BASIC EDUCATION RIGHTS HANDBOOK

EDUCATION RIGHTS IN SOUTH AFRICA

FARANAAZ VERIAVA with ANSO THOM & TIM FISH HODGSON

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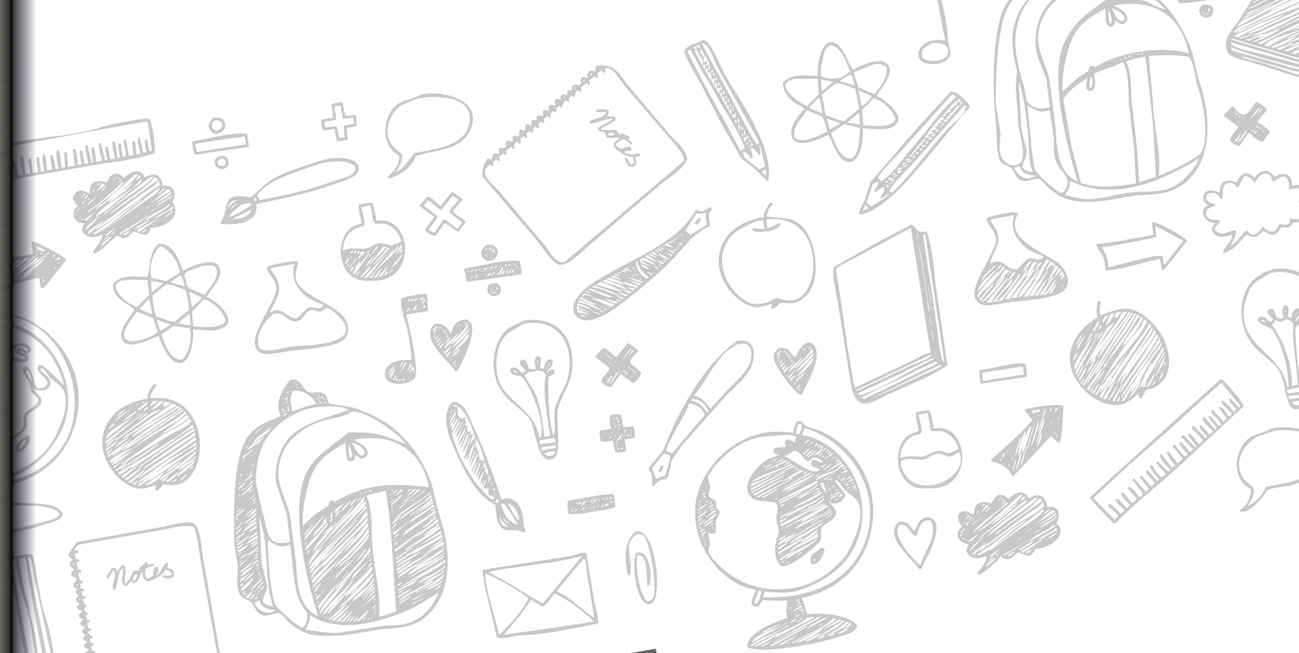

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FARANAAZ VERIAVA with ANSO THOM & TIM FISH HODGSON

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PREFACE

Faranaaz Veriava

Legal literacy is an essential tool of rights-based struggles. Legal literacy seeks to empower people and communities without any formal legal training to know and understand the law and its impact, so that they can engage and apply the law in a manner that improves the quality of their lives.

This is the purpose of the *Basic Education Rights Handbook*.

It aims to empower communities, school governing bodies, principals, teachers and learners to understand education law and policy, and to know when learners' rights have been violated and what steps are required to protect those rights.

For example, poor parents who know they have the right to apply for an exemption from school fees can resist efforts by a school to turn their child away because they cannot afford the fees being charged. Instead, parents can demand the opportunity to apply for the exemption.

This *Basic Education Rights Handbook* aims to be as comprehensive and inclusive as possible, by discussing a wide spectrum of areas of education law that potentially have an impact on learners' rights. Each chapter provides an overview of the law, policy and case law on a particular issue, and uses real-life examples that give context to the issue under discussion. Finally, each chapter provides the user with tools for remedying issues that may arise in respect of the area under discussion.

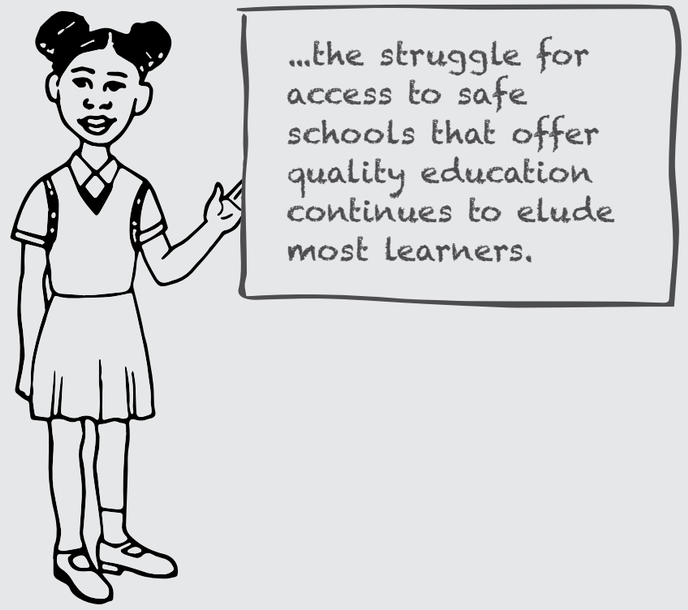
This *Basic Education Rights Handbook* was conceptualised and edited by the SECTION27 team, but is the result of collaboration between many civil-society organisations involved in education-rights activism, litigation and advocacy. The organisations involved in this book's development are: Equal Education, The Equal Education Law Centre, The Centre for Child Law, The Legal Resources Centre, The Southern African Litigation Centre, and the Studies in Poverty and Inequality Institute. Members of SECTION27 also authored some chapters. Each author has contributed to the handbook based on her or his personal and professional experience and expertise – through either research or litigation – in a particular area.

A noteworthy feature of the handbook is the approach taken in respect of learners with disabilities, across the spectrum of available schooling options in terms of South Africa's inclusive education system: special schools, full-service schools and ordinary schools. While the *Basic Education Rights Handbook* features a chapter that focuses specifically on learners with disabilities, in keeping with the philosophy of inclusive education, almost every chapter has integrated the particular concerns for learners with disabilities into the topic under discussion.

Also noteworthy is the chapter on the funding of basic education. The structure and format of this chapter differs from those of others in the handbook. This is because it seeks to provide a detailed and comprehensive rights-based overview of the processes for the funding of basic education. The purpose of this is to assist education-rights activists to understand the funding of basic education more holistically, and to develop campaigns for a more progressive funding model. It also seeks to provide insights into how basic-education stakeholders may better engage public participation processes concerning funding for basic education.

For the majority of South Africa's learners, the state of our education remains a major concern. Organisation to improve the education system is a matter of significant urgency.

Without resources such as adequate infrastructure or equipment, textbooks and teachers, historically disadvantaged schools continue to exist and function at sub-optimal levels. The impact of this is evident in educational outcomes in these schools – which constitute the majority of South African schools. Added to this are the many barriers that continue to impede access to quality education for specific groups of learners. These barriers include school fees, language barriers, and the exclusion from school of pregnant learners. Finally, levels of violence in schools – including gender-based violence – remain excessive; schools are not the safe spaces we require for our children. This is particularly true for children with disabilities, who often live in special-school hostels.



In short, the struggle for access to safe schools that offer quality education continues to elude most learners.

As a legal literacy aid, therefore, this handbook can help to build and strengthen an education movement fighting for education reform, so that each and every learner may live up to her or his potential. The importance of this movement cannot be overstated, and extends far beyond improving the numeracy and literacy of children throughout South Africa. As the Supreme Court of Appeal noted recently in the case of *Minister of Basic Education and Others v Basic Education for All and Others*, 'Basic education should be seen as a primary driver of transformation in South Africa.'

The SECTION27 editorial team would like to thank each organisation and individual who gave their time and knowledge so generously to the development of this handbook.

We would also like to acknowledge and thank Karin Schimke, the plain-language editor, for her efforts in editing and simplifying technical jargon to make the handbook as user-friendly as possible.

Let us educate to liberate.

Faranaaz Veriava is legal counsel at SECTION27. She has a BA LLB from the University of the Witwatersrand and an LLM in Human Rights and constitutional Practice from the University of Pretoria, where she is currently registered for an LLD in education.

CONTENTS

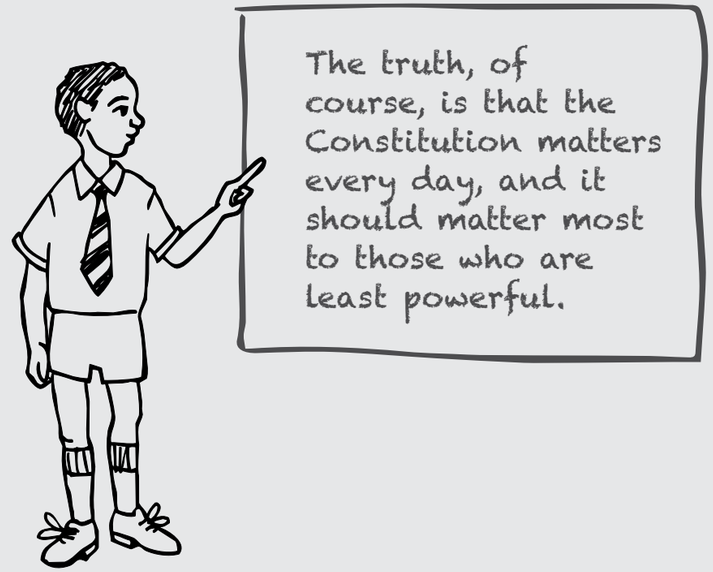
ACRONYMS

ASIDI	Accelerated School Infrastructure Delivery Initiative
ACRWC	African Convention on the Rights and Welfare of the Child
ANA	Annual National Assessments
ANC	African National Congress
CALS	Centre for Applied Legal Studies
CNE	Christian National Education
BEFA	Basic Education For All
CAPS	Curriculum and Assessment Policy Statements
CC	Constitutional Court
CCL	Centre for Child Law
CNE	Christian National Education
CRL	Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities
CEDAW	The Convention for the Elimination of all forms of Discrimination Against Women
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DBE/DOE	Department of Basic Education
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
DORA	Division of Revenue Act
DOT	Department of Transport
DPME	Department of Planning, Monitoring and Evaluation
EE	Equal Education
EELC	Equal Education Law Centre
ELRC	Education Labour Relations Council
EEA	Employment of Educators Act
EMIS	Education Management Information System
EPR	Estimates of Provincial Revenue and Expenditure
FAL	First Additional Language
FEDSAS	Federation of Governing Bodies of South African Schools
FFC	Financial and Fiscal Commission
GDP	Gross Domestic Product
GHS	General Household Surveys
HOD	Head of Department
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEC	Independent Electoral Commission
ISASA	Independent Schools Association of South Africa
LGBTIAQ	Lesbian, Gay, Bisexual, Transgender, Intersex, Asexual and Queer
LOLT	Language of Learning and Teaching
LURITS	Learner Unit Record Information and Tracking System
LRA	The Labour Relations Act
LRC	Legal Resources Centre
LTSM	Learner Teacher Support Materials
KZN	KwaZulu-Natal
MEC	Member of the Executive Council (this is like the minister of a provincial department)
MP	Member of Parliament
MTEC	Medium Term Expenditure Committee
MTEF	Medium Term Expenditure Framework
MTBPS	Medium Term Budget Policy Statement
NAPTOSA	The National Professional Teachers' Organisation of South Africa
NECT	National Education Collaborative Trust
NEEDU	National Education Evaluation and Development Unit
NCOP	National Council of Provinces
NDP	National Development Plan
NEPA	National Education Policy Act
NEIMS	National Education Infrastructure Management System
NIDC	National Interdepartmental Committee
NPEP	National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment
NSC	National Senior Certificate
NNSSF	National Norms and Standards for School Funding
NT	National Treasury
OBE	Outcomes-Based Education
OBI	Open Budget Index
OGOD	Organisasie vir Godsdienste-Onderrig en Demokrasie
PED	Provincial Education Department
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act (referred to in this handbook as 'the Equality Act')
PPM	Post-Provisioning Model
PSAM	Public Service Accountability Monitor
RCL	Representative Council of Learners
R2EWCD	The Right to Education of Children with Disabilities Campaign
RNCS	Revised National Curriculum Statements
SACE	South African Council of Educators
SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality
SADC	Southern African Development Community
SADTU	The South African Democratic Teachers Union
SAHRC	The South African Human Rights Commission
SAOU	Suid-Afrikaanse Onderwysersunie (The South African Teachers' Union)
SAL	Second Additional Language
SALGA	South African Local Government Association
SAPS	South African Police Service
SARS	South African Revenue Services
SASA	The South African Schools Act (referred to in this handbook as 'The Schools Act')
SA-SAMS	South African School Administration and Management System
SCA	Supreme Court of Appeal
SGB	School Governing Body
SIAS	Screening, Identification, Assessment and Support Policy
SONA	State of the Nation Address
SPII	Studies in Poverty and Inequality Institute
TIMSS	The Trends in International Mathematics and Science Study
VAT	Value-Added Tax
Umalusi	This is the name given to the Council for Quality Assurance in General and Further Education and Training
UNCRPD	The United Nations Convention on the Rights of Persons with Disabilities
UNDHR	The Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNICEF	The United Nations International Children's Emergency Fund
WCED	Western Cape Education Department
WHO	World Health Organisation
WP6	Education White Paper 6: Building an Inclusive Education and Training System

INTRODUCTION

EDUCATION, CONFIDENCE AND THE CONSTITUTION

Sisonke Msimang



The final Constitution was adopted when I was twenty-two years old. The following year, I began working full-time in the civil society sector. In those days, no matter what area of non-governmental life you worked in – whether it was health, or education, or housing, or water and sanitation – your efforts were grounded in the Constitution. In those early days, democracy was still brand new, and there was a lot of interest in the Constitution. Many people carried a small pocket version of the Constitution with them.

Early in my career I was hired by the African Gender Institute, at the University of Cape Town, to train public servants and people who worked for NGOs on gender equality. I could not have been more proud. In every workshop, we spent a lot of time talking about the Bill of Rights and the Constitution. Whenever I referred to something in the Constitution, I could always count on a few people in the course opening up their pocket Constitutions to make sure what I said was correct.

Our office was always stocked with those small Constitutions, and community meetings almost never took place without copies being handed around. Today, in most of the community-based events I attend, I see T-shirts are the new gift of choice.

Over time, as the excitement about the shiny new document so many people fought for has died down, I have noticed that fewer and fewer people I come across seem familiar with the language of the Constitution – and how it relates to their lives, to their rights and to what they can expect in their daily living.

In part, this was inevitable. We are becoming 'normal'; and so there is no need to be very excited that we have rights. We now accept them as part of our democracy.

I've noticed something else, though: over the last few years, our country has had more and more political dramas. When these dramas unfold, the Constitution is often invoked. South Africans have learned to talk

about the Constitution in the context of political power. This is as it should be – the Constitution is the guardian of the separation of powers. When all else fails, the Constitution stands firm.

Still, I have been worried lately; because one of the consequences of frequently settling political matters through legal means is that ordinary people can begin to see the Constitution as something that only matters when the stakes are very high, when the very life of the nation is at stake – and that the Constitution is for the powerful.

The truth, of course, is that the Constitution matters every day, and it should matter most to those who are least powerful.

Two decades into our new dispensation, many of the least powerful members of our society – who continue to live in miserable circumstances, under the continuing yoke of oppression – are asking questions about the importance of the Constitution. It's hard not to notice that even though a number of cases have been won by poor people and communities, often the circumstances of those in whose favour the court has found have not changed.

In the words of Justice Albie Sachs: 'We haven't achieved quality in daily life. There are massive discrepancies in terms of wealth and confidence and access to resources, still based largely on colour, in South Africa.'

Sachs' use of the word 'confidence' in this sentence strikes me as important. Confidence is the feeling or belief that you can have faith in or rely on someone or something. The idea that our society is divided not only along race and class lines, but along lines determined by how much confidence you can have in yourself, in the institutions that exist around you and in the future, is unsettling.

Indeed, expressed this way, the 'discrepancy in confidence' is possibly the most heartbreaking aspect of our country's journey. For South Africa, a country that has achieved so much and at such great human expense – and that has such an astounding constitutional framework – to produce children and young people who lack confidence is a tragedy of epic proportions.

