

# CONSTITUTIONALITY OF PRIMARY SCHOOL ADMISSIONS IN SINGAPORE

WU YULUN\*

## I. INTRODUCTION

Education policies are frequently discussed, and issues relating to educational equity have been contentious. The national narrative for compulsory education has been nuanced. What does it mean by “every school is a good school”?<sup>1</sup> How can one know if a school is “able to meet the needs of the child”?<sup>2</sup> More importantly, can schools become “effective social levellers”?<sup>3</sup>

This article will attempt to answer some of these questions from a constitutional law perspective, focusing on the constitutionality of primary school admissions vis-à-vis Article 16 of the Singapore Constitution. It concludes with some brief reform suggestions.

## II. BACKGROUND

### *A. Article 16 of the Constitution*

Article 16 of the Constitution states that: “there shall be no discrimination against any citizen of Singapore on the grounds only of religion, race, descent or place of birth ... in the admission of pupils and students”.<sup>4</sup> Against this backdrop, the constitutionality of primary school admissions has

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\* LLB (Candidate) (NUS), Class of 2022. All errors and views expressed in this article remain my own.

<sup>1</sup> Heng Swee Keat, “Keynote Address by Mr Heng Swee Keat, Minister for Education, at the Ministry of Education Work Plan Seminar 2015” (22 September 2015), *Ministry of Education, Singapore*, online: <<https://www.moe.gov.sg/news/speeches/20150922-keynote-address-by-mr-heng-swee-keat-minister-for-education-at-the-ministry-of-education-work-plan-seminar-2015-on-tuesday-22-september-2015-at-9-15am-at-ngee-ann-polytechnic-convention-centre>> (accessed 22 December 2021).

<sup>2</sup> Ong Ye Kung, “Keynote Address by Minister for Education Ong Ye Kung, at the Economic Society of Singapore Dinner” (25 July 2018), *Ministry of Education, Singapore*, online: <<https://www.moe.gov.sg/news/speeches/20180725-keynote-address-by-minister-for-education-ong-ye-kung-at-the-economic-society-of-singapore-dinner>> (accessed 22 December 2021).

<sup>3</sup> Lawrence Wong, “Addendum To The President's Address” (25 August 2020), *Ministry of Education, Singapore*, online: <<https://www.moe.gov.sg/news/press-releases/20200825-addendum-to-the-president-s-address-1>> (accessed 22 December 2021).

<sup>4</sup> *Constitution of the Republic of Singapore* (1999 Rev Ed Sing), art 16 [*Singapore Constitution*].

been subject to constant Parliamentary discussion. In March 2020, Nominated Member of Parliament Anthea Ong asked the Ministry of Education (“MOE”) how MOE could avoid discrimination (in the wording of Article 16) vis-à-vis primary school admissions.<sup>5</sup> MOE’s response, through then-Second Minister for Education Indraneel Rajah, was that a system of selection is needed when “the number of students applying to a [primary] school exceeds the number of available places”. Furthermore, given that there are “there are no examination results to look at for P1 admission”, Minister Rajah also considered “children of alumni who have a strong attachment to the school and wish their children to have a similar experience as they did” as a “*valid justification* for some level of priority admission”.<sup>6</sup>

Whilst the reply by Minister Rajah seems to be justified in terms of policy, it falls short of addressing an underlying issue. Are priority admissions for primary schools, based on alumni memberships, constitutional?

#### *B. Alumni associations and priority admissions*

Alumni associations, or Old Boy’s/Girl’s Associations, have existed in Singapore for many years. Historically, these associations were politically active,<sup>7</sup> and were even alleged to be a front for the now defunct Barisan Socialis.<sup>8</sup> However, in more recent years, these alumni associations have left the state of political activism in the 1950s and 1960s behind, and are now known to be a viable pathway towards priority admissions in primary schools.<sup>9</sup>

Priority admissions, in the context of Singapore’s primary school admissions process, refer to the annual registration exercise which is divided into several phases. The following table summarises the details of each phase:<sup>10</sup>

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<sup>5</sup> *Parliamentary Debates Singapore: Official Report*, vol 94 at Question 2 (4 March 2020) (Oral Answers to Questions).

