



Education Over Interference

The Limits of the Hybrid
Governance Model
in the BELA Act

Ayanda Zulu



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EXECUTIVE SUMMARY

The Basic Education Laws Amendment Act (BELA Act) represents one of the most significant reforms to South Africa's basic education governance framework since the enactment of the South African Schools Act 84 of 1996. Sections 4 and 5 of the BELA Act, which amend the provisions governing admission and language policies, have generated significant controversy regarding the appropriate balance between school autonomy and state oversight.

This paper examines whether the increased provincial authority introduced by the BELA Act is likely to resolve the recurring disputes between school governing bodies (SGBs) and provincial education departments concerning language and admission policy.

The paper argues that these disputes cannot be understood simply as conflicts arising from excessive SGB autonomy or insufficient state intervention. Rather, they are rooted in the hybrid governance framework established by the Schools Act, which places actors with competing understandings of educational governance within the same institutional

structure. Through an examination of transformative constitutionalism, school autonomy, and the Constitutional Court judgments in *Hoërskool Ermelo* and *Rivonia Primary School*, the paper demonstrates that disputes over language and admission policy involve deeper disagreements concerning equality, transformation, mother-tongue education, educational standards, and institutional capacity.

The paper argues that while the BELA Act strengthens provincial oversight over language and admission policy, it does not resolve the underlying governance tensions that have historically generated conflict. Instead, it risks shifting the form of disputes rather than eliminating them.

The paper therefore recommends re-considering the broader governance framework established by the Schools Act and moving beyond both the pre-BELA and BELA frameworks by establishing a clearer distribution of authority that preserves meaningful school-level autonomy while maintaining appropriate constitutional safeguards.

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INTRODUCTION

The Basic Education Laws Amendment Act (hereafter BELA Act) is one of the most significant policy reforms to the South African basic education system since 1994. Signed into law by President Cyril Ramaphosa on 13 September 2024, the Act introduces a range of amendments to the South African Schools Act 84 of 1996 (hereafter Schools Act).¹

Sections 4 and 5 of the BELA Act, which pertain to the language and admission policies of schools, have generated significant controversy and divided public opinion. Civil organisations such as AfriForum argue that these clauses greatly undermine the autonomy of school governing bodies (hereafter SGBs) by shifting final decision-making authority over language and admission policies to provincial education departments.² Conversely, existing scholarship that is informed by the doctrine of transformative constitutionalism contends that the clauses are a necessary and long-overdue intervention to strengthen state oversight and address exclusionary practices that stem from SGBs having “total” autonomy.³

The latter view, which reflects a degree of optimism about the transformative potential of the BELA Act, can be interpreted to suggest that sections 4 and 5 may help to manage and reduce the long-standing legal disputes between provincial departments and SGBs, particularly in former Model C schools (hereafter Model C schools), over language and admission policies. By granting heads of department the authority to approve or reject policies upon reviewing

¹ Department of Basic Education, “President Ramaphosa Signs BELA Bill into Law,” *South African Government*, September 13, 2024, <https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/President-Ramaphosa-signs-BELA-Bill-into-law-0924.aspx>

² Takudzwa Pongweni, “AfriForum and Solidarity to Challenge Full Implementation of Bela Act in Court,” *Daily Maverick*, January 16, 2025, <https://www.dailymaverick.co.za/article/2025-01-16-afriforum-solidarity-to-challenge-full-implementation-of-bela-act-in-court/>

³ R McFarlane, “School Bill Is Not Betrayal, It’s a Belated Move to Update the Law,” *Sunday Times* (Johannesburg), July 3, 2022, <http://www.timeslive.co.za/sundaytimes/opinion-and-analysis/opinion/2022-07-03-schools-bill-is-no-betrayal-its-a-belated-move-to-update-the-law/>

them, the expectation is that a more pre-emptive regulatory approach can identify contested policies at an earlier stage and, where necessary, intervene to prevent later disputes from escalating into litigation.

However, this expectation rests on the assumption that pre-emptive intervention will reduce conflict in practice. While the BELA Act may reconfigure the nature of disputes by limiting direct litigation, it does not necessarily eliminate conflict, which could instead take the form of administrative disputes that may still ultimately culminate in litigation.