I can't imagine a worse way to bring up our nation's children than to starve them of knowledge, to subject them to all manner of indignities at school and on their walks to school, to force them to use sub-standard facilities and expose them to predatory or cruel teachers. For too many of South Africa's learners, this is the reality.

We are faced with a conundrum. Many black South Africans lack confidence in the systems that affect their daily lives – public transport, health and education being key. Yet these systems have been put in place precisely to give them confidence in the future. At the same time, the Constitution no longer enjoys the place of respect it once held at the centre of our daily lives. This means that when we need it the most, faith in the Constitution is far too low.

The practical implications are profound. Those who are frustrated are alienated and disaffected, even though the Constitution offers them many ways forward. The Constitution – proactively applied – can be used to mobilise, well before crises arise in our communities.

This confluence of doubt and a lack of confidence lies at the heart of our deepest challenges.

That is precisely why this manual is so important. This handbook assumes that the people who live in this country are able to think about the Constitution

> For South Africa, a country that has achieved so much and at such great human expense [...] to produce children and young people who lack confidence is a tragedy of epic proportions.

not as a large and incomprehensible document that has let us down; but as a tool that we have not sufficiently learned how to use. It recognises the need to re-ignite a movement for the use of the Constitution in daily life. It seeks to remind us that once we were a country that ensured everyone access to and an ability to understand the contents of the Constitution, whether or not we could read and write or speak in English.

There can be no better way for children to learn confidence than through a thorough and deep understanding of their constitutional rights – not just to education, but to dignity, and safety, and water, and housing, and all the elements that contribute to their well-being.

This manual uses the Constitution as its starting point. As a collaboration between public-interest organisations that have been working in different areas of education, its purpose is to encourage and provide information to others to initiate their own activism on education issues affecting their children and communities.

The case studies in this handbook remind us that the Constitution has no meaning unless we talk about it; and that is has no power unless we act to make it real in our lives – by demanding better standards from educators and officials, and expecting more from administrators and bureaucrats. In this manual we see the blossoming of a radical idea: the idea that the structural benefits that accrue from an educated population include confidence and self-esteem, and a belief in the future.

We educate our children so that they can join the labour force, of course; but education is not instrumental. It creates a healthy, active and engaged rights-bearer; one who is also prepared to take on social duties. The education system is the engine room not only of our economy, but of our democracy.

Yet we are all too aware that this system is in crisis. Many of our schools are not functioning optimally: textbooks arrive late, conflicts in communities result in infrastructure being destroyed. Similarly, on some days it seems our constitutional democracy is in a state of disarray.

Still, there are many thriving communities in which schools are vibrant centres of learning, and where young people hold their heads up high because they know the Constitution was written with them in mind. It is these communities that serve as a guiding light, a reminder that South Africa knows how to be confident.

This manual reminds us that our work is not yet done. Each case study offers a practical example of how we can move from promises to action. It profiles everyday heroes – children and youth and community leaders who have decided to have confidence, in themselves and in the future.

In these times of cynicism and chicanery, this manual offers that rarest of commodities: hope. We all know, however, that hope without progress is mere foolishness. So this book offers a dose of practical momentum.

Most importantly, the contributions in this manual are all written in the spirit of Mwalimu Julius Nyerere, who said: 'Education is not a way to escape poverty; it is a way of fighting it.' Above all else, in these times of stagnation and paralysis, the words in the pages that follow offer us all a way forward.

A luta continua,

Sisonke

Sisonke Msimang is a South African writer and activist. Her work centres on democracy, human rights and justice.

CHAPTER 1

THE CONSTITUTION AND THE RIGHT TO A BASIC EDUCATION

Chris McConnachie, Ann Skelton, Cameron McConnachie

INTRODUCTION

The South African Constitution is described as a 'transformative' document. This means that our Constitution seeks to change South Africa for the better, rather than keeping things as they are.

These transformative aims extend to our education system. The Constitution guarantees that everyone in South Africa has the right to a basic education which requires active measures to improve education in the country.

Apartheid left South Africa with a deeply unequal and dysfunctional education system. More than twenty years into democracy, the pace of change has been slow. A fortunate few receive a world-class education; for the majority, a basic education remains a hope rather than a reality.

In this chapter we provide a broad outline of the constitutional right to a basic education, explaining its place in the South African Constitution, the meaning of this right, and how it relates to other rights. We will also explain the important legal concepts and principles that will be used in the chapters to follow.

THE CONSTITUTION

South Africa has had two Constitutions since 1994.

The 'interim Constitution' (Constitution of the Republic of South Africa, Act 200 of 1993) paved the way for our new democracy.

The interim Constitution was replaced by the Constitution of the Republic of South Africa, 1996. The 1996 Constitution refined and developed many of the rights and principles contained in the interim Constitution.

When we talk about 'the Constitution' in this chapter, we are referring to the 1996 Constitution.

A BRIEF INTRODUCTION TO THE CONSTITUTION AND THE BILL OF RIGHTS

The right to a basic education is found in Section 29(1)(a) of the Constitution. Before we explore this right in greater detail, it is helpful to understand the nature of the South African Constitution and some important principles of constitutional law.

THE CONSTITUTION

The Constitution is the supreme law of South Africa. This means that all other laws and conduct must be consistent with the Constitution. No person may act in a way that conflicts with the Constitution – not even Parliament, or the President.

THE BILL OF RIGHTS

The Bill of Rights is contained in Chapter 2 of the Constitution. It sets out the fundamental rights of all people in South Africa; these include the right to a basic education.

South Africa is one of the few countries in the world that guarantee 'socio-economic' rights in their constitutions. Socio-economic rights are entitlements to basic goods and services that are necessary for a decent standard of living. The right to a basic education is one of these socio-economic rights, alongside the rights to further education, housing, healthcare, food, water, and social security.

WHO BENEFITS FROM THESE RIGHTS?

Most of the rights in the Constitution apply to everyone, including the right to a basic education. As we explain in greater detail below, this means that any person in South Africa possesses these rights, including non-citizens.

WHO HAS DUTIES?

For every right there is a duty. This means that if a person possesses a right, then someone else is legally required to do something, or to avoid doing something. This leads to the questions of who bears these duties, and what do these duties require?

The state has extensive duties under the Constitution. Section 8(1) of the Constitution provides that 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. Section 7(2) of the Constitution tells us that the state has a duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.

The 'state' is a broad term, used to refer to everyone from the President to the lowest-level government employee. Government schools are 'organs of state', and their principals and teachers (acting in their official capacity) carry out the functions of the state. School governing bodies, although they can make some decisions independently of the government, must also carry out the functions of the state.

The duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights' includes positive and negative duties.

- A positive duty is a duty to do something, such as the duty to provide learners with teachers and textbooks.
- A negative duty is a duty not to do something, such as a teacher's duty not to hit learners, or a school's duty not to prevent learners from coming to school.

Private individuals, including people, companies, and other organisations that are not a part of the state, also have duties under the Constitution. Section 8(2) provides that private individuals have constitutional duties, where this is required by the nature of the right and the nature of the obligation arising from the right. This means that the nature of the duty that a private individual owes will depend on the context.

In all cases, private individuals have a negative duty not to prevent others from receiving a basic education. For example, a person who owns the land on which a school is built has a duty not to prevent learners from gaining access to the school.

The question of whether or not private individuals have a duty to take positive steps to provide a basic education will depend on the circumstances. The extent of these positive duties is a matter of great debate, particularly in the case of independent schools.

LIMITATIONS

Rights and duties are not absolute. Often, rights are in tension, requiring choices to be made between competing interests. For example, corporal punishment in schools (beating learners) may be an expression of religious belief for some teachers and parents; but we prohibit corporal punishment, to protect the rights of children.

The state also has to make difficult choices about how best to allocate its time, capacity and resources to many competing demands. Improving the education system is a priority, but the government also has to address many other pressing needs in society. This means that some restrictions of the right may be permitted to allow the state to meet other needs.

When a right is restricted or is not sufficiently protected or fulfilled, we say that it has been 'limited'. Section 36(1) of the Constitution permits limitations of rights, provided that these limitations are authorised by law and that they are reasonable and justifiable. A strong justification is required for the limitation of any rights.

REMEDIES

Where rights have been unjustifiably limited, the courts must decide how best to fix this situation. This is called a 'remedy'.

A court must declare the offending law or conduct to be unconstitutional, known as a 'declaration of invalidity'. Beyond this declaration of invalidity, the courts can choose from a range of other remedies. They must exercise this choice by determining what is 'just and equitable' in the circumstances.

Some of the remedies that a court can choose may include, but are not limited to:

- An order requiring the state or a person to do something or not to do something (called an interdict). An example of an interdict is an order requiring the state to provide textbooks to all learners
- An interdict combined with an instruction to report to the court on the progress in carrying out the order (known as a 'structural' interdict) – for instance, an order directing the state to provide desks and chairs to all learners within three months, and to report to the court every month on progress made

THE LIMITATIONS CLAUSE

Section 36(1) of the Constitution is known as the limitations clause. It states:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

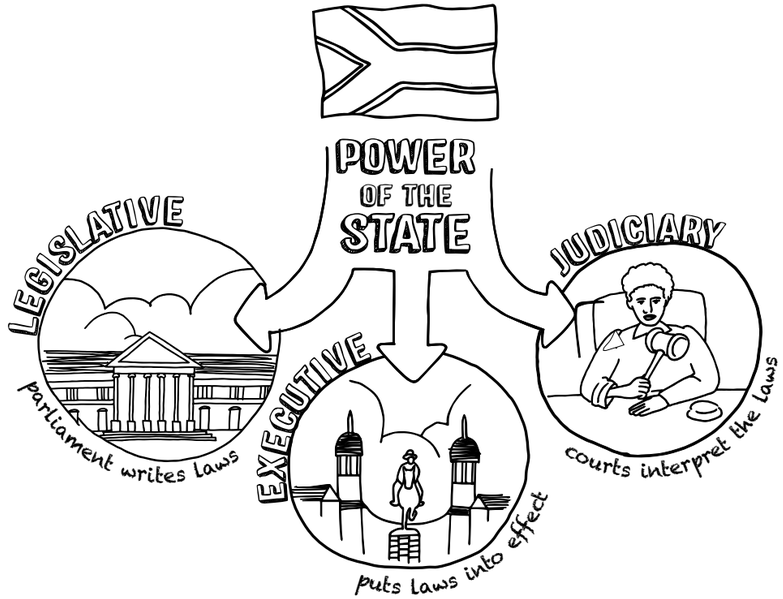
(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'



- An order that the parties enter into genuine discussion in an attempt to resolve their problems ('meaningful engagement'). For example, a court could order the state to consult with schools, parents and learners about whether their school should be merged with another one
- An order that the state or a person pay money to another person to compensate them (pay them back) for the violation of their constitutional rights ('constitutional damages'). This is reserved for exceptional cases
- Any combination of these remedies.

SEPARATION OF POWERS AND DEFERENCE

In this handbook you will often see references to the 'separation of powers' and 'judicial deference'.

The separation of powers requires that the power of the state should be split between three branches: the legislature (those who make the law at Parliament), the executive (those in government who give effect to the law), and the judiciary (those who interpret the law and resolve disputes in courts or other forums). Each of these branches has distinct powers. They also have powers to keep the other branches in check. The aim is to prevent any branch from gaining too much power or abusing their powers. It also allows for specialisation, so that these branches of the state can concentrate on what they do best.

For example, one of the laws made by the legislature is the South African Schools Act 84 of 1996, which affects many of the issues discussed in this handbook. Among other things, the Schools Act sets out how schools will be organised, governed, and funded.

DEFERENCE AND THE RIGHT TO A BASIC EDUCATION

Some degree of deference is always required in constitutional matters, particularly in matters as complex and controversial as education issues. Judges are smart and competent people, but they could never have the knowledge, skills or time to fix the education system single-handedly. Also, they are not voted into office by the public, so they lack the democratic mandate to make many of the difficult decisions that are required in shaping education policy and implementation. This does not mean that the courts should be timid or that they should avoid dealing with education rights. Deference is best shown by the sensitive handling of education issues, rather than avoidance of these issues.

EDUCATION RIGHTS IN INTERNATIONAL LAW

Some particularly important international treaties to consider when interpreting the right to education are:

- The Universal Declaration of Human Rights (UDHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on Economic, Social and Cultural Rights (ICESCR),
- The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The African Charter on Human and Peoples' Rights (African Charter)
- The African Charter on the Rights and Welfare of the Child (ACRWC)

There is also a category of international law known as 'soft' law. This consists of guidelines, declarations and recommendations by international bodies. These are not 'binding' laws, but they are persuasive guides to interpreting and applying rights. Many of the most helpful guides to the meaning of the right to a basic education are found in this body of soft international law.

In January 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, this ratification included the declaration that South Africa would only take progressive steps to realise the right to education, within its available resources. As will become clear , this declaration is inconsistent with the unqualified right to a basic education under the Constitution.

'Judicial deference' is an attitude that courts adopt in dealing with the other branches of state. A court 'defers' to these other branches when it leaves certain matters, to some extent, to the control and expertise of the other branches. For instance, a court may find that the Department of Basic Education's failure to deliver textbooks to all learners is a violation of the right to basic education; but a court may defer to the Department, by leaving it to the Department to decide how it will deliver those textbooks.

Deference can be good or bad, depending on the reasons for showing deference. Good deference is when a court defers out of appropriate respect for the other branches' constitutional powers, their proven capacity, knowledge or skills, or their legitimate democratic mandate. Bad deference occurs when a court shows undue caution or avoids dealing with an issue out of fear, favour or prejudice.

INTERNATIONAL LAW

In this chapter and the chapters to follow, you will find many references to rights and duties in international law.

International treaties (agreements signed by countries) are binding on South Africa when they have been signed and ratified. These treaties become binding law within South Africa when parliament passes legislation giving effect to these treaties.

Courts are also required to consider international law when they are interpreting and applying South African law. According to Section 233 of the Constitution, all legislation must be interpreted to be consistent with international law. Section 39(1)(b) of the Constitution also requires courts to consider international law when interpreting the Bill of Rights.

HOW TO PROTECT AND PROMOTE CONSTITUTIONAL RIGHTS

When a person's rights are threatened or violated, one of the solutions is to take the matter to court. This is called litigation, and it can be a powerful tool in resolving legal disputes. Much of this handbook highlights litigation about the right to a basic education.

It is important to remember that going to court is not the only option to promote and protect the right to a basic education, and in many cases it is not even the best option. In most cases, litigation is used when all other efforts have failed. Litigation also tends to work best when it is combined with other strategies (see the next page for a good example of this).

Other options include negotiation, activism and lobbying, and help from Chapter 9 institutions. Each of these will be discussed briefly.

Usually, the best first step to take is to enter into negotiations with the other party. This might involve writing letters or arranging meetings to raise concerns. This may open up the possibility of resolving the dispute without the cost and time delays involved in taking the matter to court. It may also help to maintain good relations between the parties.

If negotiation is unsuccessful, or while negotiations are on-going, the techniques of activism and lobbying can be very effective. This might involve marches and protests, social media campaigns, and other forms of mass mobilisation. The aim is to put pressure on the party that has failed to fulfil its obligations in order to convince them to do the right thing.

Another option is to enlist the help of so-called 'Chapter 9 institutions'. These are the institutions that are set up in terms of Chapter 9 of the Constitution. They serve as a check on government in order to hold it accountable, and they also play a role in guiding the transformation of South Africa as envisaged in the Constitution. These Chapter 9 institutions include the South African Human Rights Commission (SAHRC), the Public Protector, the Commission for Gender Equality and the Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities (CRL Commission).

The SAHRC has conducted investigations into education issues, including learner and teacher support materials (LTSM) and scholar transport. Members of the public have assisted these investigations by sending comments and concerns to the SAHRC.

While litigation is a very important tool for enforcing the right to education, it is important to remember that it not the only tool that can be used for this purpose. Negotiation, activism, lobbying and support from Chapter 9 institutions can all be used instead of, or together with, litigation.

COMBINING STRATEGIES: THE CASE OF NORMS AND STANDARDS FOR SCHOOL INFRASTRUCTURE

In many cases, litigation works best when it is combined with other strategies. The litigation and activism over norms and standards for school infrastructure is a good example.

For a number of years, activists from Equal Education (EE) had been lobbying the Minister of Basic Education, Angie Motshekga, to create norms and standards setting out basic requirements for safe and functional school facilities. These norms and standards would help to improve school infrastructure and allow parents and learners to hold provinces to account for the atrocious conditions in their schools.

Minister Motshekga at first refused to hear these demands. EE launched a national campaign in response. Activists and learners around the country protested this inaction, leading to a march on parliament in Cape Town. EE also created social media campaigns and videos which gained a wide following.

