are at least 40 learners in a particular grade (for grades 1 to 6) or 35 learners in a particular grade (in grades 7 to 12) who want a particular language of instruction, then the Policy and the norms and standards say that the provincial education department cannot refuse, on the basis that it is reasonably practicable.

The reason for this is that it would not be reasonably practicable to have one school that has 500 children learning in isiZulu, 30 children learning in isiXhosa, 17 children learning in Tshivenda and two children learning in

Afrikaans. If there are only 30 learners who wish to learn in isiXhosa then it would not be reasonably practicable in an isiZulu-medium school. This is essentially a numbers game, requiring the provincial education departments to provide education in a particular language if there are enough learners requiring education in that language.

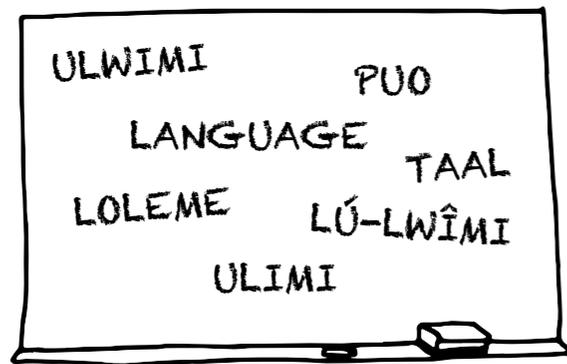
However, even where there are enough learners seeking education in a particular language, there are at least two additional requirements that must be met. isiXhosa-medium education requires teachers who are able to teach in isiXhosa, and isiXhosa textbooks in each learning area, such as mathematics and life orientation.

As we discuss elsewhere in this book, there is a serious shortage of adequately trained teachers, and a shortage of vacant posts in schools to accommodate these teachers. If an isiXhosa-medium class were to be included in an isiZulu-medium school, this would require creating a new post for at least one teacher (depending on the grade), as well as appointing a suitably qualified teacher who is able to provide isiXhosa-medium instruction. It is not clear whether this is possible in the current context.

An extreme example of this arose with the introduction of South African Sign Language as a recognised language of instruction. While this was a critical step in the realisation of the right to basic education for learners with hearing impairments, the department of education introduced sign language without ensuring that there were sufficient teachers who could communicate in South African Sign Language.

The result of this was restricted access to education for learners. In 2013, SECTION27 was approached for assistance in challenging a decision by the Western Cape Education Department that a secondary school for learners with hearing impairments would no longer accommodate learners in grades 10 to 12. This was the only secondary school that offered English-medium sign language as the LOLT. Learners seeking education through English-medium sign language would therefore have no place to receive it in grades 10 to 12.

It emerged that the problem was that there were no teachers in any of the schools in the province suitably trained to teach the learners using English-medium sign language. Fortunately, the



Western Cape Education Department accelerated its teacher training to ensure that all learners with hearing impairments could be adequately catered for. The learners were then transferred to another school that had appointed suitably trained teachers to teach them.

Although the national Department of Basic Education has tried to address the shortage of adequately trained teachers – in part through its Fundza Lushaka Bursary Scheme, discussed above – we are of the view that this is not enough to ensure that sufficient teachers are trained in indigenous African languages and South African Sign Language; or that once qualified, there will be adequate posts for them. The Department has recognised this and has stated its commitment to prioritising these issues. It is important

that these issues are addressed as soon as possible, to avoid a denial of the right to be educated in the language of one's choice.

Similarly, there have been problems with the procurement and delivery of textbooks to schools across South Africa, including the delivery of textbooks to schools in the correct language. Factors affecting this are limited funding, weak procurement systems and poor data management to assess and meet the requirements of each school. The provincial education departments will need to improve their systems substantially to support the more complex needs of schools in each province offering different languages, as well as different languages offered within a particular school.

It will also be important for the national Department of Basic Education

to engage with publishers to ensure that textbooks are available in all of the official languages in each learning area, so that all learners have access to their required learning materials, regardless of their chosen language of instruction.

In relation to Braille textbooks in particular, there is a severe and chronic shortage of textbooks in African languages for learners with visual impairments, and very little progress in ensuring the availability of these materials. This is discussed in more detail in Chapter 16: Textbooks.

However, the existence of these obstacles to the 'reasonable practicability' of offering education in different languages does not excuse the state from taking positive steps to remove these obstacles.

**The national and provincial education departments cannot rely indefinitely on a lack of qualified teachers and appropriate textbooks to justify their failure to provide education in a particular language, especially where there is a large number of learners wanting a particular language of instruction. They must take positive steps to ensure that these challenges are addressed, in line with their constitutional obligations.**

**Nikki Stein** is a member of the Johannesburg Bar.

#### CASES

*Governing Body, Hoërskool Overvaal and Another v Head of Department of Education Gauteng Province and Others* (86367/2017) [2018] ZAGPPHC 258.

*Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* (CCT40/09) [2009] ZACC 32.

*Laerskool Middelburg en 'n Ander v Departmentschoof: Mpumalanga Department van Onderwys en Andere* (2002) 4 All SA 745 (T).

*Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

*Minister of Education (Western Cape) v Mikro Primary School Governing Body* (140/2005) [2005] ZASCA 66.

*Solidariteit Helpende Hand NPC and Another v Minister of Basic Education and Others* (58189/2015) [2017] ZAGPPHC 1220.

#### LEGISLATION, POLICY AND GUIDELINES

Constitution of the Republic of South Africa, 1996.

Draft Policy on the Incremental Introduction of African Languages in South African Schools.

Language in Education Policy.

National Education Policy Act 27 of 1998.

Norms and Standards for Language Policy in Public Schools.

South African Schools Act 84 of 1996.

#### FURTHER READING

Stu Woolman and Brahm Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) pp 45–81.