This recurring nature of conflict underscores an underlying structural tension in the governance of basic education. Contrary to the overstated claim regarding the supposed total autonomy of SGBs prior to the adoption of the BELA Act, the basic education system, as set out by the Schools Act, operates as a hybrid governance system in which the Department of Basic Education (hereafter DBE), provincial departments, and SGBs exercise overlapping authority over language and admission policies.⁴ Within this system, SGBs exercise legally defined authority under the Schools Act, while provincial departments implement national education policy and fulfil an oversight role to ensure compliance with both the Act and the broader constitutional framework.⁵ This system of hybrid governance reflects a broader post-apartheid governance settlement that sought to balance decentralised governance with centralised state oversight within a partially publicly-funded education system.⁶ In this context, the BELA Act is not a mechanism that clearly separates authority or gives the state total control, but significantly strengthens state oversight with the aim of recalibrating the balance of power between the DBE, provincial departments, and SGBs.

⁴ *South African Schools Act 84 of 1996* (South Africa), s 5.

⁵ *South African Schools Act 84 of 1996* (South Africa), s 5.

⁶ J. van der Westhuizen, "A Post-Apartheid Educational System: Constitutional Provisions," *Columbia Human Rights Law Review* 21 (1989): 130.

While the hybrid governance system of basic education is historically grounded in an attempt to balance decentralised governance with centralised state oversight, it does not, as this paper notes, adequately account for the fundamentally divergent understandings of educational governance that exist between SGBs in Model C schools and certain state actors within the DBE and provincial departments. These differences extend beyond constitutional interpretation alone and encompass competing views regarding the role and extent of school autonomy, the significance of mother-tongue education, the pursuit of transformation through state intervention, the maintenance of educational standards, and the appropriate balance between educational access and local institutional realities.

SGBs have generally and legitimately approached disputes concerning language and admission policy through a framework that emphasises school autonomy, mother-tongue education, local institutional realities, and the preservation of educational standards. In contrast, these state actors, whose worldview is strongly influenced by the doctrine of transformative constitutionalism and who view the BELA Act as an operationalisation thereof, have generally approached such disputes through a framework that prioritises the notion of “substantive equality” and transformation through state intervention.

The placement of the DBE, provincial departments, and SGBs within a hybrid governance system has naturally generated recurring conflict over language and admission policies, and is likely to reproduce such conflict in different forms going forward. This suggests that while a transformative intervention such as the BELA Act functions as an immediate driver of conflict and resistance, the more fundamental issue lies in the architecture of hybrid governance itself, which places actors with fundamentally different understandings of educational governance within the same governance framework.

This paper should be seen within the broader context of South Africa's socio-economic malaise. As Malan notes in the Free Market

Foundation's "Liberty First: Regulation" report of November 2024: "South Africa faces numerous challenges to unlocking its economic potential, with excessive regulation impeding progress in sectors crucial to growth: the labour market, education, and healthcare." Deregulation and decentralisation of education, among other things, would promote the economic freedom and opportunity necessary to fixing South Africa's manifold existential crises.⁷

Against this backdrop, this paper argues that the BELA Act, which at the time of writing was in the implementation phase, should be withdrawn in its entirety, or that sections 4 and 5 should be repealed as an immediate step as they significantly alter the balance of power in a manner that threatens the autonomy of SGBs in Model C schools, the right to mother-tongue education, and educational excellence. More broadly, this paper argues that the Schools Act requires reconsideration and restructuring to rebalance authority in a manner that moves beyond the pre-BELA governance framework and grants SGBs substantial autonomy. Model C schools perform exceptionally in part due to relatively limited state intervention. The state, rather than seeking to advance transformation through legislation, should prioritise strengthening and improving existing public schools under its control that cannot yet meet the standard set by Model C schools. It should also focus on expanding educational infrastructure to address capacity constraints in the basic education system.

This paper is organised into four headings. Heading 1 examines the hybrid governance framework established by the Schools Act and the distribution of authority between SGBs, provincial education departments, and the DBE in relation to language and admission policy prior to the enactment of the BELA Act. Heading 2 analyses the competing understandings of educational governance that have informed disputes between SGBs and certain state actors within provincial departments and the DBE, with particular reference to the

⁷ Morné Malan, Liberty First: Regulation, Free Market Foundation, November 2024, <https://freemarketfoundation.com/wp-content/uploads/2024/11/Morne-Malan-Liberty-First-Regulation.pdf>, 1.

Constitutional Court judgments in *Hoërskool Ermelo* and *Rivonia Primary School*. Heading 3 examines the amendments introduced by the BELA Act and considers their implications for the balance of power within the governance of basic education. Heading 4 concludes the paper and provides recommendations for reforming the governance framework governing language and admission policy.