In the meantime, EE, represented by the Legal Resources Centre (LRC), took the Minister to court to force her to pass these norms and standards. The combined pressure of activism and litigation eventually resulted in the Minister agreeing to pass norms and standards.

This shows that litigation, negotiation and activism can be used together to apply pressure for positive change.

WHERE TO GO FOR HELP?

If you suspect that the rights of learners are being infringed and the relevant individual, school or departmental officials do not deal with your complaint satisfactorily, you can contact a number of public-interest law organisations around the country that offer free advice and legal services. These organisations include:

- Centre for Applied Legal Studies (CALS)
- Centre for Child Law
- Equal Education Law Centre
- Legal Aid Justice Centres
- Lawyers for Human Rights
- Legal Resources Centre (LRC)
- Probono.org
- SECTION27
- Socio-Economic Rights Institute of South Africa (SERI)
- University law clinics

Chapter 9 institutions are also available to assist:

- South African Human Rights Commission
- Public Protector
- Commission for Gender Equality
- Commission for the Protection and Promotion of Cultural, Religious and Linguistic Communities (CRL Commission)

THE RIGHT TO A BASIC EDUCATION

With this background in mind, we now turn to explaining the meaning and content of the constitutional right to a basic education. Section 29(1) of the Constitution contains the right to a basic education and the right to a further education.

Section 29(1) provides:

> 'Everyone has the right –
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.'

To understand the content and application of the right to a basic education, we need to answer five important questions:

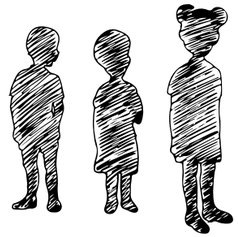
First, the right to a basic education is guaranteed to everyone. Who is 'everyone'?

Second, Section 29(1) distinguishes between a basic education and a further education. What, then, is the content of a 'basic' education?

Third, there is an important difference in the way that the two rights to education in Section 29(1) are worded. The right to a further education is qualified by the additional statement that the state must take 'reasonable measures' to make a further education 'progressively available and accessible'. By contrast, the right to a basic education does not have this additional wording; it is unqualified. What does this mean for the content and application of the right to a basic education?

Fourth, under what circumstances may limitations to the right to a basic education be justified under Section 36(1) of the Constitution?

Fifth, how will courts determine appropriate remedies for unjustified limitations to the right to a basic education?



WHO IS EVERYONE?

'Everyone' refers to all people within South Africa's borders. This means that the right to a basic education is not restricted to citizens.

The Supreme Court of Appeal confirmed the wide application of 'everyone' in its judgment in *Minister of Home Affairs v Watchenuka*. The court connected the right to an education with the right to human dignity in the Constitution:

> 'Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human.
> …
> 'The freedom to study is … inherent in human dignity; for without it, a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.' (paras 25, 36)

Here, the Court emphasises that everyone has a right to human dignity, citizens and non-citizens alike. Since education is essential to a life with dignity, it is also not limited to citizens. The word 'everyone' in Section 29(1) confirms this wide application.

But it is important to remember that the fact that the right to a basic education is available to everyone in the country does not mean that it cannot be limited in some cases. As explained above, rights are not absolute and can be restricted, provided there is a strong justification. However, the possibility of limitations does not deprive non-citizens of the right.

THE WATCHENUKA CASE

Ms Watchenuka and her son were refugees from Zimbabwe who sought asylum in South Africa. They were issued with a permit allowing them to remain in the country while their asylum application was being considered, but they were prohibited from working or studying during this time. The Supreme Court of Appeal held that this blanket restriction was unlawful.

The court found that the state had acted unlawfully by prohibiting asylum seekers from studying while their asylum applications were being processed.

The Supreme Court of Appeal avoided answering the broader question about whether the state has a duty to provide an education to non-citizens. This issue is discussed in more detail in Chapter 7 of this handbook which deals with refugees.

WHAT IS A BASIC EDUCATION?

The Constitution does not define the term 'basic education'. There was once speculation about whether a 'basic' education was a period of time in school (the time-based approach) or an education of an appropriate standard (the adequacy-based approach). Policy-makers and courts have increasingly favoured the adequacy-based approach, and for good reason.

The first reason for an adequacy-based approach is the wording of Section 29(1)(a). This section includes the right to 'adult' basic education. This means that a basic education cannot be confined to particular ages, or to time spent in school.

A second reason is that an adequacy-based approach best fits the purposes of the right to a basic education. The Constitutional Court summarised some of these purposes in its important decision in *Governing Body of the Juma Musjid Primary School v Essay*. In that judgment, Justice Bess Nkabinde explained that:

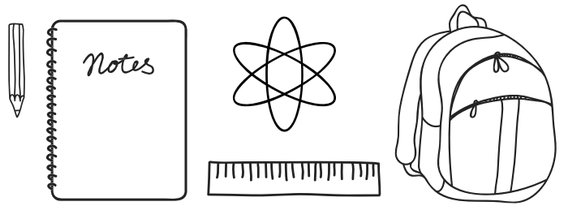
> 'The significance of education, in particular basic education, for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.
> …
> '[B]asic education is an important socioeconomic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities.'

THE SIGNIFICANCE OF JUMA MUSJID

The Constitutional Court's 2010 decision in *Juma Musjid* is a landmark in the development of education-rights law in South Africa. This was the first time that the Court provided a detailed analysis of the right to a basic education.

This case was about the eviction of a government school from privately owned land. While the Court allowed the eviction to proceed, it put in place measures to protect the rights of learners at the school.

The Constitutional Court also confirmed that private landowners have a negative duty not to unjustifiably prevent learners from receiving a basic education.



These passages indicate that a basic education must be capable of achieving goals of individual and societal development; and in doing so, it must help to eradicate the effects of apartheid. In this view, a basic education must have a certain content and quality. If the right to a basic education was only concerned with the time a learner has spent in school, then it would have nothing to say about the inequalities that still exist in our education system, or the developmental needs of learners.

The final reason for the content-based approach is that it is strongly supported in international law. The phrase 'a basic education' has its origins in the 1990 World Declaration on Education for All. This is one of the non-binding 'soft' law instruments discussed above, but it has been hugely influential in shaping the international understanding of the right to education. Article 1 of the World Declaration explains that the right to a basic education is a guarantee that:

> 'Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.'

In this understanding of a basic education, the process of defining the content of this right involves three stages:

- First, we need to identify the purposes that an education should serve, which include individual and societal development
- Second, we need to identify learners' basic learning needs in light of these purposes, such as literacy, numeracy, problem-solving skills, and so on
- Third, we need to identify the materials and resources required to meet these basic learning needs, such as adequately trained teachers, textbooks, classrooms, and adequate school furniture.

The content of a basic education is not fixed. As Article 1 of the World Declaration goes on to say, 'basic learning needs and how they should be met' will vary with the context, and will '[change] with the passage of time'.

Our courts have increasingly supported the adequacy based understanding of the right to a basic education, and have started giving content to this right. For example:

- In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*, the High Court noted that a basic education for learners with severe intellectual disabilities may be very different to that provided to learners in mainstream schools.

THE FOUR A'S APPROACH

Another helpful way to understand the content of the right to a basic education is through the 'Four A's' approach. This approach was pioneered by the UN Special Rapporteur on Education Rights, and was adopted by the **UN Committee on Economic, Social and Cultural Rights**.

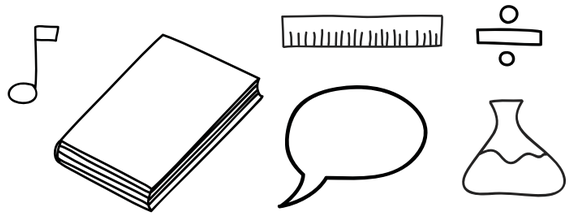
THE FOUR A'S ARE:

Availability (including infrastructure, teachers and textbooks),

Accessibility (including physical and economic access to education),

Acceptability (education must be of good quality); and

Adaptability (education must be flexible, to adapt to the changing needs of learners due to changes in society).



What is important is that the learner receives an education that 'will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be.'

- In *Madzodzo v Minister of Basic Education*, the High Court held that access to basic school furniture was required for children to receive a basic education. The Court supported an adequacy-based understanding of the right to a basic education, explaining that '[t]he state's obligation to provide a basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials, and appropriate facilities for learners' (para 20).
- Most recently, the Supreme Court of Appeal's decision in *Minister for Basic Education v Basic Education for All* confirmed that the right to a basic education gives every learner the right to adequate textbooks.

It is important to remember that the courts are just one of the many institutions that have a role in defining the content of a basic education. Lawmakers and policymakers play a crucial role in expanding on the content of this right through detailed laws and policies. Teachers, learners, parents, activists and community organisations also have an important role to play. Through lobbying and activism, ordinary people can create changes in the way the right to a basic education is understood and applied. Defining the right to a basic education is ultimately a democratic and cooperative exercise.

THE DEMOCRATIC AND COOPERATIVE EXERCISE

In *Mazibuko & Others v City of Johannesburg*, the court explained the ideal relationship between courts, law-makers and society in giving content to socio-economic rights such as the right to a basic education:

> '[O]rdinarily, it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails, and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.'

This does not mean that courts have no role to play in determining the content of socio-economic rights. Courts will still need to consider whether the state's policies and programmes give proper effect to the right to a basic education. Courts will show a measure of deference to the state's choices; but that deference has its limits.

WHAT DOES IT MEAN TO SAY THAT THE RIGHT IS 'UNQUALIFIED'?

As mentioned earlier, the right to a basic education is different to the right to a further education and other socio-economic rights, because it is 'unqualified'.

The right to a further education is 'qualified' by additional words that say that the state must take 'reasonable measures' to make a further education 'progressively available and accessible'. That wording is similar to the wording used for other socio-economic rights. For example, Section 26, which addresses housing, provides as follows:

> '(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

The right to a basic education contains none of this additional language qualifying the state's obligations to provide a basic education.

To understand the differences between the unqualified right to a basic education and the other qualified socio-economic rights, it is important to understand two things:

- The distinction between positive and negative duties, introduced briefly above
- The distinction between immediately realisable and progressively realisable rights.

QUALIFICATIONS, AND POSITIVE AND NEGATIVE DUTIES

We mentioned earlier that all rights create positive and negative duties: duties to do something, and duties not to do something.

All socio-economic rights create negative duties that are unqualified and 'immediate'. This means that the state and other individuals must not deprive people of existing goods, or prevent them from accessing these goods. For example, the state has a negative duty not to stop people from receiving a further education at university. The state cannot say that it is taking reasonable measures, within its available resources, to comply with this duty.

Where a socio-economic right is 'qualified', that qualification applies to the positive duties flowing from the right. The state does not have a duty to provide a further education to everyone immediately. It only has a duty to take reasonable measures over time and within its available resources to provide access to university and other further education opportunities. This duty to take incremental steps over time is known as 'progressive realisation'.

The right to a basic education is different. Both the negative and the positive obligations flowing from this right are unqualified and 'immediately realisable'.

THE IMMEDIATELY REALISABLE RIGHT TO A BASIC EDUCATION

The fact that the right to a basic education is unqualified and immediately realisable has an impact on how we determine whether this right has been limited.

As we explained earlier, a limitation of a right is a restriction or failure to fulfil the right. If a limitation has occurred, the state must justify that limitation under Section 36(1) of the Constitution.

Where a socio-economic right is qualified and progressively realisable, the state's failure to provide does not amount to a limitation by itself.

Returning to the example of a university education, a person does not have the positive right to a university education immediately. The mere fact that a person is not receiving a university education is not necessarily a limitation of her constitutional right to further education. A limitation will have occurred only if the state's programmes to provide access to further education over time are found to be unreasonable.

In comparison, it is much easier to establish a limitation of a learner's right to a basic education. If a learner is not receiving a basic education, then his or her right has been limited. A learner does not have to show that the state has failed to take reasonable measures over time, within its available resources, to provide access to a basic education. This is why we say that the right is 'immediately realisable': a learner has a right to a basic education here and now, and does not have to wait for the state to take reasonable measures over time.

Such a limitation of the right to a basic education is unconstitutional, unless the state can justify the limitation under Section 36 of the Constitution.

THE UNQUALIFIED, IMMEDIATELY REALISABLE RIGHT

In Juma Musjid, the Constitutional Court explained the difference between the right to a basic education and qualified socio-economic rights as follows:

'Unlike some of the other socioeconomic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in Section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in Section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible."

WHEN IS A LIMITATION OF THE RIGHT JUSTIFIED UNDER SECTION 36?

As explained above, one of the requirements for a justifiable limitation of rights is that the limitation must be authorised by a law of general application. If there is no law permitting the limitation, then no further justification is permitted, and the limitation must be declared unconstitutional.

This means that the state would have to show that any failure to provide a basic education is authorised by a specific law. In most cases where the state has failed to act, such as failing to deliver desks and chairs to learners, the state will not be able to point to any law that authorises that failure. It would be hard to imagine a law that says that it is acceptable to provide desks and chairs to some schools, but not to others! As a result, the limitation of the right to a basic education would be unjustified and unconstitutional.

Even if a law does authorise the limitation of the right, the state must still present a strong justification to show why the limitation of the right is outweighed by other important goals.

HOW DOES A COURT DETERMINE AN APPROPRIATE REMEDY?

A declaration of constitutional invalidity is not the end of the matter. As indicated above, the courts have a choice of available remedies, depending on what is just and equitable in the circumstances.

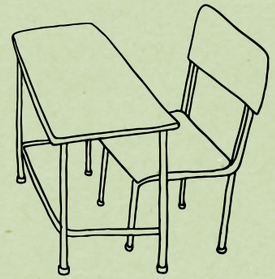
In deciding on a just and equitable remedy, a court will take many factors into account. The most important consideration is that a remedy must be 'effective', meaning that it must offer some relief to those who are suffering a violation of their rights.

In designing remedies, courts will also be realistic about what the state can achieve, given its limited resources. The state does not have unlimited time or money. It also has many other pressing demands, such as providing health care, sanitation, and housing. A just and equitable remedy will need to be sensitive to these other competing demands.

This means that a court will not necessarily order the state to provide a basic education immediately. It may instead set deadlines for the state to deliver, or require the state to take all reasonable measures to realise the right to basic education with immediate effect, and require the state to report on its progress. What is important is that this remedy should require concrete steps to deliver a basic education, even if it cannot be provided overnight.

Take the example of schools that lack desks and chairs. The failure to provide adequate school furniture would be a limitation of the right to a basic education. But the state may show that it needs time to plan and deliver desks and chairs to all schools. It may also argue that if it were to divert all its resources to school furniture, other important parts of the education system would suffer. The court will weigh up these considerations, and decide on an appropriate remedy. The court may give the state a deadline to deliver, giving it time to gather the resources and put together appropriate plans.

This may seem puzzling at first: how can the right to a basic education be immediately realisable if the court does not order the state to provide a basic education immediately? We need to remember that there is a difference between rights and remedies. The right to a basic education sets out what an individual ought to receive from the state. Remedies are about finding practical ways to achieve this goal. A court cannot order the impossible; it must find a way to fix the rights violation, while taking into account what is feasible.



THE SCHOOL FURNITURE LITIGATION

The litigation over school furniture in the Eastern Cape shows how the unqualified right to a basic education affects how courts assess limitations of this right.

In *Madzodzo v Minister of Basic Education (2014)*, the applicants asked for desks and chairs to be provided to approximately 600 000 learners in the province. The government argued that they did not have the budget to provide this immediately. The Court found that desks and chairs are part of the right to education. Furthermore, it confirmed that the right is not qualified to say that government may deliver according to 'available resources'. Therefore government cannot use a limited budget as a reason for non-delivery – they should have already planned and budgeted according to the right.

The Court ultimately allowed government 90 days to provide desks and chairs to those in need. However, the Court gave the state the opportunity to apply for extensions on this deadline if it could show good reasons for these extensions.

COMBINING STRATEGIES: #TEXTBOOKSMATTER

As explained earlier, it is important to combine litigation with other strategies to achieve changes.

Another good example of this was the #Textbooksmatter campaign, in 2015. This formed part of a series of court cases challenging the government's failure to deliver textbooks to learners in Limpopo Province.

In the build-up to the hearing in the Supreme Court of Appeal in Minister of Basic Education v Basic Education, SECTION27 and BEFA ran an extensive media campaign. The aim of this campaign was to ensure that the public understood the problem, as well as the importance of the case.

SECTION27 and BEFA did the following:

- Wrote articles on the role of textbooks in education.
- Produced videos from well-known, respected voices talking about the importance of textbooks. Some of the people include writer Njabulo Ndebele; journalist Justice Malala; ex-Wits SRC President Shaeera Kalla from #FEESMUSTFALL; and Mary Burton from the Black Sash. These messages were distributed across various media platforms.
- Held district workshops in Limpopo, talking to schools/communities/ SGBs about the case.
- Organised a 'funeral march' in Polokwane with learners in Limpopo just before the case. The march symbolised the death of educational opportunities for poor learners.
- Produced videos of Limpopo learners talking about their experiences.