<sup>6</sup> *Ibid.*

<sup>7</sup> Justus M van der Kroef, “Nanyang University and the Dilemmas of Overseas Chinese Education” (1964) 20 *China Q* 96 at 113.

<sup>8</sup> *Parliamentary Debates Singapore: Official Report*, vol 22 at col 1033-1034 (19 December 1963) (Mr Ong Pang Boon).

<sup>9</sup> Specifically, Phase 2A(1) and 2A(2).

<sup>10</sup> Ministry of Education, “Registration phases and key dates” (2021), online: <<https://www.moe.gov.sg/primary/p1-registration/registration-phases-key-dates/>> (accessed 4 May 2021) [MOE, “Registration Phases and key dates”].

| Phase               | Details  |
|---------------------|--|
| 1                   | For families who have another child currently studying at the preferred school   |
| 2A(1)               | For parents who are former members of the school (holding alumni membership) and members of the Advisory or Management Committee of the preferred school   |
| 2A(2) <sup>11</sup> | For former members (inclusive of both parents and siblings) of the school (not holding alumni membership), staff members of the school and children in a MOE Kindergarten under or within the purview of and located within the preferred school |
| 2B                  | For parent volunteers, members who are endorsed by a church/clan connected to the preferred school and members who are endorsed as an active community leader  |
| 2C                  | For children eligible for P1 but not yet registered into a Primary School  |
| 2C<br>Supplementary | For children eligible for P1 but not yet registered into a Primary School after Phase 2C   |

*Figure: Summary of the phases of primary school admissions*

It may be noted that, accounting for the various phases of registration, MOE has also set aside a minimum number of 40 places for non-alumni affiliated students (*ie*, Phases 2B and 2C) in every primary school.<sup>12</sup> This article will focus on admissions based on Phase 2A(1), where registration to admit a child is based upon alumni priority and proof of membership in the affiliated alumni association.<sup>13</sup>

### III. ORIGINS OF ARTICLE 16

<sup>11</sup> The amended admissions process will see “Phases 2A(1) and 2A(2) [being combined] into a single Phase 2A”: Ministry of Education, “Changes to the Primary 1 (P1) Registration Framework” (Sept 2021), online: <<https://www.moe.gov.sg/primary/p1-registration/changes-to-p1-registration>> (accessed 22 December 2021).

<sup>12</sup> *Parliamentary Debates Singapore: Official Report*, vol 94 at Question 38 (19 November 2018) (Mr Ong Ye Kung) [2018 Debate].

<sup>13</sup> MOE, “Registration Phases and key dates”, *supra* note 10.

As the Constitution is the supreme law of Singapore, school admissions based on descent are *prima facie* prohibited and ought to be unconstitutional. Nevertheless, Article 16 has never been litigated before the Singapore courts. As such, the origins of Article 16 may be helpful in understanding how ‘descent’ should be understood.

Article 16 was discussed in both the Reid Commission Report<sup>14</sup> and the Wee Commission Report<sup>15</sup>. This section shall consider them in turn.

The Reid Report is relevant as its recommendations were incorporated into the Malaysian Federal Constitution, which was later transplanted to Singapore when she gained independence in 1965. Two points can be made about the Reid Report. First, it sets out Article 12 (which was the initial promulgation of Article 16) as a “fundamental individual right ... generally regarded as an essential condition for a free and democratic way of life”.<sup>16</sup> Second, and more importantly, the Reid Report makes clear that such rights are *enforceable* and the Courts can annul “any attempt to subvert them whether by legislative or administrative action or *otherwise*”.<sup>17</sup>

This position remained unaltered when the Wee Report was published in 1966. The only significant recommendation and amendment as a result of the Wee Report was the removal of financial aid articles which carved out special exceptions for the Malays and their related institutions.<sup>18</sup>

However, neither report addressed how Article 16 was to be defined, and the scope of its prohibition based on ‘descent’ remains unclear.

Notwithstanding the uncertain scope of the word ‘descent’ as it appears in Article 16, its ordinary meaning remains relevant. The ordinary meaning of ‘descent’ is defined as a person’s “kinship ties to another”.<sup>19</sup> This definition would sufficiently cover the ‘parents’ who are eligible under Phase 2A(1); it would not extend to relatives or multi-generational relationships, who may be covered under a

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<sup>14</sup> Federation of Malaya Constitutional Commission Report (1956-1957) [*Reid Report*].