1. HYBRID GOVERNANCE UNDER THE SCHOOLS ACT

Motala, Porteus, and Tshoane note that the hybrid system of basic education that was established under the Schools Act in November 1996 reflects a post-apartheid governance settlement that sought to balance decentralised governance through SGBs with centralised state oversight:

“The platform of the democratic movement prior to 1994 – as reflected in the Reconstruction and Development Programme (RDP) which embraced central planning as a way of removing national inequities, as well as the devolution of power to facilitate a more participative democracy – reflects a more complex arrangement of the traditional centralisation-decentralisation debate.”⁸

Within this hybrid governance system, SGBs exercise delegated authority to set language and admission policies, but their autonomy is not absolute. The DBE sets national education policy and regulatory standards, while provincial education departments are responsible for implementing national policy and conducting oversight to ensure compliance with both the Schools Act and the broader constitutional framework.⁹ This constitutional framework is grounded in values such

⁸ Shireen Motala, Kim Porteus, and Margaret Tshoane, “The Implementation of the South African Schools Act: Implications for Redress and Equity,” in *2002 International Conference on Education and Decentralisation: African Experiences and Analyses* (Johannesburg, 10-14 June 2002), 204.

⁹ South African Schools Act 84 of 1996 (South Africa), s 5.

as equality and non-racialism, while also emphasising access to education.¹⁰

Section 5 of the Schools Act, which governs admission policy, demonstrates the distribution of authority in practice. While subsection (5) grants SGBs the authority to determine admission policy, this authority is subject to several constraints that are set out in earlier subsections of the Act, which include the prohibition of unfair discrimination, admission testing, and exclusion on the grounds of the non-payment of school fees.¹¹ Subsection (7) further provides that applications for admission must be made to a provincial educational department through the Head of Department (hereafter HoD).¹² Where an application is refused, the HoD must inform a parent or learner in writing of such refusal and provide reasons for the decision.¹³ Subsection (9) provides that any learner who has been refused admission may appeal against the decision to the Member of the Executive Council (hereafter MEC), who is the political head of the provincial education department (the HoD is administrative head).¹⁴

A similar distribution of authority is evident in section 6, which governs language policy. While subsection (2) grants SGBs the authority to set language policy, this authority is subject to the oversight role exercised by provincial education departments and to subsection (3), which prohibits racial discrimination.¹⁵

Together, sections 5 and 6 of the Schools Act establish a governance system in which SGBs, provincial education departments, and the DBE exercise overlapping authority over admission and language policy. While SGBs are vested with decision-making authority in these areas, their autonomy is bounded by the Act, the broader constitutional framework, and provincial oversight. This produces a

¹⁰ Motala, Porteus, and Tshoane, "The Implementation of the South African Schools Act," 204.

¹¹ South African Schools Act 84 of 1996 (South Africa), s 5(5).

¹² South African Schools Act 84 of 1996 (South Africa), s 5(7).

¹³ South African Schools Act 84 of 1996 (South Africa), s 5(7).

¹⁴ South African Schools Act 84 of 1996 (South Africa), s 5(9).

¹⁵ South African Schools Act 84 of 1996 (South Africa), s 6(3).

system of shared institutional responsibility in the governance of basic education rather than clearly separated spheres of authority. In practice, under the pre-BELA governance framework, Veriava notes that this arrangement operated in a largely reactive manner, with provincial departments typically intervening only after disputes arose through appeals relating to admission and language policy.¹⁶

2. COMPETING UNDERSTANDINGS OF EDUCATIONAL GOVERNANCE

As noted in the introduction, the hybrid governance system established by the Schools Act places actors with different understandings of educational governance within the same governance framework. To understand why disputes concerning language and admission policy have repeatedly emerged under this arrangement, it is necessary to examine the competing understandings of educational governance that have informed the positions of SGBs and certain state actors within the DBE and provincial departments.