THE RIGHT TO A BASIC EDUCATION IN ACTION

We have covered many complex concepts in a very short space of time. It is helpful to put these concepts into perspective by seeing how they would be applied in solving a real-life problem.

Take the example of a school near a busy and very dangerous road. Most learners at the school have to cross this road to get to school. Many learners have been hit by cars on this road, resulting in serious injuries and deaths. Some learners are so afraid of crossing the dangerous road that they skip school or arrive late for class.

To solve this problem, lawyers and the courts will ask a series of questions:

- Is this situation a limitation of the right to a basic education?
- If it is a limitation, is this limitation justified under Section 36?
- If it is not justified, what is the appropriate remedy?

The learners in this example are clearly being denied safe access to their school. Learners can only obtain a basic education if they are able to access school without fear of death or injury, so there is a limitation of the right. The unqualified nature of the right means that we do not need to assess whether the state is taking reasonable measures to fix the problem over time and within its available resources. The fact that children are being denied a basic education is enough to show their rights are being limited.

The next question is whether this limitation is justified under the Section 36 limitation clause. There is no law that authorises the absence of safe access to schools, so no further justification could

be provided. The result is that this situation is an unconstitutional violation of the learners' rights.

This leads to the question of the appropriate remedy. A court must declare this situation to be unconstitutional. However, it then has a choice of further remedies, based on what is just and equitable in the circumstances. At this stage, the court would need to consider the extent of the limitation, and the urgent need for a solution. It would also have to take into account the resources, capacity and expertise of relevant state authorities.

There are many different options available to resolve this problem, such as placing traffic officers at the crossing point, or constructing a pedestrian bridge over the road. The court would not necessarily have the expertise to know which option is best. Instead, the court may order the relevant state organs to fix the problem of unsafe access to the school within a certain period of time, leaving it to the authorities to decide on which solution would work best. The court could also order these authorities to report back to the court, to allow the court to supervise their progress. This demonstrates that in most cases, the question of an appropriate remedy will often be the most complex issue.

Once the court has given its remedy, there is also the difficult task of making sure that the remedy is implemented. The state has often ignored court orders, or failed to comply fully. This may require further negotiation, activism and litigation to make sure that the court order is fulfilled.

OTHER CONSTITUTIONAL RIGHTS IN EDUCATION

The right to a basic education cannot be seen in isolation. The rights in the Bill of Rights are all deeply connected. As a result, a violation of the right to a basic education may also involve a violation of other rights, and vice versa. For instance, in the example we have just discussed, the dangerous road outside the school is not only a threat to the learners' right to a basic education; it is also a threat to their right to freedom and security of person, as they are at risk of being killed or injured.

In this section, we will briefly discuss some of the other constitutional rights that are often at stake in education matters. Many of these rights will be discussed in greater detail in the chapters to follow.

BEST INTERESTS OF THE CHILD

Children are the primary beneficiaries of the right to a basic education, and the main victims of inadequacies in our education system. Section 28(2) of the Constitution states that 'a child's best interests are of paramount importance in every matter concerning the child'. Section 28(2) is an important aid in interpreting other rights, including the right to a basic education. Section 28(2) is also a stand-alone right, generating its own set of obligations. In *Juma Musjid*, the constitutional court said that all courts must consider the best interests of children before making a decision to evict a school from its premises.

EQUALITY AND THE PROHIBITION OF UNFAIR DISCRIMINATION

Section 9 of the Constitution guarantees the right to equality and prohibits unfair discrimination. Apartheid has left deep patterns of inequality and disadvantage in our education system. The patterns of segregation under apartheid remain in many schools, and the imbalances in resources and outcomes are far from being made right. Unfair discrimination on the basis of race, gender, religion and sexual orientation, among other grounds, remains common in our schools.

The right to equality and the prohibition of unfair discrimination is therefore an important tool in education litigation. This was demonstrated in *Minister of Basic Education v Basic Education for All*, in which the Supreme Court of Appeal found that the failure to provide textbooks to learners in Limpopo not only deprived them of a basic education, but also discriminated unfairly against these learners.

DIGNITY

The Section 10 right to human dignity informs all other rights contained in the Bill of Rights. Human dignity is based on the idea that all humans have equal worth, which should be respected and protected. However, human dignity is not only an underlying value; it is also a stand-alone right. The right to human dignity protects all people from degrading, humiliating, exploitative or abusive treatment and conditions. The appalling conditions in which many learners are educated clearly violate their dignity.

FREEDOM AND SECURITY OF THE PERSON

Section 12 of the Constitution protects the freedom and security of persons, and their right to physical and bodily integrity. The lack of adequate security and the dilapidated conditions in many schools pose a risk to learners' freedom and to security of the person. The conduct of principals and teachers can also place children at risk. For instance, in *Christian Education South Africa v MEC of Education*, it was held that the use of corporal punishment in schools is an unconstitutional infringement of children's Section 12 rights.

PRIVACY

Section 14 affords the right to privacy, which gives learners the right not to have their person or property searched, their possessions seized, or the privacy of their communications infringed. These rights are often restricted in the school environment, to maintain discipline and safety. In many cases these limitations may be justified; but in some cases, these measures may go too far.

RELIGION

Freedom of religion and belief is protected in Section 15 of the Constitution, which states that 'everybody has the right to freedom of conscience, religion, thought, belief and opinion'. The place of religion in schools is a complex topic that will be discussed in its own dedicated chapter.

FREEDOM OF EXPRESSION

Freedom of expression is contained in Section 16 of the Bill of Rights. Freedom of expression plays a central role in the right to education. It is essential that both teachers and learners are allowed to express and explore different opinions and ideas. Unjustified restrictions of freedom of expression can prevent learners from receiving a basic education. In some cases, unrestrained freedom of expression can also become an obstacle to teaching and learning, requiring a balance to be struck between these rights.

CONCLUSION

This chapter has shown that the right to a basic education is basic only in name. It is a right with rich and flexible content. It also places urgent demands on the state to address the existing inequality and inadequacy of education in South Africa.

The chapters that follow in this handbook will explore the content of this right, and its application to many areas of our education system.

Chris McConnachie is an advocate at the Johannesburg Bar, an honorary research associate at Rhodes University, and has recently completed his doctorate in law at the University of Oxford.

Ann Skelton is Director of the Centre for Child Law and a Professor of Law at the University of Pretoria, and holds the UNESCO Chair in Education Law in Africa.

Cameron McConnachie is an attorney at the Legal Resources Centre, Grahamstown, and has played a leading role in education-rights litigation in the Eastern Cape.

The authors would like to thank Jane Borman and Rebecca Freund for their assistance in preparing this chapter.

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CHAPTER 2

FUNDING BASIC EDUCATION

Daniel McLaren

INTRODUCTION

This chapter will provide an overview of how public schools are funded in South Africa, and what the challenges and opportunities are for parents, teachers and learners to ensure that this funding goes as far as possible to secure the right to a basic education for all.

It has been designed to help those working with or who have an interest in education funding to understand the education budget process, and advocate for changes that will promote the right to basic education.

Equal access to education is critical for ensuring that everyone has the opportunity to participate equally in society and fulfil their potential. The Constitution of South Africa guarantees everyone access to basic education; and ensuring that basic education is adequately and equitably funded by the state has been prioritised since the democratic transition, in order to promote more equal access to quality teaching and learning.

The apartheid government that ruled South Africa until 1994 was well aware of the power of education and the fundamental role that access to quality education could play in the development of a country. Yet the racial, gender and class bias of that government meant that it supported the provision of quality education for only a minority of the population. Black, coloured, Indian and Asian South Africans, as well as women and the disabled, received an inferior basic education to that provided to whites.

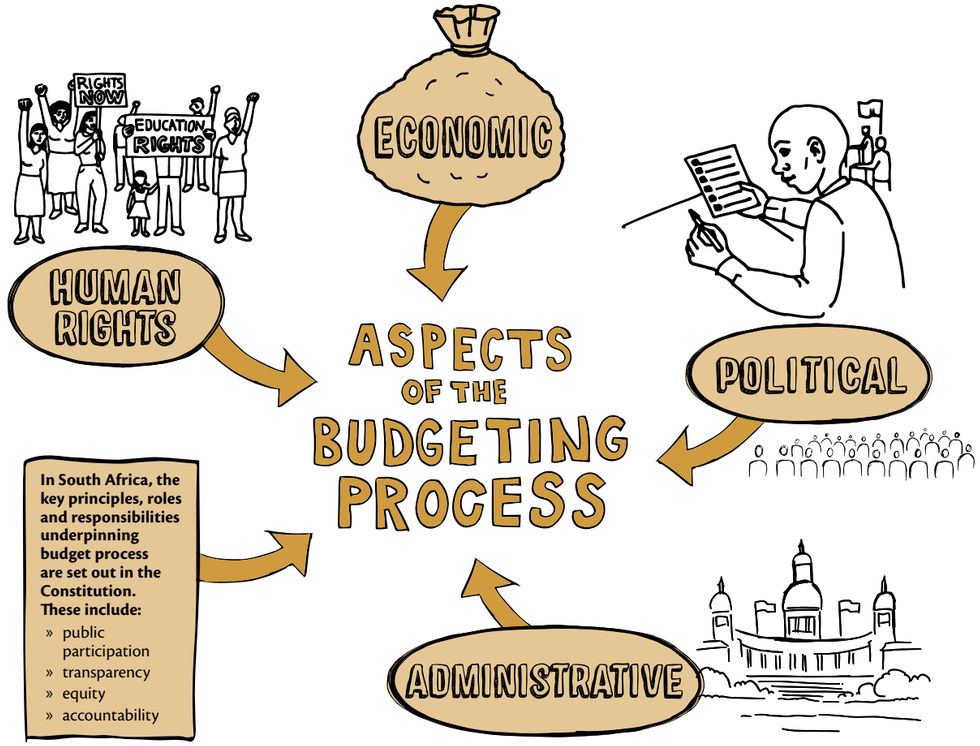
This discrimination was especially evident in the highly inequitable resource allocations that were provided to schools according to their racial classification. By providing as much as ten times more funding to white schools than black schools, the previous government ensured that economic and social opportunity would be prescribed based on one's race, gender or class. The effects of these policies continue to hamper the provision of equal education today.

Education takes place over many years, and is a cross-generational exercise involving learners, teachers and parents, so the inferior education provided to the majority of people until 1994 continues to reproduce unequal outcomes. This can be seen in the legacies of substandard infrastructure and teacher subject knowledge, lower scores, and higher dropout rates at historically black schools.

The post-apartheid democratic administration inherited a segregated education system based on a highly inequitable funding model designed specifically to promote certain groups over others. The question of equalising resource allocations and ensuring economic access to a quality education for all has been at the centre of debate on how to overcome the legacies of the past, and – as the 1995 White Paper on Education and Training promised – 'open the doors of learning and culture to all'.

The policy guidelines adopted at the 1992 National Conference of the ANC and published in 'Ready to Govern' committed the ANC government-in-waiting to 'equalising the per capita expenditure between black and white education', and ensuring that 'resources are redistributed to the most disadvantaged sectors of our society, in particular, women, rural and adult students, and mentally or physically disabled children and adults'.

The remainder of this chapter explains the choices that were subsequently made and enacted into law since 1994, and the funding model that was adopted to ensure the constitutional guarantee of a quality basic education for all.



THE BUDGET PROCESS

Public education, which accounts for 95% of all education provided in South Africa, is funded by the government budget. Some public schools are able to supplement this funding by charging fees. This section will explain:

- What a constitutional approach to public-school funding requires
- The budget process in South Africa, including the main stakeholders involved, key documents produced, and a timeline of the basic education budget process and where the public can provide input
- How revenue is raised for the government to spend on providing basic education
- How revenue raised nationally is divided between the three spheres of government: national, provincial and local
- The national equitable share, including conditional grants
- The provincial equitable share
- The determination of each province's equitable share of the provincial sphere's share of revenue, including whether the formula used to determine this share is indeed equitable.

A CONSTITUTIONAL APPROACH TO PUBLIC SCHOOL FUNDING

Chapter 1 of this book spoke at length about the right to basic education in the Constitution. A summary of the constitutional approach to basic education funding can be seen in Table 2.1 below.

Table 2.1: A summary of the constitutional approach to basic education funding.

WHAT THE CONSTITUTION REQUIRES		WHAT THIS MEANS FOR SCHOOL FUNDING POLICY
Universal Access	Everyone has the right to a basic education.	• No-one may be denied access to education on any ground. • Basic education must be physically and economically accessible to all. • Physical access means that schools must be within a reasonable distance of learners, and transport must be available, at the state's expense, to carry learners who live beyond a reasonable distance to the nearest school • Economic access means that no-one may be denied access to a public school due to an inability to pay fees or to pay for basic school supplies.
Adequacy and Quality	The right to basic education is the right to an education of an adequate quality.	• Resources – which are sufficient to ensure high levels of quality throughout the basic education system – must be raised and invested by the state. • This includes that all educational infrastructure and goods, and teacher training and development, must be adequate to meet the needs of teachers and learners.
Substantive Equality and Redress	Education of an adequate quality must be provided and made available and accessible to all.	A progressive funding model must be in place which ensures that: • all schools have the resources necessary to provide a quality basic education • schools that were underfunded in the past must receive relatively more resources from the state than schools that were well funded during apartheid, in order to rectify past funding imbalances and ensure substantive equality • under-performing schools must receive funding which, in conjunction with other reforms, is sufficient to bring them up to standard.
Priority	Basic education of an adequate quality must be provided and made available to all immediately.	• Ensuring equal access to quality basic education must be treated as a priority in government budgets.
Efficiency and effectiveness	Resources allocated to public schools and basic education more broadly must be used as efficiently and effectively as possible to achieve their intended aims.	• A lack of available resources cannot be a justifiable reason for the state failing to provide a quality basic education. • Schools (including their teachers, learners and parents) who feel that the quality of education being provided is being limited by a lack of resources can claim more resources from the state, and sue the state for more resources if necessary. • Teachers, learners and parents can also sue their school or their provincial government if the resources that are being made available to the school are being misused, or otherwise inefficiently or ineffectively used towards providing quality basic education.

THE BUDGET PROCESS IN SOUTH AFRICA

Every year in late February, the Minister of Finance delivers the budget speech in the National Assembly. This important speech sets out the government's revenue and spending plans, and key financial and performance targets, for the next financial year (1 April to 31 March).

The budget process that ultimately leads to this speech is complex; and to the outside observer, can appear rather opaque and confusing, too. At any one time throughout the year, there are a variety of budgets under consideration by a number of stakeholders, who all have different roles to play.

This section will describe the key stakeholders, documents and stages involved in the budget process, focusing on how these ultimately contribute to the development of a basic education budget that is managed and spent at national, provincial and school level. Throughout, I will highlight points at which the public can provide input into this process in order to advance and protect their right to education.

THE PRINCIPLES AND FUNCTIONS UNDERPINNING THE BUDGET PROCESS

Budgeting is one of the most important tasks carried out by government. This is because without adequate funding, even the best policies and plans will be hard to implement successfully.

Budgeting is a political, economic, administrative and human-rights-based process. Political in the sense that it entails competition among various groups for limited resources. Economic in the sense that the budget is the government's most important economic tool for setting the direction of the economy, and for allocating resources within the economy. The budget process is also a vital administrative process, because it is central to the purposes of planning, coordinating, controlling and evaluating the activities of government. Finally, government budgeting is also a human-rights process, in that the ultimate goal of the budget is to raise and allocate funds in a way that enables government to fulfil its constitutional and international human-rights obligations to people.

In South Africa, the key principles, roles and responsibilities underpinning the budget process are set out in the Constitution. These include public participation, transparency, equity and accountability. I have noted above that substantive equality is a key goal and obligation under the Constitution. The budget plays a very important role in achieving this, and therefore must be judged by (among other factors) its impact on reducing and eliminating inequality in the country, including in relation to access to quality basic education.

Section 215(1) of the Constitution states that 'National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and effective financial management'. The principle of accountability applies to all government processes and is particularly important in the allocation and expenditure of government budgets.

All funds raised by the state are public funds, because they derive mainly from the taxes people pay. So the public are entitled to have a say in how these funds are allocated and spent, and must be able to hold officials accountable if these funds are not directed towards the public good, do not achieve their stated objectives, or are misspent or wasted by departments.

Public participation is regarded as a 'basic value' in the Constitution, which requires in Section 195(e) that 'people's needs must be responded to, and the public must be encouraged to participate in policymaking'.