<sup>15</sup> Report of the Constitutional Commission (1966) [*Wee Report*].

<sup>16</sup> Federation of Malaya Constitutional Commission, “Federation of Malaya Constitutional Commission Report” (1956-1957) at [161]-[162].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Wee Report*, *supra* note 15 at para 39.

<sup>19</sup> Britannica, The Editors of Encyclopaedia, “Descent”, *Encyclopaedia Britannica*, online: <<https://www.britannica.com/topic/descent>> (accessed 22 December 2021).

broader definition of ‘descent’. In addition, reference can be also made to Part X of the Constitution (Citizenship), which supports this limited definition. This is because a newborn will be able to acquire Singapore citizenship via descent if “his father or mother is a citizen of Singapore”.<sup>20</sup> Taken together, it is argued that the definition of ‘descent’ under Article 16 only contemplates a child’s direct parents, at least in the context of Phase 2A(1) admissions.

#### IV. ORIGINS OF THE PRIMARY SCHOOL ADMISSION POLICY

The origin of this policy also plays a crucial role in determining how the court might approach the issue of constitutionality, if such an issue arises. As it is currently unclear if the primary school admission policy stems solely from executive discretion or from statute/subsidiary legislation, both will be considered in turn.

On one hand, it can be argued that the policy originates from executive discretion. There are three main reasons which support this. First, the earliest mention of the primary school registration process pre-dates the Education Act<sup>21</sup> and was made known to the public through press statements rather than through Parliament.<sup>22</sup> This practice continued even after the enactment of the Education Act.<sup>23</sup> For example, the first mention of the priority admission scheme, consisting of a Phase similar to the present day Phase 2A(1), can be found in a 1965 MOE statement that was published by the press.<sup>24</sup> Second, a clearer reference to the policy as an executive/administrative act can be gleaned from the Ministerial Statement made by then-Minister for Education Tony Tan in 1985. Upon stating MOE’s intention to abolish the graduate mothers’ scheme, Minister Tan also mentioned that

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<sup>20</sup> *Singapore Constitution*, *supra* note 4, art 122(1)(b).

<sup>21</sup> (Cap 87, 1985 Rev Ed Sing) [*Education Act*]. The *Education Act* commenced on 13 December 1957.

<sup>22</sup> Department of Information Services, “Singapore Government Press Statement: Registration of Children to Government Chinese Primary Schools” (22 June 1957), online: <<https://www.nas.gov.sg/archivesonline/speeches/record-details/4e971359-bc60-11e6-b045-0050568939ad>> (accessed 22 December 2021).

<sup>23</sup> Department of Information Services, “Singapore Government Press Statement: Registration for Admission to Chinese Primary Schools” (23 June 1958), online: <<https://www.nas.gov.sg/archivesonline/speeches/record-details/7b050178-bcf7-11e6-b045-0050568939ad>> (accessed 22 December 2021).

<sup>24</sup> The Straits Time, “Registration of Primary One children to begin” (9 June 1965), online: <<https://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes19650609-1.2.18>> (accessed 22 December 2021).

MOE will be reverting to its “1982 guidelines” vis-à-vis primary school admissions.<sup>25</sup> Third, this policy can also be viewed as an executive ‘direction’ in the enforcement of the Compulsory Education Act.<sup>26</sup>

Alternatively, it can be argued that this policy originates from the statutory provisions of the Education Act<sup>27</sup> (and related subsidiary legislation). There are two main reasons which support this. First, during the parliamentary debates surrounding the initial passing of the Act, the then-Minister for Education Chew Swee Kee broadly emphasised that the Act was “[not to] discriminate against any particular group or schools or community or teachers” and stated that the Act’s “overriding purpose ... is to protect the interests of the children”.<sup>28</sup> As such, the historical purpose of the Act seems wide enough to cover matters such as school admissions. Second, the admission policy is not an executive/administrative act as it seems to originate from subsidiary legislation that has been enacted by the Minister under the Education Act. Such subsidiary legislation can relate to “all matters regarding the conduct and efficiency of schools”<sup>29</sup> and “shall be published in the Gazette and shall be presented to Parliament as soon as possible after publication”.<sup>30</sup> One such subsidiary legislation is the Education (Grant-in-aid) Regulations, which expressly lays out the applicable admission policy for certain government-aided schools.<sup>31</sup> These schools consist of primary schools,<sup>32</sup> which are obliged to maintain the same standards as government schools “in respect of ... admission of pupils.”<sup>33</sup>