2.1 Transformative constitutionalism

A significant influence on the approach adopted by certain state actors within the DBE and provincial education departments is the doctrine of transformative constitutionalism. While the concept has been defined in different ways, it is generally associated with the view that the Constitution should be used as an instrument to address the continuing effects of historical injustice and structural inequality. In explaining the assumptions that underpin transformative thought in South Africa, Van Staden states that transformation is generally understood to imply that:

“(1) South Africa has a deeply unjust history, spanning roughly from 1652 to 1994 under successive forms of white minority

¹⁶ Faranaaz Veriava, “The Basic Education Laws Amendment Bill: A Case Study in Transformative Constitutionalism Beyond the Courts,” *African Human Rights Law Journal* 24 (2024): 162.

domination, characterised by inequity and oppression; and because

(2) this inequity continues to this day by proxy (usually economic but also psychological and cultural means), the law must be used to artificially engineer South African society (not merely politics, but also the economy, culture, and other spheres) away from this past; so as to

(3) attain socio-economic equality in the socio-economic sphere between the haves and the have-nots; through

(4) the medium of a strong, invasive, and prescriptive government abetted by an involved and ideologically conscious judiciary.”¹⁷

In Van Staden’s analysis, transformative constitutionalism proceeds from the view that historical injustice continues to shape present social and institutional realities. Second, it frames transformation as requiring the use of law and state authority to address continuing socio-economic inequality. Third, it envisages a strong role for the state and judiciary in pursuing these objectives through intervention in institutional arrangements that are perceived to reproduce inequality.

In the context of basic education, transformative constitutionalism supports state intervention in school governance, particularly in relation to language and admission policies. These policies are viewed not merely as matters of local school governance, but as mechanisms through which substantive equality and access to education may be advanced or undermined.¹⁸ On this basis, state intervention is justified where these policies are perceived to reproduce inequality or restrict educational access.¹⁹ The practical implications of this approach can be seen in disputes at former Model C schools. Veriava argues that

¹⁷ Martin van Staden, *Transformationism in South African Constitutional Discourse: A Historical and Thematic Appraisal* (PhD diss., University of Pretoria, 2025), 2.

¹⁸ McFarlane, “School Bill Is Not Betrayal, It’s a Belated Move to Update the Law.”

¹⁹ McFarlane, “School Bill Is Not Betrayal, It’s a Belated Move to Update the Law.”

language policies in single-medium Afrikaans school have effectively excluded black learners, while admission policies based on feeder zones and geographical catchment areas in the same schools have limited access for learners outside these communities, thereby reinforcing patterns of racialised exclusion.²⁰

It is important, however, to distinguish between transformative constitutionalism as an interpretive doctrine and the text of the Constitution itself. While transformative constitutionalism has exercised significant influence in South African constitutional jurisprudence and public policy, Van Staden notes that the Constitution does not expressly prescribe the institutional arrangements associated with this approach.²¹ The extent to which language and admission policies should be subject to greater state intervention therefore remains a matter of politically-informed constitutional interpretation rather than textual constitutional prescription.

2.2 School autonomy and local governance

SGBs in former Model C schools have generally approached language and admission disputes through a framework that emphasises autonomy, mother-tongue education, educational standards, and local institutional realities.

As noted in heading 1, SGBs function as statutory bodies under the Schools Act and exercise delegated authority over language and admission policies. While their autonomy is not absolute, it reflects a model of decentralised governance in which decision-making is located at school level. This is based on a conception of grassroots democracy that recognises that those closest to the school are best placed to determine its internal policy arrangements.²² In this regard, Jeffery correctly contends that autonomy enables former Model C

²⁰ Veriava, "The Basic Education Laws Amendment Bill," 161.

²¹ Van Staden, Transformationism in South African Constitutional Discourse, 3.

²² Afriforum, "Submission by Afriforum on the Basic Education Laws Amendment Bill, 2022," submitted to the Select Committee on Education and Technology, Sports, Arts and Culture, March 6, 2024, 7, https://static.pmg.org.za/240306_AfriForum.pdf

schools, which are partially state-funded but largely sustained through school fees and community contributions, to develop policies tailored to their institutional contexts and to maintain educational standards and performance outcomes.²³

Closely related to the emphasis on educational standards is the importance of mother-tongue education. While mother-tongue education is constitutionally protected through section 29(2) of the Constitution, which grants everyone the right to receive education in the official language of their choice at public educational institutions where reasonably practicable, its significance within the SGB framework extends beyond constitutional protection alone.²⁴ In *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*, the Constitutional Court recognised the important role of SGBs in determining language policy and acknowledged that they are often best placed to assess the educational circumstances of their schools.²⁵ Moreover, a substantial body of research has linked mother-tongue instruction to improved educational outcomes and the maintenance of educational standards. The continued success of many Afrikaans-medium public schools provides a practical illustration of this relationship.²⁶