The National Treasury's Budget Analysis Manual confirms this, by stating that:

> Participation is an indispensable principle in the budget process. […] and is likely to result in more equitable expenditure patterns than a process which is dominated by the powerful sectors of society. Effective participation can also serve to ensure efficient provision and more equitable distribution of budgetary allocations. Through active participation in the budget process, people could challenge programmes or policies that are potentially threatening to the enjoyment and guarantee of constitutional rights.

But before public participation in the budget process can happen, there must also be transparency in the budget process.

Transparency and openness are also basic values of the Constitution, and require the government to take steps to ensure that information on the budget processes of national, provincial and local government is accessible and enables the public to engage with these processes.

For the past 10 years, South Africa has consistently been ranked among the top six countries in the world by the internationally recognised Open Budget Index (OBI) for the transparency of its budget process. This means that a large amount of information on the budget is made available by the National Treasury in a timely and accessible manner. Much of this information is published online at www.treasury.gov.za. All of the key budget documents mentioned in this chapter are available online.

Provincial Treasuries and local governments have a more mixed record in providing timely and up-to-date information on their budget processes; sometimes documents are not made available online at all, and must be requested – either from the provincial treasury or local government concerned, or from National Treasury.

No matter how much information is available, however, engaging with the budget process can be quite daunting at first. The remainder of this section will try to make engagement with the basic education budget process easier, by explaining the main stakeholders involved and the key documents produced in this process, and by showing when in the year key budget decisions are made, and how the public can provide input into these important decision-making processes.

THE MAIN STAKEHOLDERS INVOLVED AND KEY DOCUMENTS PRODUCED IN THE BUDGET PROCESS (focusing on basic education)

Minister's Committee on the Budget (Mincombud) – a subcommittee of the Cabinet, Mincombud discusses the overall budget environment and advises Cabinet, which is responsible for the final approval of the budget.

National Treasury (NT) – led by the Minister of Finance, NT is responsible for managing the government's finances and the budget process. This includes advising Cabinet on the state of the economy and government finances, overseeing expenditure by national departments, and monitoring the implementation of provincial budgets. NT also develops a three-year Medium Term Expenditure Framework (MTEF), the basis for discussions with departments, which in turn leads to the Medium Term Budget Policy Statement (MTBPS), which is tabled at least three months before the budget speech and sets out the government's financial plans for the next three years. NT also issues guidelines for departments to complete their own MTEF and Estimates of Expenditure. Finally, NT prepares the Division of Revenue Bill, Appropriation Bill, Estimates of National Expenditure and Budget Review for presentation to parliament in the budget speech.

Provincial Treasuries – led by each province's MEC for Finance, provincial treasuries are responsible for managing provincial government finances and budget processes, including facilitating each province's MTBPS and the provincial budget, which includes an Appropriation Bill and Estimates of Provincial Revenue and Expenditure (EPRE). Provincial Treasuries also monitor and support the implementation of the provincial budget by provincial departments.

Medium Term Expenditure Committee (MTEC) – consists of senior officials from NT and other departments, including Basic Education. It is responsible for hearing and scrutinising the budget submissions made by each department to ensure they are aligned to the Cabinet's policy and budgetary priorities. In addition, there are eight Formal Functional MTECs based on functional groupings known as 'clusters', which also scrutinise and help departments develop budgets that are in harmony with the plans and priorities of other departments in that cluster.

10x10 working group on basic education – the management and provision of basic education is a concurrent function, meaning that the implementation of basic education is carried out by the national Department of Basic Education together with (or concurrently with) provincial education departments. To ensure a cohesive planning and budgeting process, the 10x10 working group is convened by NT to bring the chief role players in national and provincial education departments together with national and provincial treasuries. The 10x10 group therefore includes the Minister of Basic Education and the nine provincial MECs for education, plus representatives from NT and the nine provincial treasuries – hence the name of the group: '10x10'.

National Department of Basic Education (DBE) – led by the Minister of Basic Education, the DBE overseas the basic education sector as a whole, including the implementation of national legislation and regulations by provinces (including the National Norms and Standards for School Funding), and manages conditional grants to provinces together with NT. The DBE takes part in Mincombud, the MTECs and the 10x10 working group on basic education. Through these interactions, the DBE plays an important role in establishing the national education policy priorities, and therefore the outlines of the total national budget for basic education.

Provincial Education Departments (PEDs) – led by each province's MEC for education, PEDs oversee and manage the basic education system within their jurisdiction, including the provincial education budget. Provincial treasuries, together with PEDs, determine how much of their total provincial budget will be allocated to basic education. Following national guidelines, PEDs and Provincial Treasuries also decide the precise allocations to schools, and how the provincial education budget will be divided between personnel and non-personnel expenditures, as well as how much money will be allocated to other expenditures required for the provision of basic education such as the payment of teachers and the upgrading of infrastructure.

Department of Planning, Monitoring and Evaluation (DPME) – located in the presidency, the DPME is responsible for planning and monitoring the implementation of national priority outcomes, as identified in the National Development Plan (NDP) and elaborated every five years in the Outcome Agreements of the Medium Term Strategic Framework (MTSF). The DPME takes part in Mincombud, MTECs and 10x10 working groups, to ensure that the Outcome Agreement for basic education is reflected upon and given effect to in the budget process.

Financial and Fiscal Commission (FFC) – the FFC is mandated by Chapter 13 of the Constitution to provide independent advice to government on financial and fiscal matters. The FFC conducts research and investigations into basic education budgeting and expenditure, and makes recommendations to National Treasury, MTEC, the 10x10 working-group members and Parliament's Portfolio Committee on Basic Education.

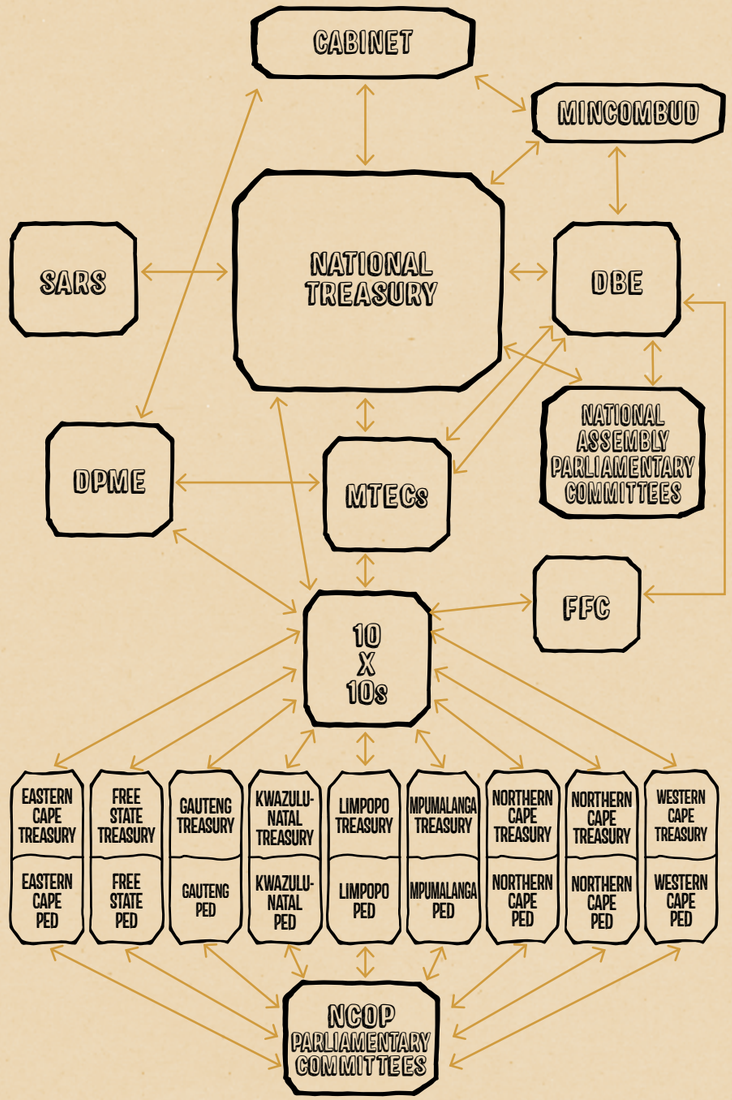
Parliamentary Committees in the National Assembly – consisting of 15-20 MPs broadly representative of the parties in the National Assembly, Parliamentary Committees monitor the activities and budgets of national departments and hold them accountable. Committees also debate and provide input into the development of bills; and can receive petitions from members of the public, and often issue calls for comment by the public on proposed bills as well as issues relating to the budget. The committees therefore provide a platform for the public to put their views across directly to MPs. Three National Assembly committees are particularly important for the basic education budgeting process:

- ***The Portfolio Committee on Basic Education*** oversees the activities, spending and budgeting of the DBE, and produces reports on the basic education budget for which the public can provide written or verbal input
- ***The Standing Committee on Finance*** oversees and holds NT accountable, and provides inputs into the budget process
- ***The Standing Committee on Appropriations*** primarily advises NT on the Appropriations Bill, including considering public comments.

Parliamentary Committees in the National Council of Provinces (NCOP) play a similar role to the National Assembly committees, but at the provincial level. They are made up of provincial MPs and also hear public petitions and comments on the budget and proposed bills. The committees involved in the basic education budget process are the NCOP Education and Recreation, NCOP Finance and NCOP Appropriations.

Members of the public and civil society organisations can participate in various stages of the budget process, including by making petitions or submissions to many of the bodies listed above (see Figure 2.1, and next page).

Figure 2.1: Diagram of the budget process and main stakeholders



ENGAGING WITH THE BUDGET PROCESS

There are numerous opportunities for members of the public – either as individuals, or collectively through a non-governmental organisation or community organisation – to engage and provide input into the budget process. Figure 2.1 on the previous page and Figure 2.2 on the next page should assist those interested to find the stakeholders and documents they need to analyse and engage with the basic education budget process.

THERE ARE MANY WAYS TO ENGAGE WITH THE BASIC EDUCATION BUDGET PROCESS, INCLUDING THE FOLLOWING:

- Make written or oral submissions or petitions in any of the official languages of South Africa to the parliamentary committees of the National Assembly and National Council of Provinces
- Request MPs to ask questions on your behalf in the parliamentary committees and in the weekly sessions to the executive
- Participate in public hearings on the budget organised by national and provincial treasuries
- Make a contribution to the 'Alternative Budget Speech', which is developed by civil society organisations in the months prior to the official budget speech
- Lobby the DBE and/or PEDs on their budget submissions, as well as on their performance and the spending of their budgets
- Submit 'Budget Tips' to the Minister of Finance by visiting www.treasury.gov.za
- Visit www.vote4thebudget.org before the Budget Speech to vote for what you would like to see in the budget, and after the budget speech to vote for what you liked and didn't like about the budget, and submit comments directly to the Appropriations Committee in parliament
- At the school level, join the school governing body (SGB) to participate in the budgeting and spending of funds allocated for the school.

The chart on the next page shows that while the budget process is complicated, involves many different stakeholders, and goes on throughout the year, there are some key opportunities for the public to provide input into the basic education budget.

Information about issues in basic education funding can also be brought to the Financial and Fiscal Commission. By doing so, members of the public can highlight corruption and misspent funds, or schools that were not built despite funds being allocated for this in the budget.

Whatever the reason for providing input into the budget process, government must listen; by using these opportunities, members of the public can help the government decide what is working and what isn't working in basic education, and therefore what its budget priorities should be.

Figure 2.2: Timeline of the basic education budget process and where the public can provide input

JUNE

› NT sends MTEF guidelines to DBE.

Pre-budget bilateral meetings between NT and the DBE reflecting on the previous year's process, the current year's process, and general expectations. DBE and PEDs begin to formulate their budget submissions (how much money they want, and for what activities).

JULY

› DBE and Provincial Treasuries make their first budget submissions to NT & Cabinet Lekgotla on the budget takes place.

Opportunity for public input. Lobbying conducted prior to July could have an impact on what the DBE and PEDs include in their budget submissions.

EARLY AUGUST

› Mincombud approves preliminary fiscal framework and division of revenue and sectoral budget priorities.
› Formal functional MTECs meet to discuss expenditure priorities.

MID AUGUST

› MTEC discussions and 10x10s start.

Treasury presents the new budget environment / All reflect on previous year's performance (financial and non-financial) / DPME input on NDP Outcome 1 Agreement for Basic Education / 10x10 for the Basic Education Sector established.

AUGUST

› 10x10s continue

The 10x10 discusses basic education-sector performance (expenditure and outputs, value for money and NDP Outcome 1 Agreement); opportunities for reprioritisation of resources or activities; funding pressures and options for resourcing those; new policy initiatives and options for resourcing those.

LATE AUGUST

› MTEC presents recommendations to the 10x10 group. 10x10 identifies risks and opportunities, and collectively agrees on priority issues.

Guided by the NDP, MTEF and Portfolio Committee Reports. *Opportunity for public input*: Submissions to the Committees of the National Assembly & NCOP

SEPTEMBER

› MTECs and 10x10s end.
› DBE and Provincial Treasuries make their revised budget submissions and submit chapters for the Adjustments Estimates

The revised submission is in line with the recommendations of MTEC and agreements of the 10x10.

Opportunity for public input:
Submissions to the Committees of the National Assembly & NCOP

OCTOBER

› Adjustments Appropriation Bill, Amended Division of Revenue Bill and MTBPS are tabled in parliament by the Minister of Finance.

NOVEMBER

› NT issues guidelines to DBE and Provinces for their Estimates of Expenditure.

Parliamentary Committees publish Budgetary Review and Recommendations Reports.
Opportunity for public input: Submissions to the Committees of the National Assembly & NCOP

DECEMBER

› DBE and Provincial Treasuries finalise MTEF and Expenditure Estimates.

JANUARY

› Final allocation letters sent by NT to DBE and Provincial Treasuries.

FEBRUARY

› The President outlines the government's priorities for the year in the mid-February State of the Nation Address (SONA).
› In the last week of February the budget is tabled by the Finance Minister outlining how these priorities will be financed in the budget speech. The national budget includes the Division of Revenue Bill and the Appropriation Bill.

Opportunity for public input:
1. Visit www.treasury.gov.za and go to 'Budget Tips'.
2. Visit www.vote4thebudget.org before the Budget Speech to vote for what you would like to see in the budget, and after the budget speech to vote for what you liked and didn't like about the budget, and submit comments directly to the Appropriations Committee in parliament.

MARCH

› MECs for Finance make their Budget Speeches to Provincial Legislatures on the Provincial Budget, which includes an Appropriation Bill and Estimates of Provincial Revenue and Expenditure (EPRE).

MARCH – APRIL

› Parliamentary Committees hold hearings on the Budget Vote.

The Portfolio Committee on Basic Education asks the DBE whether it fulfilled its promises from the previous year's budget, and what it plans to achieve from the current budget.
Opportunity for public input:
Submissions to the Portfolio Committees of the National Assembly and NCOP

JULY

› The National Assembly and NCOP vote to pass the final budget into law through the Appropriation Act and Division of Revenue Act (DORA).

Once the provincial treasuries and education departments, and National Treasury and the DBE and other stakeholders involved in the budget process – including the public – have deliberated and finally decided how much money will be required and allocated for basic education, and what it will be spent on, the Finance Minister will have a figure for the total basic education budget.

Once all the other national, provincial and local government departments have done the same, a final budget for the whole of government can be prepared by the Finance Minister to present to parliament. The remainder of this section will look at the key divisions of this revenue that are established by the budget process and formalised in the Division of Revenue Act and the Appropriation Act.

RAISING REVENUE (INCOME) FOR THE GOVERNMENT

Government revenue is collected mainly by the South African Revenue Service (SARS), and is kept in the National Revenue Fund (the government's bank account). Government revenue consists of:

- Taxes: including personal and corporate income tax, dividends tax, and value-added tax (VAT)
- Duties: including transfer duties and customs and excise duties
- Levies: including the skills development levy, fuel levy and electricity levy
- Mineral royalties.

The amount of revenue (or income) the government collects is affected by many things, including economic activity and growth (measured in Gross Domestic Product, or GDP), the amount of trade South Africa has with other countries, and the amount of investment in the economy. When GDP is growing and trade is good, more revenue should be collected and available for the government to spend on anything from providing health care to basic education.

When economic performance is not so good, the government will collect less revenue, due to the decrease is economic activity. This may result in government's spending plans being higher than the revenue it expects to receive. This is known as a budget deficit.

When there is a high budget deficit, the government will have to make difficult choices about its revenue raising and spending plans. It may decide to reduce its spending by making cuts to services, or to move funds around by cutting some areas of spending and adding to other areas.