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<sup>25</sup> *Parliamentary Debates Singapore: Official Report*, vol 46 (14 May 1985) at col 30-33 (Ministerial Statement by Dr Tony Tan).

<sup>26</sup> *Compulsory Education Act* (Cap 51, 2001 Rev Ed Sing), s 6(3) [*Compulsory Education Act*]: “The Minister may give such directions, not inconsistent with the provisions of this Act, as to the performance of the duties and the exercise of the powers of the Board and the Board shall give effect to any such directions.” [Emphasis added.]

<sup>27</sup> *Education Act*, *supra* note 21, s 11: “The Council shall advise the Minister upon any matter of educational policy or development which may be referred to it by the Minister or which it may itself propose.” [Emphasis added.]

<sup>28</sup> *Parliamentary Debates Singapore: Official Report*, vol 3 at col 1530 (24 April 1957) (Mr Chew Swee Kee) [*1957 Debate*].

<sup>29</sup> *Education Act*, *supra* note 21, s 61(1).

<sup>30</sup> *Education Act*, *supra* note 21, s 61(2). See also s 23(1)(a) of the *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), which provides that “[s]ubsidiary legislation made under any Act or other lawful authority shall — (a) unless it is otherwise expressly provided in any Act, be published in the Gazette ...”

<sup>31</sup> *Education (Grant-in-aid) Regulations* (Cap 87, Reg 3, 2013 Rev Ed Sing), reg 8 [*Education (Grant-in-aid) Regulations*]: “An aided school shall not refuse any person admission to study in the school on the grounds only of religion or race.” [Emphasis added.]

<sup>32</sup> *Ibid*, The Schedule.

<sup>33</sup> *Ibid*, reg 7.

## V. IS PHASE 2A(1) OF THIS POLICY CONSTITUTIONAL?

For the purpose of evaluation, this article will utilise cases related to Article 12 to evaluate the constitutionality of this policy. There are two reasons for this approach. First, Article 16 is broadly similar to Article 12. It is one of the few ‘equality’ articles in the Constitution that was expressly considered as a fundamental and enforceable right. Second, a plain reading of Article 16 suggests that it should be interpreted consistently with Article 12. Article 16(1) expressly states that the article ought to be interpreted “without prejudice to the generality of Article 12”. As such, the extensive discussion of discrimination in Article 12 cases is relevant to Article 16, which also concerns discrimination.

Furthermore, in light of *Syed Subail bin Syed Zin v Attorney-General*,<sup>34</sup> it seems that the determination of constitutionality for both executive and statutory acts would follow some form of the reasonable classification test.

### *A. Challenging the policy as an Executive/ Administrative Act*

The test of “intentional and arbitrary discrimination”<sup>35</sup> vis-à-vis executive actions seems to be no longer applicable in light of *Syed Subail’s* two-step framework.<sup>36</sup> As such, the *Syed Subail* framework will be utilised to evaluate the constitutionality of executive actions vis-à-vis the ‘descent’ limb of Article 16.

It is clear that Phase 2A(1) treats equally situated children differently. These children are equally situated in that they are all eligible for primary school admission upon reaching the requisite school age.<sup>37</sup> Differential treatment occurs as parents cannot seek to admit their children under Phase 2A(1) unless it is shown that they are alumni of the school.

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<sup>34</sup> [2021] 1 SLR 809 [*Syed Subail*].

<sup>35</sup> *Eng Foong Ho and others v Attorney-General* [2009] 2 SLR(R) 542 at [30]-[31].

<sup>36</sup> *Syed Subail*, *supra* note 34 at [62]: “... (a) whether it resulted in the appellant being treated differently from other *equally situated* persons; and (b) whether this differential treatment was reasonable in that it was *based on legitimate reasons*”.