The claim that language policy in Afrikaans-medium schools functions principally as a mechanism of exclusion is difficult to substantiate. Jeffery notes that approximately 80 per cent of learners attending former Model C schools are black, with some schools having become almost exclusively black.²⁷ Furthermore, Afrikaans-medium schools have declined steadily over time, while Afrikaans is

²³ Anthea Jeffery, *South African Institute of Race Relations NPC Submission to the Portfolio Committee on Basic Education Regarding the Basic Education Laws Amendment Bill of 2022 [B2-2022]* (Johannesburg, June 15, 2022), 23, <https://irr.org.za/reports/submissions-on-proposed-legislation/irr-submission-bela-bill-2022-15-june-2022-1.pdf>

²⁴ Jeffery, *South African Institute of Race Relations NPC Submission to the Portfolio Committee on Basic Education Laws Amendment Bill*, 23.

²⁵ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, para 57.

²⁶ Afriforum, "Submission by Afriforum on the Basic Education Laws Amendment Bill," 17.

²⁷ Jeffery, *South African Institute of Race Relations NPC Submission to the Portfolio Committee on Basic Education Laws Amendment Bill*, 24.

used as a medium of instruction in less than 10 per cent of public schools nationally.²⁸ This roughly corresponds to 11 per cent of South Africans who speak Afrikaans as home language.²⁹ Most former Model C schools are either English-medium or dual-medium institutions. These realities indicate that the relationship between language policy and exclusion is considerably more complex than the transformative constitutionalist approach suggests.

Equally problematic is the assumption that converting single-medium schools into dual-medium institutions necessarily provides an effective solution. A report on multilingual education by the *United Nations' Special Rapporteur for Minority Rights* highlights significant practical difficulties associated with accommodating multiple languages within a single institution, including the provision of equivalent teaching materials, the maintenance of comparable educational standards, and the fair assessment of learners across language streams.³⁰ It also points to the risk that speakers of less dominant languages may experience the gradual erosion and eventual displacement of mother-tongue instruction in favour of a dominant language (English, in this case).³¹ These concerns are particularly significant given the continued decline of single-medium Afrikaans schools. As the judgment in *Hoërskool Ermelo* will later demonstrate, disputes concerning language policy have often involved schools that were willing to accommodate additional learners but resisted measures they believed would undermine mother-tongue education.

²⁸ Jeffery, *South African Institute of Race Relations NPC Submission to the Portfolio Committee on Basic Education Laws Amendment Bill*, 24.

²⁹ Zeynep Dierks, *Distribution of languages spoken in the households in South Africa as of 2022*, Statista, March 2025, <https://www.statista.com/statistics/1114302/distribution-of-languages-spoken-within-households-in-south-africa/>.

³⁰ Fernand de Varennes, *Education, Language and the Human Rights of Minorities: Report of the Special Rapporteur on Minority Issues*, United Nations Human Rights Council, 43rd session, agenda item 3, February 24-March 20, 2020, 9, file:///C:/Users/debbi/Downloads/A_HRC_43_47-EN.pdf

³¹ de Varennes, *Education, Language and the Human Rights of Minorities*, 9

The same claim regarding exclusion is also extended to admission policy. Yet the central challenge facing the basic education system is not discrimination but a shortage of adequate places in public schools. In *Hoërskool Ermelo*, the Constitutional Court acknowledged the scarcity of classroom space for learners seeking English-medium instruction and emphasised the state's obligation in terms of section 3(3) of the Schools Act to ensure that sufficient school places are available for every child within a province.³² In reality, the availability of public schooling capacity has not kept pace with demographic demand. Between 2000 and 2020, approximately 3 785 schools were closed, while learner enrolment increased from 11.6 million to 12.5 million over the same period.³³ These figures illustrate that many admission disputes arise in a context of systemic capacity constraints rather than deliberate exclusion, making it difficult to treat admission policy as a straightforward proxy for discriminatory intent.

Equally important is the point that SGBs are best-placed to assess the institutional realities that shape admission decisions. Because they operate at the level of the school, they are directly aware of available infrastructure, staffing levels, and resource constraints, as well as the financial and administrative implications of increasing learner intake. Given this reality, it cannot simply be assumed that a refusal of admission amounts to impermissible exclusion, particularly where accommodating additional learners may compromise educational standards. As the judgment in *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* will also demonstrate, there are circumstances in which schools are unable to expand intake without undermining educational standards, notwithstanding a willingness to accommodate additional learners in principle.