Government could also raise taxes, to try to collect more revenue and therefore avoid cuts. Or it could try to borrow money from banks and other financial institutions, both in and outside South Africa. It could also try to 'stimulate' the economy by lowering interest rates (to increase borrowing and spending by consumers) or by printing money (to stimulate spending).

In reality, government will usually respond to a decrease in revenue by trying more than one of these options. In all cases, government must do everything it can to maintain and progressively increase social spending in areas such as basic education, in order to fulfil its constitutional obligations.

THE EQUITABLE DIVISION OF REVENUE BETWEEN THE THREE SPHERES OF GOVERNMENT

Section 40(1) of the Constitution establishes that 'government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'.

The principle of co-operative government is established in Section 41 of the Constitution, and requires that the three spheres work together to provide effective government for the people.

The Constitution also sets out the distinctive features and functions of each sphere of government. This includes functional areas in which a single sphere is responsible (for example, only the National Assembly can amend the Constitution, and only under special circumstances, while only provincial governments can issue liquor licences).

While some functional areas are limited to one sphere of government, many overlap with other spheres.

When both national and provincial governments are responsible for a functional area, this is known as a concurrent function. Basic education is a good example of a concurrent function, because it is managed, overseen and implemented at both the national and provincial levels (or spheres) of government.

The budgeting process for basic education therefore involves both national stakeholders such as the DBE and National Treasury, and provincial stakeholders such as PEDs and Provincial Treasuries.

This is important to note, because the first major division of the government's revenue is between the three spheres of government: national, provincial and local. This is known as the **vertical division of revenue**. Each year, the Minister of Finance presents a Division of Revenue Bill in the budget speech, which once passed by parliament becomes the **Division of Revenue Act**. This Act gives effect to the division of revenue among the three spheres, as per Section 214(1) of the Constitution.

Section 241(2) of the Constitution requires further that the Division of Revenue Act (DORA) can only be enacted after provincial governments, organised local government via the South African Local Government Association (SALGA) and the Financial and Fiscal Commission have been consulted and their recommendations considered.

The amount of money that is divided between and distributed directly (as a 'direct charge' against the national revenue fund) to the three spheres of government is known as each sphere's equitable share.

In 2016/17, the national department's equitable share was R855 billion (65% of the total), while the provincial equitable share was R411 billion (31% of the total), and the local government equitable share was R53 billion (4% of the total). However, while these equitable shares are transferred directly to the three spheres, a large portion of the national department's share includes South Africa's debt service costs and conditional grants that are paid to provinces and municipalities.

When presenting the vertical division of revenue, it is therefore useful to separate the amount of revenue that is actually reserved for the payment of the national debt and conditional grants, as this cannot be spent on anything else by the national departments. When these transfers are accounted for, one can see what national, provincial and local governments are actually able to spend on providing goods and services such as basic education.

Table 2.2: Vertical division of revenue raised nationally among the three spheres of government (including equitable share allocations, conditional grants, general fuel levy sharing with metros and debt service costs), 2012/13 – 2016/17

R BILLION / % OF TOTAL	2012/13	2013/14	2014/15	2015/16	2016/17
National departments	**420**	**453**	**490**	**547**	**560**
Percentage share	43.5%	43.3%	43.3%	43.8%	42.5%
Provinces	**381**	**411**	**440**	**472**	**500**
Percentage share	39.5%	39.2%	38.8%	37.8%	37.9%
of which Equitable share	311	336	360	387	411
Conditional grants	70	74	80	85	89
Local government	**76**	**83**	**88**	**100**	**105**
Percentage share	7.9%	7.9%	7.7%	8.0%	8.0%
of which Equitable share	37	39	42	51	53
Conditional grants	30	34	36	38	41
General fuel-levy sharing with metros	9	10	10	11	11
Debt service costs	**88**	**101**	**115**	**129**	**148**
Percentage share	9.1%	9.7%	10.1%	10.4%	11.2%
Total government expenditure	**965**	**1048**	**1132**	**1247**	**1318**

Table 1 shows how much of the total government budget is spent by national departments, provincial government, local government and on debt-service costs. This table shows that in recent years, rising debt-service costs have had a negative impact on the percentage of the budget allocated to the national and provincial spheres in particular.

While debt costs constituted 9.1% of the total budget in 2012/13, by 2016/17 this had increased to 11.2%. Meanwhile, the share going to national departments dropped from 43.5% to 42.5%, and the share going to the provinces dropped from 39.5% to 37.9% during the same period. The share going to local government has been relatively stable.

As basic education is a concurrent function between the national DBE and PEDs, funding for basic education is provided from both the provincial equitable share (around 90% of the total basic education budget) and the national equitable share (the remaining 10%). Any decrease in the national and provincial equitable shares as a percentage of total government expenditure is therefore likely to put pressure on basic education funding.

1. THE NATIONAL EQUITABLE SHARE, INCLUDING CONDITIONAL GRANTS

The national share pays for all the functions and activities of national departments and debt-service costs, as well as conditional grants, which are transferred to the provinces. Conditional grants are funds that National Treasury allocates to the national departments to pay for specific programmes and activities that will be implemented by the provinces and local government.

2. THE PROVINCIAL EQUITABLE SHARE

The provincial equitable share is the main source of revenue for provinces, and must cover all of the functions and activities of provincial governments. Over 90% of education spending by the provinces is based on equitable share funding. In addition to the equitable share, provinces receive conditional grants from national departments which allow them to undertake further activities, as determined by National Treasury, in conjunction with relevant national departments. However, provinces decide how they will spend their equitable share allocation. This explains why conditional grants are used by national government: it gives it more control and oversight over certain functions carried out by the provinces, as these funds are provided conditionally on their undertaking of specific programmes and activities.

THE DETERMINATION OF EACH PROVINCE'S EQUITABLE SHARE OF THE PROVINCIAL SPHERE'S SHARE OF REVENUE

The provincial equitable share is further divided 'horizontally' between the nine provinces. This is known as the horizontal division of revenue. The determination of each province's share of the provincial sphere's share of revenue follows a formula called the equitable share formula. This formula is designed to divide these funds equitably between the provinces, based on criteria established by Section 214(2) of the Constitution:

> (b) the need to ensure that the provinces are able to provide basic services and perform the functions allocated to them;
>
> (f) developmental and other needs of the provinces;
>
> (g) economic disparities within and among the provinces.

The equitable-share formula devised by National Treasury consists of six separate components, which aim to divide revenue among the provinces equitably based on the above criteria.

- *Education component* (weighted: 48%), based equally on the size of the school-age population in each province, and the number of learners enrolled in public ordinary schools
- *Health component* (weighted 27%) based on province's risk profile and health-system case load
- *Basic component* (weighted 16%) derived from each province's share of the national population
- *Institutional component* (weighted 5%) divided equally between the provinces
- *Poverty component* (weighted 3%) distributed progressively, based on the number of people living in each province who fall in the lowest 40% of household incomes
- *Economic output component* (weighted 1%) distributed regressively, based on regional GDP.

At 48%, the education component therefore determines 48% of each province's share. This means that in 2016/17, 48% of the R411 billion allocated to the provinces – R197 billion – was divided among the provinces based on the number of learners in each province.

EDUCATION FUNDING UNDER THE EQUITABLE SHARE FORMULA: NOT SO EQUITABLE

However, the equitable share formula does not necessarily result in an equitable share of revenue among the provinces. Table 2 shows how the provincial equitable share was divided among the provinces in 2016/17.

Table 2.3: Actual equitable share allocations and amounts allocated to education (PEDs) in 2016/17

2016/17 PROVINCE AND (POVERTY RANKING)	TOTAL EQUITABLE SHARE ALLOCATION (R MILLION)	OF WHICH, ALLOCATED TO EDUCATION	% OF EQUITABLE SHARE ALLOCATED TO EDUCATION	SHARE OF LEARNERS IN SA	SHARE OF TOTAL PROVINCIAL EDUCATION EXPENDITURE	LEARNERS AS A % OF PROVINCE'S TOTAL POPULATION	EQUITABLE SHARE ALLOCATION TO EDUCATION PER LEARNER	2015 MATRIC PASS RATE RANKING
Limpopo (1)	48 709	24 635	50.6% (1)	13.7%	12.7%	28.2% (2)	R14 058 (9)	7
Eastern Cape (2)	58 060	28 207	48.6% (2)	15.2%	14.6%	24.3% (5)	R14 473 (8)	9
North West (3)	28 062	12 824	45.7% (7)	6.4%	6.6%	17.0% (9)	R15 771 (4)	4
Mpumalanga (4)	33 450	16 234	48.5% (3)	8.4%	8.4%	26.3% (3)	R15 068 (6)	5
KwaZulu-Natal (5)	87 898	41 905	47.7% (4)	22.5%	21.6%	30.6% (1)	R14 575 (7)	8
Free State (6)	22 995	10 693	46.5% (5)	5.3%	5.5%	25.1% (4)	R15 695 (5)	3
Northern Cape (7)	10 863	4 769	43.9% (8)	2.3%	2.5%	24.2% (6)	R16 488 (1)	6
Gauteng (8)	79 600	36 857	46.3% (6)	17.6%	19.0%	21.9% (7)	R16 400 (2)	2
Western Cape (9)	41 062	17 455	42.5% (9)	8.6%	9.0%	17.7% (8)	R15 944 (3)	1
Total / average	**410 699**	**193 580**	**47.1%**	**100%**	**100%**	**23.3%**	**R15 148**	**-**

Note that:

- The two poorest provinces – Limpopo and Eastern Cape – have the lowest education allocations per learner (R14 058 and R14 473)
- Together with KwaZulu-Natal, these provinces share of total provincial education expenditure is less than their share of SA's learners
- Conversely, Gauteng and Western Cape have a higher share of total provincial education expenditure than their share of SA's learners, and among the highest education allocations per learner.

How is this possible?

1. GETTING THE NUMBERS RIGHT

Determining the formula is a complex exercise and there are a range of issues that need to be considered. First, the education portion of the equitable share is based on the average between the cohort of 5-17 year olds and the number of enrolled learners in each province. However, while school enrolment numbers are updated each year, the age cohort of 5-17 year olds has not been updated since the 2011 census, and is therefore out of date. Including these out of date age cohort numbers results in skewed effects. For example, the formula under-estimates the number of learners in most provinces (especially EC, LP and KZN) and overestimates the number of learners in the Western Cape.

2. THE FORMULA NEEDS TO TAKE INTO ACCOUNT THE UNEQUAL COST OF PROVIDING EDUCATION IN RURAL AND URBAN SETTINGS, THE PROPORTION OF SCHOOLS IN EACH PROVINCE THAT ARE CLASSIFIED AS POOR (QUINTILES 1 TO 3), AND THE RELATIVE BURDEN OF POVERTY AND UNEQUAL DEVELOPMENT IN EACH PROVINCE.

The current equitable share formula has thus resulted in the poorest provinces spending more of their provincial equitable shares on education than richer provinces, but still ending up spending less per learner. This is problematic for two further reasons.

QUALITY EDUCATION IS MORE EXPENSIVE TO PROVIDE IN RURAL COMPARED TO URBAN SETTINGS

As well as being provinces with high percentages of people living in poverty, Limpopo, Eastern Cape and KwaZulu-Natal are also among the most rural. It is more expensive to provide quality education in rural areas than it is in urban areas. This is for several reasons, including:

- Urban areas benefit from 'economies of scale', which means that a wider variety of goods and services are produced and made available, and are therefore easier to find and cheaper to procure. It is therefore generally cheaper to build and maintain schools and procure the goods and services necessary for providing education in urban areas (such as water and sanitation, books and textbooks, furniture, IT equipment, and internet access, among others)
- There are also cost benefits to the higher population density and smaller geographical space of urban areas, because the closer that learners, teachers and schools are to each other, the less expensive it is to get them together for the purposes of schooling. For example, funding scholar transport in rural areas is an ongoing problem that is not accounted for in the equitable share formula.

For a variety of reasons (which will be looked at in the next section), there are also more teachers trained in the urban parts of the country, and these parts therefore tend to have more qualified teachers. These teachers are more likely to want to teach in the urban areas where they were trained, which means that schools in urban areas have a higher range of qualified teachers to choose from than rural areas.

One way of getting teachers to teach in more rural areas would be to provide them with a financial incentive to do so, but no extra funding for this is included in the equitable share formula.

THE IMPERATIVE OF REDRESS REQUIRES MORE FUNDING FOR POORER PROVINCES AND SCHOOLS THAN RICHER ONES

The formula also does not take into account the unequal starting points of historically disadvantaged and under-funded schools.

More rural provinces such as the Eastern Cape have a higher number of schools that were under-resourced during apartheid, and therefore require more funds now for building new or renovating inadequate schools. Improving school infrastructure, such as providing libraries or sports facilities to the many schools that currently lack these, is expensive; but the equitable share formula does not account for this.

Although conditional grants have been allocated in recent years to tackle backlogs in school infrastructure, these make up a very small portion of provincial spending compared to the equitable share, and have experienced a number of implementation problems (see chapter 12 of this book).

3. TOWARDS A MORE EQUITABLE SHARE FORMULA FOR EDUCATION

In order for education to be transformed, South Africa needs a more progressive funding model that provides relatively more funding to poorer and more rural provinces.

Under such a model, poorer and more rural provinces, and provinces with historical backlogs in relation to trained teachers and school infrastructure, would have more education funds available per learner than richer and more urban provinces. Under the present formula, the opposite is the case.

At only 3% of the total, the weighting given to the poverty component in the equitable-share formula is insufficient to reduce the inequality that exists due to the demographic, economic and geographical differences between the provinces. In 2016/17, 3% of the provincial equitable share amounted to about R12 billion; a relatively small amount, which – even if distributed progressively (i.e. a higher share to the poorer provinces) – would not have a significant impact on poverty and inequality within or between the provinces.

The National Norms and Standards for School Funding (NNSSF), discussed in the next section of this chapter, do take into account some of the above factors, and are therefore a more redistributive funding mechanism than the equitable share formula. The same is largely true of conditional grants made to provinces.

However, the NNSSF and conditional grants affect only 10 to 20% of total education funding (the remaining 80-90% is equitable share and personnel funding, which is also not significantly progressive or redistributive), which means that however redistributive the NNSSF are, they cannot fundamentally reduce disparities between poorer and richer schools.

Also, by the time each school's funding allocation based on the NNSSF is calculated, the total provincial equitable share has already been determined based on a formula that doesn't take the need for redistribution and the achievement of equity and equality between schools and provinces that much into account. So, even if a province really wanted to equalise schooling inputs and outcomes – for example, by making significant extra investments into poorer public schools – its ability to do so is limited by the fact that its main budget is based on an equitable-share formula that hasn't taken this consideration significantly into account.

There are at least two things the government can do to achieve a more equitable share formula for education:

1. National Treasury and the Department of Basic Education should analyse the cost differences of providing education in rural and urban settings, and adjust the formula accordingly.
2. Treasury should increase the weighting given to the poverty component of the formula, so that provinces with a higher share of their population living in poverty receive relatively more funds. This is necessary to reduce inequality within and between the provinces , as the Constitution requires..

Until these issues with the formula are addressed, the current high levels of inequality between wealthier provinces, schools and learners and those that are less well-resourced will be difficult to overcome.

THE BASIC EDUCATION BUDGET

Having seen how the budget process works and how the government's budget is divided between the three spheres, this section will describe the make-up of the basic education budget itself.

A. THE TOTAL BASIC EDUCATION BUDGET

Since 1994, the government has reorganised the budget so that more people benefit from government spending than was the case in the past. This is true of basic education as well as for health care and other social spending. For example, spending on defence (the military) and state security has been reduced from 10.5% of total government spending in 1994/95 to 3.3% of total government spending in 2016/17. At the same time, funding for basic education has increased substantially, and access to basic education has been expanded to the vast majority of people in the country.

The total government budget for all of its expenditures was R1.46 trillion in 2016/17. Figure 2.2 shows how the budget was divided between the government's main expenditure items between 2012/13 and 2017/18.

Figure 2.3: Government expenditure on basic education and other main expenditures, 2012/13 – 2017/18.