<sup>37</sup> *Compulsory Education Act*, *supra* note 26, s 2 provides that a “child of compulsory school age’ means a child above the age of 6 years who has not yet attained the age of 15 years and who satisfies such conditions for receiving primary education as the Director-General may determine ...”.

Nevertheless, this article submits that the differential treatment is reasonable as it is based on “legitimate reasons”.<sup>38</sup> The government has repeatedly, in good faith, fine-tuned and explained the objectives behind this policy. For instance, Prime Minister Lee Hsien Loong has stated that this policy adequately balances the need for primary schools to “to develop its traditions, its history, and its identity” without becoming “closed institutions”.<sup>39</sup> Similar reasons have also been reflected in various Ministerial addresses to Parliament.<sup>40</sup>

The constitutionality of this policy is further supported when “due regard [is given] to the nature of the executive action”. This would include the fact that the executive act is taken on a “broad-brush basis”<sup>41</sup> and that the government has committed to reserve 40 places for children who have no prior connections to the school.<sup>42</sup> As such, if the implementation of Phase 2A(1) is treated as an exercise of executive/administrative discretion, it is unlikely to be unconstitutional.

### B. *Challenging the policy in light of the Education Act*

As mentioned previously, subsidiary legislation under the Education Act has stipulated some form of admission policy for government-aided schools. In addition, these schools have to “conform ... [and] maintain standards that are comparable with or similar to those of Government schools”.<sup>43</sup> This suggests that the admission policy found under the Grant-in-aid Regulations is generally representative of the existing admission scheme that has been applied to all government schools.

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<sup>38</sup> *Syed Subail, supra* note 34 at [61].

<sup>39</sup> Lee Hsien Loong, “Prime Minister Lee Hsien Loong’s National Day Rally 2013 (English)” (18 August 2013), *Prime Minister’s Office Singapore*, online: <<https://www.pmo.gov.sg/Newsroom/prime-minister-lee-hsien-loongs-national-day-rally-2013-english>> (accessed 4 May 2021).

<sup>40</sup> *2018 Debate, supra* note 12: “... we do not want our schools to become segregated, as it will reduce opportunity for social mixing and weaken Singapore’s social fabric. Thus, we try to encourage as much mixing and mingling as possible. We adjusted primary and secondary school registration to ensure primary schools do not become closed circles.” See also *Parliamentary Debates Singapore: Official Report*, vol 90 at Question 81 (12 August 2013) (Mr Heng Swee Keat): “Many alumni parents want their children to experience the same ethos, values and school culture that they had as students and they feel strongly that alumni priority should remain. On the other hand, parents who are not alumni but who are keen to get their children into those schools argue that there should be more diversity within each school, and to realise this, we should give less priority or allocate fewer places to children of alumni.” [*2013 Debate*].

<sup>41</sup> *Syed Subail, supra* note 34 at [63].

<sup>42</sup> *Ibid.*

<sup>43</sup> *Education (Grant-in-aid) Regulations, supra* note 31, reg 7.



Specifically, the subsidiary legislation stipulates a negative obligation to ensure schools do not “refuse any person admission to study ... on the grounds only of religion or race”. The lack of mention of ‘descent’ as a prohibited basis for refusing admission suggests that it may be permissible to refuse a child’s admission to a primary school solely on the basis of his or her descent. This seems to be reminiscent of Phase 2A(1), where parents seeking admission for their child under the Phase would be *prima facie* rejected if they are unable to show their associated alumni membership(s).

As such, there is a limited but plausible situation where an aggrieved applicant to those schools seeks to challenge the school’s admission policy as an unconstitutional statutory classification under the abovementioned subsidiary legislation. In this sense, the reasonable classification test<sup>44</sup> is relevant in evaluating the constitutionality of this policy as a statutory classification.

Akin to a constitutional challenge to the policy as an executive act, it is clear that the policy allows room for schools to discriminate between children who have parents affiliated to the school on the basis of their alumni membership and children who do not have such connections. As Phase 2A(1) limits the opportunity to admit a child into a particular primary school based on his or her parents’ alumni status, it does lead to “different treatment to different people”.<sup>45</sup> In other words, this policy as interpreted from the Grant-in-aid Regulations should be *prima facie* discriminatory based on the ‘descent’ limb of Article 16.