³² *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 para 100, 76.

³³ Jeffery, *South African Institute of Race Relations NPC Submission to the Portfolio Committee on Basic Education Laws Amendment Bill*, 23.

2.3 Hoërskool Ermelo

The dispute in *Hoërskool Ermelo* arose in 2007 after English-medium schools in the town of Ermelo had reached capacity and the Mpumalanga Department of Education instructed an Afrikaans-medium school to admit 113 learners seeking instruction in English.³⁴ The SGB indicated that the learners were welcome to attend the school provided they complied with its Afrikaans language policy.³⁵ When the learners declined to do so, the HoD withdrew the SGB's function of determining language policy and appointed an interim committee which immediately converted the school into a dual-medium institution.³⁶

The facts of this case are significant because they challenge the assumption that language disputes necessarily arise from a refusal to accommodate learners. The school was prepared to admit the learners. The dispute instead concerned the language in which instruction would take place and the department's attempt to alter the school's language policy through administrative intervention. In this respect, it illustrates the concern that converting single-medium schools into dual-medium institutions may undermine mother-tongue education.

Although the Constitutional Court reaffirmed that language policies are not beyond state scrutiny, it held that the HoD had acted unlawfully in withdrawing the SGB's powers and emphasised the importance of procedural fairness when intervening in school governance.³⁷ Significantly, the Court also identified the underlying problem as the shortage of available places for learners seeking English-medium education in the area and stressed the state's obligation to ensure sufficient school capacity.

³⁴ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 para, 16-17.

³⁵ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 para, 18-21.

³⁶ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32 para, 18-21.

³⁷ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, para 22, 27.

The judgment therefore supports the argument that disputes concerning language policy are shaped not only by competing understandings of language, autonomy, and transformation, but also by broader constraints in the availability of school places, particularly for learners seeking English-medium instruction.

2.4 Rivonia Primary School

In the matter of *Rivonia Primary School*, the school refused admission of a Grade 1 learner on the basis that it was at full capacity and already had a waiting list.³⁸ However, when the Gauteng HoD relied on the school's tenth-day statistics, which reflected 124 enrolled learners rather than the 120 indicated in its admission policy, he concluded that space remained available and proceeded to instruct the school to admit the learner.³⁹ He also sent officials to place the learner directly into a Grade 1 classroom, at an empty desk intended for another learner with learning difficulties.⁴⁰

The Constitutional Court, drawing on its earlier judgment in the *Hoërskool Ermelo* case, reaffirmed that while school governing bodies exercise statutory authority over admission policy, this authority is not absolute.⁴¹ Any interference with an SGB's admission policy must be expressly authorised by law and must comply with the requirements of reasonableness, procedural fairness, and lawful administrative action.⁴² The Court emphasised that even where intervention is legally permissible, it must be preceded by meaningful engagement with the SGB and must consider the impact on educational resources, teaching quality, and the learner concerned.⁴³

³⁸ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others [2013] ZACC 34, para 9, 12, 14.

³⁹ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others [2013] ZACC 34, para 9, 12, 14.

⁴⁰ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others [2013] ZACC 34, para 9, 12, 14.

⁴¹ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others [2013] ZACC 34, para 49 (a) to (d).

⁴² MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others [2013] ZACC 34, para 49 (a) to (d).

⁴³ MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others [2013] ZACC 34, para 49 (a) to (d).

Importantly, the Court stressed that the SGB and the HoD operate within a hybrid governance framework that requires good faith engagement when disputes arise.⁴⁴ In this case, the HoD failed to afford the school an opportunity to make representations regarding the implications of the placement, including its effect on classroom capacity and resource allocation. The Court further rejected the suggestion that the school's refusal of admission, in the context of declared capacity constraints and a waiting list, could automatically be equated with discriminatory exclusion.⁴⁵

The judgment therefore reinforces the principle that admission disputes must be assessed within the constraints of institutional capacity and procedural fairness, rather than being reduced to assumptions of exclusion or discrimination.

2.5 Implications for the BELA Act

The disputes examined above illustrate the tensions that arise when competing understandings of educational governance operate within the same hybrid governance framework. They demonstrate how differences regarding school autonomy, mother-tongue education, educational access, and the appropriate role of state intervention have repeatedly generated conflict under the Schools Act.