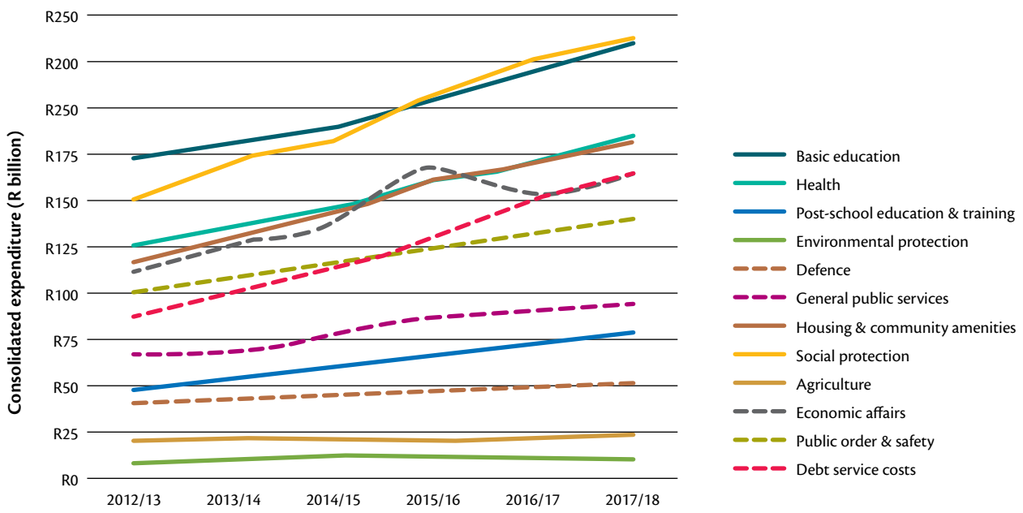


Figure 2.3 shows that the government spent more money on basic education and social protection (which includes social grants) than other expenditure areas between 2012/13 and 2017/18. This indicates that government is giving priority to basic education at the national level, which reflects the importance attached to the right to basic education in the Constitution, as discussed above.

One thing to note on this graph is that government classifies basic education spending differently to spending on post-school education and training. The latter includes spending on higher and further education, whereas basic education includes only spending on primary and secondary school (and some pre-primary spending, on early childhood development).

Figure 2.4: Basic education and other main expenditures as a percentage of total government expenditure, 2012/13 – 2017/18.

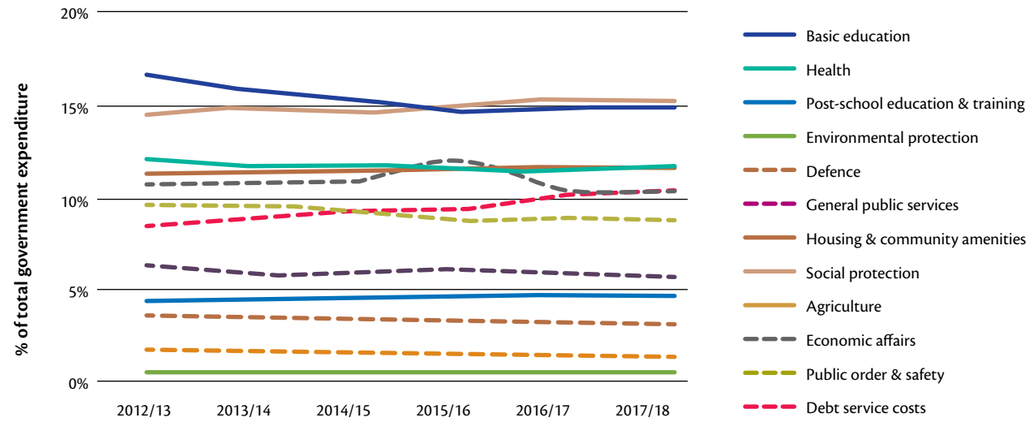


Figure 3 shows that the share of total government expenditure going to basic education has declined by about 1.5 percentage points since 2012/13, while the share of the budget going to social protection, housing and debt-service costs, in particular, has increased.

Figure 2.5: Annual increase to the basic education budget, compared with CPI inflation and other expenditures, 2013/14 – 2017/18

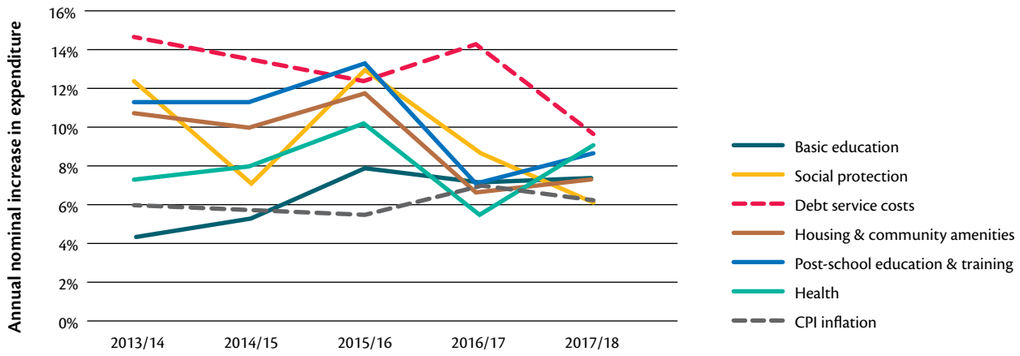


Figure 4 above shows that in recent years, annual increases to the basic education budget have been lower than annual increases on other expenditures, including debt-service costs, social protection, health and housing. The basic education allocation has only just kept up with CPI inflation during this period, meaning that it hasn't grown much in real terms, and in 2016/17 and 2017/18 is projected to be almost stagnant.

Table 2.3 below shows the actual amounts in the budget allocated to basic education and other main expenditures for the 2016/17 financial year.

Table 2.4: Consolidated spending on basic education and other main expenditures, 2016/17.

2016/17 Government expenditures	R billion	% of total
Social protection	224.2	15.3%
Basic education	218.8	15.0%
Housing and community amenities*	169.3	11.6%
Health	167.5	11.5%
Economic affairs**	152.4	10.4%
Debt service costs	147.7	10.2%
Public order and safety	129.5	8.8%
General public services	86.4	5.9%
Post-school education and training	68.7	4.8%
Defence	47.7	3.3%
Agriculture	19.8	1.4%
Arts, sports, recreation and culture	11.4	0.8%
Environmental protection	7.9	0.5%
Contingency reserve	6.0	0.4%
Total government expenditure	**1 463.3**	**100.0%**

*'housing and community amenities' includes water and sanitation and other basic services, as well as rural development and land reform.

** 'economic affairs' includes investments in economic infrastructure.

BREAKDOWN OF THE TOTAL BASIC EDUCATION BUDGET: NATIONAL EXPENDITURE, CONDITIONAL GRANTS AND PROVINCIAL EQUITABLE-SHARE EXPENDITURE

The total basic education budget is divided between the national DBE and the nine provincial education departments (PEDs). However, of the total funds that are allocated to the DBE, around 70% are subsequently transferred to PEDs in the form of conditional grants. This means that the total provincial budget for basic education is made up of two funding streams: conditional grants from the DBE, and an amount allocated from the provinces' equitable-share allocation. The latter is the provinces' main budget for basic education: conditional grants supplement this budget.

While there are many ways to break down the total basic education budget, one way is to divide the budget between national DBE expenditure, conditional grants and provincial equitable share expenditure on basic education. These main funding streams cover the following functions and expenditures:

National DBE expenditure includes administration costs, curriculum policy, support and monitoring, teacher education and institutional development, planning, assessment and educational enrichment services.

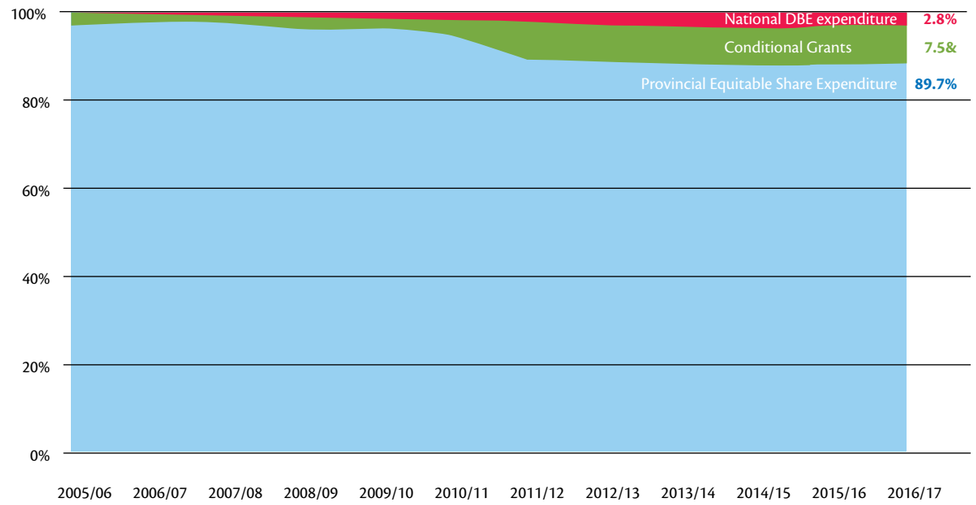
The following conditional grants are funded by the DBE:

- Dinaledi Schools Grant
- Technical Secondary School Recapitalisation Grant
- Occupation-Specific Dispensation for Education-Sector Therapists Grant
- Education Infrastructure Grant
- HIV and AIDS Life Skills Programme Grant
- National School Nutrition Programme Grant.

Provincial equitable share expenditure by PEDs. Provinces decide how much of their provincial equitable share to allocate to basic education, which as Table 2.2 showed, is between 42% to 51%. This includes expenditure on personnel costs (compensation of employees and teachers) and non-personnel costs, such as books and school facilities.

Dividing the total basic education budget between national DBE expenditure, conditional grants and provincial equitable-share expenditure helps us to have an overall picture of the basic education budget.

Figure 2.6: The total basic education budget divided by national DBE expenditure, conditional grants, and provincial equitable share expenditure, 2005/06 – 2016/17



As Figure 2.5 illustrates, the bulk of basic education spending is done by the provinces. When you add provincial equitable-share expenditure on basic education to the conditional grants received by PEDs, provincial expenditure makes up around 97% of all expenditure on basic education.

However, Figure 5 also demonstrates a trend towards a higher share of total spending by the national DBE, combined with a rise in the use of conditional grants. This highlights the evolving structure of basic education funding in South Africa, which has moved gradually away from a model in which in 2005/06, PEDs had discretion over almost 98% of total basic education spending, to the 2016/17 model, in which PEDs control less than 90% of the total basic education budget (with the remainder controlled by the DBE through conditional grants and its own expenditures).

B. THE ROLE OF THE NATIONAL DEPARTMENT OF BASIC EDUCATION IN PROVIDING AND OVERSEEING BASIC EDUCATION FUNDING, INCLUDING CONDITIONAL GRANTS

The Department of Basic Education (DBE) emerged in 2009 when the former Department of Education was split into two departments: the DBE, and the Department of Higher Education and Training (DHET).

The DBE is now responsible for governing South Africa's primary and secondary school system, which includes 13 years of formal schooling from Grade R to Grade 12, while the DHET is responsible for post-school education and training.

The government and the DBE have developed an extensive legislative, policy and regulatory framework to give effect to the state's constitutional obligations to ensure the right of learners to access quality basic education. The DBE, based in Pretoria, is responsible for overseeing the implementation of national education laws and policies.

Implementation itself (i.e. the provision of education and management of schools), however, takes place at provincial and school level, and is the responsibility of the nine provincial education departments (PEDs) in conjunction with school governing bodies (SGBs). The DBE's oversight and governance role should not be understated, however, since the DBE develops and monitors the implementation of the laws, policies, regulations and financial frameworks to which provinces must adhere.

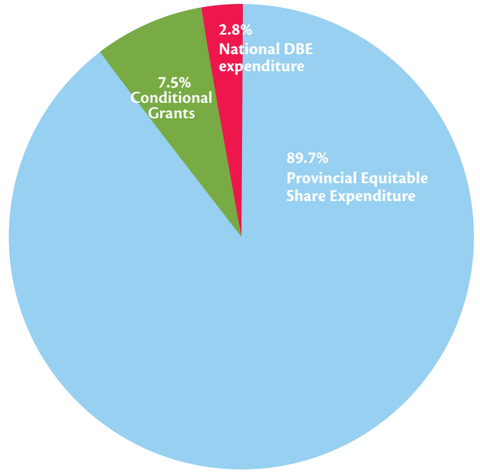
The most important laws and regulations governing basic education funding include:

- **National Education Policy Act (Act No. 27 of 1996)** – empowers the Minister of Basic Education to determine the national policy for the planning, provision, financing, staffing, coordination, management, governance, monitoring, evaluation and well-being of the basic education system. This Act provides a framework within which the Minister of Basic Education works with the provinces to determine national norms and standards for the education system, including in relation to funding, which the PEDs are then responsible for implementing
- **South African Schools Act (Act No. 84 of 1996)** – provides for a uniform system, overseen by the DBE, for the organisation, governance and funding of schools. The Schools Act, among other things, establishes SGBs and determines their role in school funding, as well as the principles governing policies around school fees
- **National Norms and Standards for School Funding (NNSSF, as amended in 2006)** – adopted in terms of Section 39(7) of the Schools Act, the NNSSF deals with the procedures to be adopted by PEDs in determining resource allocations to their schools
- **Employment of Educators Act (Act No. 76 of 1998)** – regulates the employment of educators by the state
- **Education Laws Amendment Act (Act No. 24 of 2005)** – this Act amended the Schools Act to authorise the Minister of Basic Education to declare schools in poorer areas to be 'no-fee schools'.

It is important to note that these laws and regulations are developed and overseen by the DBE, but largely implemented by the provinces. This means that when it comes to advocating for changes to overall school funding policies or for new policies, citizens should focus their advocacy efforts on the DBE, and the Portfolio Committee on Basic Education, which holds the DBE accountable and assists in the development of new or amended law and policy. An overview of the law and case law that has an impact on education provisioning is set out in Chapter 12 of this handbook.

Figure 2.6 shows the make-up of the total basic education budget in 2016/17.

Figure 2.7: The total basic education budget divided by national DBE expenditure, conditional grants and provincial equitable-share expenditure, 2016/17

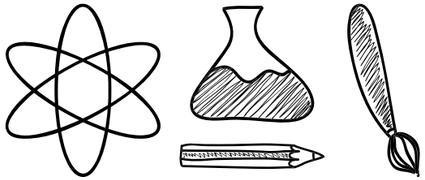


National DBE expenditure is divided between five programmes. Conditional grants are allocated by National Treasury to the DBE, and then transferred to the provinces under these programmes. This system ensures that the provinces use these funds on specific programmes and activities, which gives the DBE more control and oversight over how these funds are spent.

With the exception of Administration, conditional grants are funded under these programmes as set out in table 2.4.

Table 2.5: DBE programmes under which conditional grants are funded

DBE PROGRAMME	CONDITIONAL GRANT TRANSFERRED TO PROVINCES
1. Administration	• No conditional grants
2. Curriculum Policy, Support and Monitoring	• Dinaledi Schools Grant • Technical Secondary School Recapitalisation Grant
3. Teacher Education, Human Resource and Institutional Development	• Occupation-Specific Dispensation for Education-Sector Therapists Grant
4. Planning Information and Assessment	• Education Infrastructure Grant
5. Educational Enrichment Services	• National School Nutrition Programme Grant • HIV and AIDS Life Skills Programme Grant



PROGRAMME 1: ADMINISTRATION

Programme 1 funds the management and administration of the DBE and Ministry of Basic Education, with the objects of improving the capacity of the DBE to deliver on its mandate of developing and overseeing a quality basic education system, and strengthening partnerships with stakeholders to ensure that education is a national priority. Officials under this programme are also responsible for the development of national education policies.

This programme also funds the DBE's research and reports, including the department's Annual Report, which details the spending and performance of the department each year, and on which most of the information in this section is based.

Finally, a grant-management unit is situated under this programme. It provides inputs into the draft conditional grant frameworks and MTEF allocations that are sent to National Treasury, as well as facilitating interaction between the DBE and PEDs on the grants, and conducting annual monitoring and evaluation of all the conditional grants administered by the DBE.

PROGRAMME 2: CURRICULUM POLICY, SUPPORT AND MONITORING

The purpose of Programme 2 is to develop curriculum and assessment policies and monitor and support their implementation, as well as the following objectives:

- Improve teacher capacity and practices
- Increase access to high-quality learning materials
- Strengthen partnerships with all stakeholders, resulting in education becoming a national priority
- Universalise access to Grade R.

In other words, this programme is responsible for developing and overseeing the Curriculum Assessment Policy Statements (CAPS), the development, procurement and delivery of Learning and Teaching Support Materials (workbooks, textbook and libraries – LTSM), Early Childhood Development, Adult Literacy, Special Needs Education, e-Learning, and Mathematics, Science and Technology programmes.

This programme funds two conditional grants to the provinces:

Dinaledi Schools Conditional Grant

The aim of the Dinaledi Schools Conditional Grant is to increase participation in and improve the performance of learners taking Mathematics, Physical Science and Life Science subjects. Of the R111 million allocated to this grant in 2014/15, R96 million was spent. The R15 million of under-expenditure was mainly by Limpopo PED.