Similarly, there is a distinct differentiation “capable of being apprehended by the intellect or understanding, as opposed to the senses”.<sup>46</sup> In seeking to admit a child under Phase 2A(1), parents have to produce evidence of their membership in the related alumni association.

However, the last stage of the test (*ie*, the ‘nexus’ between the differentia and the purpose sought to be achieved by the legislation) warrants further discussion. Given the possibility to view Phase 2A(1) as originating from statute (*ie*, the Education Act and its subsidiary legislation), a greater emphasis should be placed on the statute when evaluating the policy’s constitutionality. Whilst the Education Act is meant to unify educational policies in the 1950s,<sup>47</sup> primary school admissions were

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<sup>44</sup> *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 at [57]-[60] [*Lim Meng Suang*].

<sup>45</sup> *Wee Report*, *supra* note 15 at para 33 (which defined what it means by discriminatory in the context of the then-Article 8).

<sup>46</sup> *Lim Meng Suang*, *supra* note 44 at [67].

<sup>47</sup> *1957 Debate*, *supra* note 28 at col 1523 (Mr Chew Swee Kee) and at col 1530 (Mr D. S. Marshall).

not specifically considered.<sup>48</sup> In this sense, it seems that Phase 2A(1) (as viewed from the Grant-in-aid Regulations) is unconstitutional as there is simply no nexus between the purpose and object of the Act vis-à-vis the admissions policy as part of the subsidiary legislation. Furthermore, the court is not acting like a ‘mini-legislature’<sup>49</sup> by finding subsidiary legislation unconstitutional. Rather, it is upholding the supremacy of the constitution as a “first order right of equality”.<sup>50</sup>

## VI. SUGGESTIONS AND CONCLUSION

The earlier section argues that, in limited circumstances, it is possible for Phase 2A(1) to be found unconstitutional under Article 16. Nevertheless, such a challenge may be academic should there be further clarifications to the policy or legislative amendments to the Education Act. For instance, the admissions policy can be expressly legislated as part of the Education Act, thus giving a clear nexus to the differentia that arises from the current policy.

There remain other aspects of the public education system where alumni affiliation may play a significant role. For instance, alumni affiliation may play a role when a student decides to appeal for admission into a Junior College or other pre-university course.<sup>51</sup> As such, the government could go beyond balancing diversity and alumni support in primary schools<sup>52</sup> by reconsidering the role that alumni associations play in the overall education infrastructure in Singapore.

In the age of continued disruptions and discontent towards apparent inequity, it is time for MOE to give this matter “serious consideration”<sup>53</sup> and refine parts of the primary school admission policy which may be unconstitutional. In the words of then-Senior Minister of State Lawrence Wong (who had initiated the recent review of the primary school registration process and is the current Minister for Finance), any suggestions are welcomed as the government is committed to “review[ing] [the

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<sup>48</sup> *Ibid* at col 1523-1525 (Mr Chew Swee Kee).

<sup>49</sup> *Lim Meng Suang*, *supra* note 44 at [84].

<sup>50</sup> Chan Sek Keong, “Equal Justice Under the Constitution and Section 377A of the Penal Code: The Roads Not Taken” (2019) 31 SAclJ 773 at 826.

<sup>51</sup> Ministry of Education, “Joint Admissions Exercise (JAE)” (2021), online: <<https://www.moe.gov.sg/post-secondary/admissions/jae/submit-appeal/>> (accessed 4 May 2021) states that ultimately “[a]ppeals are evaluated on a *case-by-case basis* by the institutions. A place may be granted only when compelling reasons are presented and vacancies are available.” [Emphasis added.]

<sup>52</sup> See *2013 Debate*, *supra* note 40.

<sup>53</sup> *Ibid*.

primary school admission policy] regularly ... [and will] look at strategies that are going to be sustainable and that will yield more impact.”<sup>54</sup>

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<sup>54</sup> *Parliamentary Debates Singapore: Official Report*, vol 89 at 598 (10 September 2012) (Oral Answers to Questions).