It is against this backdrop that the BELA Act must be assessed.

3. THE BELA ACT AND THE REALIGNMENT OF EDUCATIONAL GOVERNANCE

The BELA Act introduces significant amendments to sections 5 and 6 of the Schools Act, which regulate admission and language policy

⁴⁴ *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34, para 49 (a) to (d).

⁴⁵ *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34, para 64.

respectively. While the amendments do not remove SGBs from these areas of governance, they alter the manner in which authority is distributed between SGBs and provincial education departments. The result is a modified governance framework in which provincial departments exercise a more direct role in matters relating to admission and language policy than was the case under the pre-BELA framework.

3.1 Admission policy

Section 4 of the BELA Act amends section 5 of the Schools Act, which regulates admission policy. Under the pre-BELA framework, SGBs were responsible formulating admission policies, while provincial departments exercised oversight through the administration of applications and appeals. The amended section 5 retains the authority of SGBs to determine admission policy, but introduces several changes to the manner in which their authority is exercised.

The amended section 5(5) provides that admission policies must be determined in accordance with the Constitution and relevant legislation and requires SGBs, when determining or amending admission policies, to take into account factors such as the best interests of the child, equality, equity, the availability of alternative schools, available resources, and space at the school.⁴⁶ The amendment further requires SGBs to review admission policies every three years or whenever circumstances require such a review.⁴⁷

The most significant change is contained in section 5(5)(b), which provides that the HoD, after consultation with the SGB, has the final authority to admit a learner to a public school.⁴⁸ This represents a departure from the pre-BELA framework described in heading 1. While SGBs continue to determine admission policy, the final decision regarding the admission of a learner now rests with the HoD.

⁴⁶ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s4(5).

⁴⁷ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s4(5).

⁴⁸ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s4(5b).

The amended section also introduces a formal appeal mechanism for SGBs. Where an SGB is dissatisfied with a decision of the HoD regarding admission, it may appeal to the MEC within fourteen days.⁴⁹ During the appeal process, the admission policy remains valid and applicable, although the disputed provisions are suspended pending the outcome of the appeal.⁵⁰

3.2 Language policy

Section 5 of the BELA Act amends section 6 of the Schools Act, which regulates language policy. As under the pre-BELA framework, SGBs retain the authority to determine the language policy of a public school, subject to the Constitution, the Schools Act, and applicable provincial legislation. However, the amendment introduces additional requirements and significantly expands the role of provincial departments in relation to language policy.

The amended section 6(5) requires SGBs, when determining or reviewing language policy, to take into account a range of factors, including equality, equity, the language needs of the broader community, enrolment trends, the changing number of learners who speak the language of learning and teaching at the school, and the effective use of classroom space and school resources.⁵¹ As with admission policies, SGBs are required to review language policies periodically.⁵²

The most significant amendment is contained in section 6(7), which empowers the HoD, where practicable, to direct a public school to adopt more than one language of instruction.⁵³ In determining whether such a directive should be issued, the HoD must consider

⁴⁹ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s4(5b).

⁵⁰ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s4(5b).

⁵¹ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(5).

⁵² Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(6).

⁵³ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(7).

factors including equality, enrolment trends, the language needs of the community, and the effective use of available resources.⁵⁴

The amended section prescribes procedural steps that must be taken before such intervention may take place. These include written notice to the school and SGB, notification of parents and the broader community, an opportunity for representations to be made, a public hearing, and consideration of the representations received.⁵⁵ The amendment further requires the HoD to ensure that the necessary resources are provided before an additional language of instruction is implemented.⁵⁶ SGBs are also afforded a right of appeal to the MEC.⁵⁷

3.3 Implications

The amendments introduced by the BELA Act do not eliminate the hybrid governance system established by the Schools Act. Instead, they recalibrate the balance of power between SGBs and provincial departments by strengthening the role of provincial oversight in matters relating to admission and language policy.

Under the pre-BELA framework, provincial intervention generally occurred after disputes had arisen, often through appeals or administrative processes. It is notable that in substance, provincial departments tended to be on the losing end of these disputes, with the courts finding that they had acted improperly by escalating the matters in question. The BELA Act grants provincial departments a more direct role within the governance process itself, particularly through the HoD's final authority regarding learner admissions and the power to direct the adoption of additional languages of instruction.

⁵⁴ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(8).

⁵⁵ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(9).

⁵⁶ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(9).

⁵⁷ Basic Education Laws Amendment Act 32 of 2024 (South Africa), s5(9).

4. CONCLUSION AND RECOMMENDATIONS

This paper has argued that disputes concerning language and admission policy in South African public schools cannot be understood simply as conflicts between school autonomy and state responsibility. Rather, these disputes are rooted in the hybrid governance framework established by the Schools Act, which places SGBs, provincial education departments, and the DBE within the same governance structure despite their competing understandings of educational governance.

Although this framework sought to balance decentralised decision-making with centralised state oversight, the disputes examined in this paper demonstrate that the allocation of overlapping authority has contributed to recurring conflict over the appropriate balance between autonomy, equality, transformation, educational access, and institutional realities.

The analysis of transformative constitutionalism and school autonomy demonstrated that these disputes are shaped by fundamentally different conceptions of the purpose and governance of public education. Certain state actors influenced by transformative constitutionalism approach language and admission policies primarily through the pursuit of substantive equality and increased state intervention to address historical inequality. In contrast, SGBs in former Model C schools have generally approached these issues through a framework that emphasises school autonomy, mother-tongue education, educational standards, and the importance of local institutional realities. The tension between these competing understandings has been central to many of the disputes that have emerged under the Schools Act.

The cases examined in this paper further demonstrate that disputes concerning language and admission policy cannot automatically be reduced to allegations of exclusion or resistance to transformation.

In *Hoërskool Ermelo*, the dispute did not arise because the school refused to accommodate additional learners, but because of disagreement over the language of instruction and the legality of state intervention in determining language policy. Similarly, *Rivonia Primary School* demonstrated that admission disputes must be assessed within the context of institutional capacity, available resources, procedural fairness, and the practical realities faced by schools. These judgments illustrate that effective governance requires consideration of both constitutional objectives and the realities of school-level decision-making.

Against this background, the BELA Act represents a significant shift in the balance of power within the hybrid governance framework. While the Act does not remove SGBs from decision-making over language and admission policy, it strengthens provincial oversight by granting Heads of Department greater authority to intervene in these areas. While these amendments are justified on the basis of equality and educational access, they risk undermining the decentralised governance arrangements that have contributed to the success of many former Model C schools.

However, the solution does not lie simply in restoring the pre-BELA governance framework. As this paper has demonstrated, the pre-BELA framework itself contained structural weaknesses arising from overlapping authority and the placement of actors with competing understandings of educational governance within the same system.

Rather, what is required is a reconsideration and restructuring of the governance framework established by the Schools Act that provides greater clarity regarding the respective roles of SGBs, provincial departments, and the DBE, while preserving substantial school-level autonomy.

“The authority of governing bodies and the autonomy of independent educational institutions should be restored and respected,” writes Malan, as part of the Free Market Foundation’s Liberty First policy agenda. The repeal of “measures limiting parental authority in public

schools, especially the Basic Education Laws Amendment (BELA) Act” was suggested in particular. “[T]he BELA Act is not merely an insufficient solution to the issues plaguing education, it is rather a clear and significant step in the wrong direction”.⁵⁸

In this respect, this paper therefore recommends that sections 4 and 5 of the BELA Act be repealed and that the broader framework of school governance be reconsidered. Future reform should recognise that meaningful SGB autonomy is not inconsistent with constitutional obligations, provided that appropriate safeguards exist to prevent unlawful discrimination and protect learners’ rights. The state should avoid pursuing transformation primarily through increased intervention in existing high-performing schools (an unnecessary zero-sum game), and instead focus on improving the quality of schools under its direct control and expanding educational infrastructure to address capacity constraints within the basic education system.

Finally, where disputes arise between SGBs and provincial departments, intervention should take place through meaningful engagement and cooperative governance. The case law demonstrates that legal authority alone is insufficient to resolve disputes where disagreement concerns competing understandings of educational governance. Effective governance requires both constitutional oversight and recognition of the knowledge and institutional realities possessed by school communities.

The central challenge facing South Africa’s basic education system is not simply determining whether authority should rest with the state or with schools. It is developing a governance framework that recognises the responsibility of the state to protect constitutional equality and access while preserving the value of local institutional autonomy, mother-tongue education, and educational standards. A sustainable approach to reform should therefore move beyond both the pre-BELA and BELA frameworks by establishing a clearer

⁵⁸ Morné Malan, *Liberty First: Regulation*, 18-19.

distribution of authority that preserves meaningful school-level autonomy within the governance of basic education.



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