Technical Secondary School Recapitalisation Grant

This grant aims to improve the conditions of technical schools to meet the requirements of learners, and to increase the number of qualified and skilled graduates from these schools. Of the R233 million allocated to this grant in 2014/15, R220 million was spent by the provinces. The R13 million of under-expenditure was put down to slow procurement, service delivery and payment processes by Limpopo, Mpumalanga and Eastern Cape PEDs.

Following a review by the DBE in 2015, it was decided that these grants would be merged into a new Maths, Science and Technology (MST) Grant from 2015/16 onwards. The MST Conditional Grant aims to promote mathematics, physical science and technology teaching and learning, and also to improve teacher content knowledge and learner numbers in these subjects.

PROGRAMME 3: TEACHERS, EDUCATION HUMAN RESOURCES AND INSTITUTIONAL DEVELOPMENT

The purpose of Programme 3 is to promote quality teaching and institutional performance through the effective supply, development and utilisation of human resources. This includes:

- Improving teacher capacity and practices
- Strengthening school management and promoting functional schools (management tools)
- Strengthening the capacity of district offices.

This programme is therefore responsible for the policy areas of teacher supply and utilisation, teacher qualifications and development, teacher accountability, school management and governance, and district development. Programme 3 therefore works closely with PEDs as well as education unions. This programme funds one conditional grant:

Occupation-Specific Dispensation for Education-Sector Therapists Grant

This grant was established to augment the baseline compensation budget of the PEDs in order to enable them to reach parity in remuneration in compliance with Collective Agreement 1 of the Education Labour Relations Council.

PROGRAMME 4: PLANNING, INFORMATION AND ASSESSMENT

The DBE's Programme 4 exists to promote quality service delivery in the basic education system through effective planning, information and assessment. This includes:

- Improving school infrastructure (including furniture, water and sanitation services, and overseeing the implementation of national norms and standards for school infrastructure)
- Ensuring adequate learner transport is provided by the PEDs and departments of transport
- Developing and overseeing a 'world-class' system of standardised national assessments (including the NSC, ANA, TIMSS and SACMEQ)
- Promoting sound financial planning, which ensures that all schools are funded at least at the minimum per-learner levels determined nationally, and that funds are utilised transparently and effectively
- Developing and maintaining the Education Management Information System (EMIS), National Education Infrastructure Management System (NEIMS); South African School Administration and Management System (SA-SAMS), and the Learner Unit Record Information and Tracking System (LURITS)
- supporting under-performing districts and managing the DBE call centre, which provides information about education services and programmes (such as certificates and NSC results), as well as allowing anyone to report problems in the education system directly to the DBE on a toll-free line (0800 202 933).

Programme 4 also funds the National Education Collaborative Trust (NECT) and National Education Evaluation and Development Unit (NEEDU), and handles conditional grants to provinces to improve school infrastructure.

Education Infrastructure Conditional Grant

The provision and maintenance of adequate education infrastructure is an essential component of the right to basic education. According to NEIMS, as of 2015:

- 913 schools lack electricity, while a further 2 854 have unreliable electricity
- 452 schools have no water supply, while 4 773 have an unreliable water supply
- 128 schools have no toilet facilities, while 10 419 schools have only pit or bucket latrines

The Education Infrastructure Grant was established in 2011 to help to accelerate the construction, maintenance and upgrading of existing and new education infrastructure. It has received between R5 billion and R9 billion in allocations per year since 2011/12, which are disbursed to all nine provinces. PEDs are required to spend the funds in a way that maximises education infrastructure improvements in their province.

PEDs have had a very mixed record in spending and delivering on this grant since it was introduced.

In 2014/15, Eastern Cape PED under-spent on this grant by R181-million, while Free State and North West PEDs under-spent by a combined R141 million. Other provinces spent all of their grant, which is a significant improvement – particularly for Limpopo PED, which in previous years had under-spent as much as 20% of its allocation under this grant, and Western Cape PED, which had under-spent by as much as 15% of its allocation in previous years.

School Infrastructure Backlogs (indirect) Conditional Grant

The Accelerated School Infrastructure Delivery Initiative (ASIDI), established in 2011/12, was also designed to fast-track improvements to school infrastructure. It has been funded by an indirect conditional grant provided by National Treasury called the School Infrastructure Backlogs Grant. This is an indirect grant because it is not channelled through the provinces, but rather through the implementing agent, which is the Development Bank of South Africa.

This grant was meant to implement projects in provinces to replace inappropriate infrastructure and provide water, sanitation and electricity to schools, but has performed very badly since its inception.

Less than half of the grant was spent in its first three years of implementation, and the targets for its impact were therefore largely scaled back. Despite R7.8 billion of allocations to this grant between 2011/12 and 2014/15, only 106 schools had been improved or built and completed and handed over to the communities, while a further 381 schools had been provided with improved water and sanitation and 292 schools provided with electricity.

In 2015, National Treasury and the DBE agreed to merge the School Infrastructure Backlogs Grant into the Education Infrastructure Grant in order to address the poor performance of ASIDI. The legal developments in respect of school infrastructure are discussed in Chapter 13 of this handbook.

PROGRAMME 5: EDUCATION ENRICHMENT SERVICES

The purpose of Programme 5 is to develop policies and programmes to improve the quality of learning in schools. This includes promoting the overall well-being of learners by improving their physical and psychological health, which is crucial for learners to be able to study effectively. It is under this programme that the DBE funds the National School Nutrition Programme Conditional Grant and the HIV and AIDS Life-Skills Programme Conditional Grant.

HIV and AIDS Life-Skills Programme Conditional Grant

This grant exists to support South Africa's HIV/AIDS prevention strategy by increasing knowledge about sexual and reproductive health among learners and educators, and ensuring an environment in schools that is free of discrimination, stigma and sexual harassment and abuse. Provinces have consistently spent well on the annual allocation to this grant of around R230 million, which has shown strong performance in achieving its main aims.

National School Nutrition Programme Conditional Grant

The National School Nutrition Programme aims to foster better education by enhancing children's active learning capacity and addressing barriers to learning associated with hunger and malnutrition, by providing nutritious meals to learners in all schools.

The programme also serves as a means for the state to fulfil its mandate to ensure that children and youth attending public schools are able to access sufficient food. The programme has an allocation of over R5 billion, and currently provides meals to around nine million learners each day.

Although occasional reports have emerged of corruption and delivery failures with contractors undermining performance on this grant, PEDs have consistently spent the funds allocated to them, and the programme has been able to expand and improve its impact over the years.

PERSONNEL FUNDING

DBE expenditure makes up only around 3% of total spending on education in South Africa. The remaining 97% is spent by the PEDs, whose budget comes from a combination of equitable share allocations and conditional grants. To make sense of how PEDs spend this money, it is useful to show what is spent on personnel costs and what is spent on non-personnel costs.

Personnel costs include teacher and support-staff salaries, as well as the compensation of PED and Education District Office staff. Education is a labour-intensive activity, and personnel costs therefore make up a large part of the budgets of PEDs.

In 1997, the Department of Education implemented its teacher-rationalisation policy, which equalised teacher salaries that had previously been significantly unequal under the apartheid-era education budgets that favoured learners attending white schools.

Later that same year, national guidelines for the redeployment of teachers were abolished, and PEDs were empowered to determine the number of teachers to employ from their provincial education budgets. While this policy strove to ensure that all schools were provided with adequate numbers of teachers, learners continued to attend schools with overcrowded classrooms due to lack of sufficient classroom space for all teachers, inefficiencies in teacher post provisioning processes, and delays in the filling of vacant teacher posts.

The **Employment of Educators Act (Act No. 76 of 1998)** provided for the employment of educators by the State, and continues to regulate the conditions of service, discipline, retirement and discharge of educators.

In 1998, regulations titled **Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to The Educational Institutions of Such a Department** were also promulgated. These regulations provide a formula for the allocation of teacher posts to schools based on a number of factors, including:

- the maximum ideal class size
- period load of educators
- the need to promote certain subjects
- language of instruction
- school phases, and the number of grades taught at the school
- disabilities of learners
- number of learners attending the school.

Accordingly, dual-medium schools that teach in multiple languages, for example, receive more teachers than single-medium schools. After the provincial MEC determines how many posts the province can afford, the provincial Head of Department (HOD) is then responsible for distributing the posts to schools by 30 September each year (for the following year) after consultation with unions and SGB organisations.

While schools are empowered to publicise and take applications for teacher-post vacancies and choose their own teachers, teachers hired through post allocations are employed by PEDs, not by the schools. PEDs therefore use personnel funding from their provincial equitable share to pay teachers directly. However, the Schools Act empowers SGBs to hire and pay additional teachers through school funds collected via school fees and other initiatives.

LACK OF REDISTRIBUTION IN PERSONNEL FUNDING

Personnel spending is perhaps the least redistributive aspect of education funding. This is because provinces use personnel funding to pay teachers and staff who are allocated to schools through formulas that weight learners according to their grade level and expected size of the class for the subject being taught, with poverty and redistribution playing only a small role.

The Post Distribution Model for the Allocation of Educator Posts to Schools **(Regulation 1451 of 2002)** establishes this formula.

While the Employment of Educators Act mandates that PEDs fill teacher posts on the basis of equality, equity and other democratic values and principles laid out in the Constitution, other funding mechanisms effectively interfere with the state's policy towards equity in the system of teacher allocation.

Since teachers all belong to a single national civil service, their salaries are set nationally and in accordance with their qualifications and experience. Accordingly,

wealthier schools that attract better qualified and more experienced educators, particularly in subject areas such as mathematics and sciences, take up a larger share of a PED's personnel budget than a poor school that employs less qualified and less experienced educators. Also, these wealthier ordinary public schools are able to ensure that they attract higher-qualified and more experienced educators through topping up teacher salaries and adding additional SGB-funded educator posts through the collection of school fees, resulting in lower learner/teacher ratios.

The poverty grading (by quintile) of a school is used as a factor for distributing teacher posts in the Post Distribution Model formula. Regulation 1451 requires heads of department to set aside up to 5% of their posts for poverty redress purposes, to be allocated according to the Norms and Standards For School Funding distribution formula described below.

Of the 5% of posts reserved for redress, the poorest (quintile 1) schools receive 35% of these posts, while the least poor (quintile 5) schools receive 5% of these posts. Redress therefore accounts for a very minor amount of personnel expenditure, despite this making up the vast majority of each province's education budget.

The Norms and Standards for School Funding set a target of 80:20 for personnel to non-personnel costs, and a further target of 85:15 for educators and support staff. These targets are designed to ensure that provinces have sufficient funds remaining to pay non-personnel costs, such as learning and teaching support materials, school maintenance and stationery costs, as well as other school expenses.

Salaries for teachers are determined nationally and provincially through negotiations at the Education Labour Relations Council (ELRC).

The ELRC is a bargaining council that serves the public education sector nationally and provincially. The stated purposes of the ELRC are to promote the maintenance of labour peace in the public education sector through the provisioning of dispute resolution and prevention services, as well as through the facilitation of negotiations between trade unions and the state as employer.

The following trend graph shows which provinces have met the 80:20 target for personnel and non-personnel costs since 2012/13.

Figure 2.8: Personnel costs as a percentage of total expenditure by PEDs, 2012/13 – 2016/17.

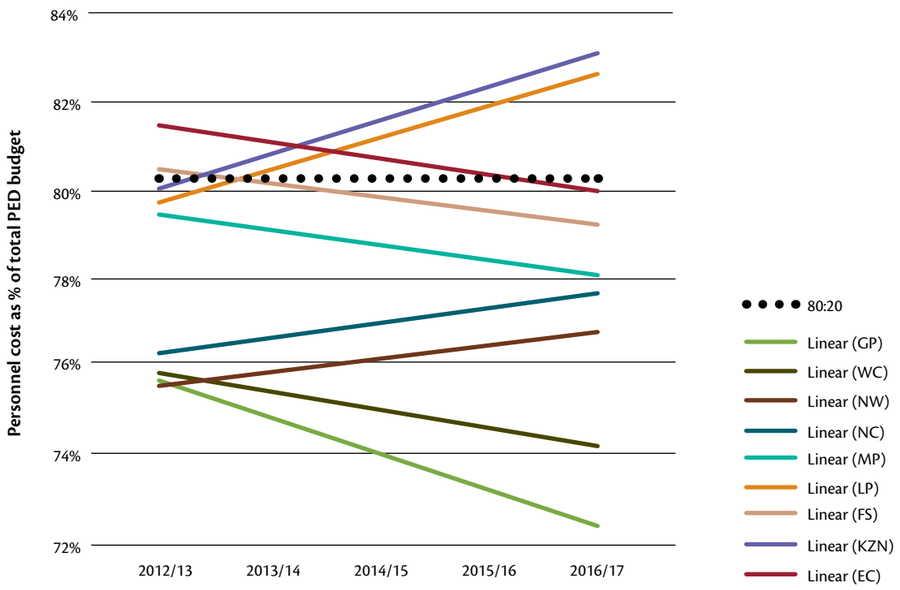
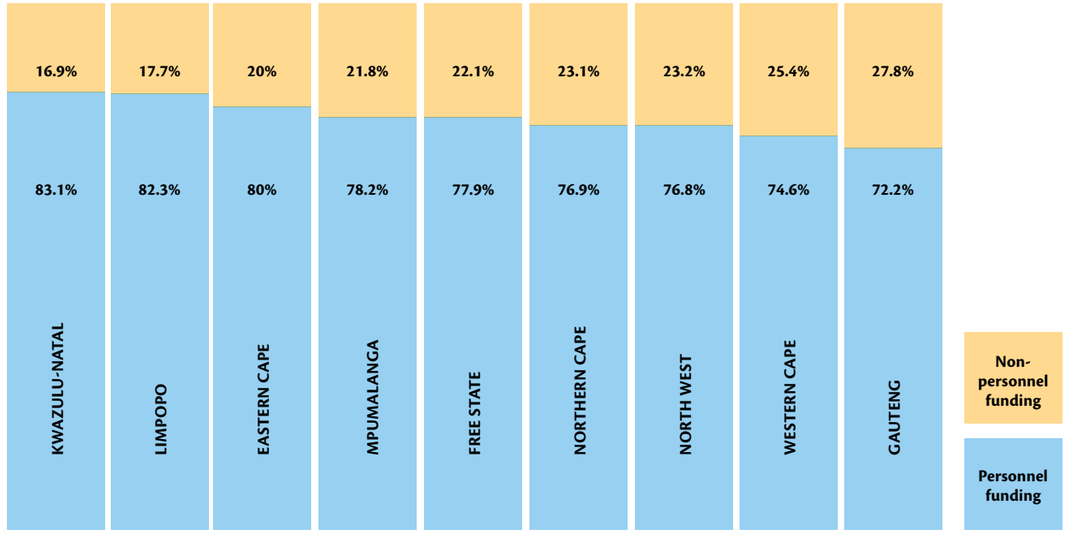


Figure 2.8 below shows that most provinces spend less than the recommended 80% of their budgets on personnel costs. KwaZulu-Natal and Limpopo have demonstrated a trend towards spending a higher portion of their budget on personnel costs. Both these provinces have missed the 80:20 target over the past few years. After spending the highest share of its budget on personnel costs in 2012/13, the Eastern Cape has reduced the portion of its budget spent on personnel costs and managed to meet the 80:20 target in 2016/17. Northern Cape and North West have seen their personnel costs increasing, but still spend less than 80% of their budgets on personnel. Western Cape and Gauteng have the lowest personnel to non-personnel cost ratios.

Figure 2.9: Personnel and non-personnel expenditure by PEDs in 2016/17.



In 2016/17, KwaZulu-Natal spent the highest portion of its budget on personnel costs, followed by Limpopo and Eastern Cape. This figure shows that there is a big difference in the amount of money that Gauteng and Western Cape have available in their budgets for non-personnel costs, compared to KwaZulu-Natal, Limpopo and Eastern Cape.

This means that Gauteng and Western Cape have more money – after compensating their employees – to spend on other school expenses such as improving school infrastructure and providing other resources for their schools.

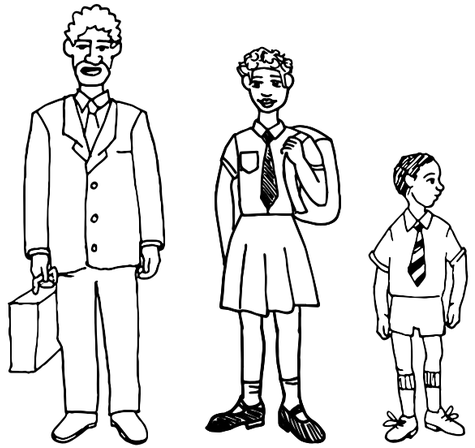
CHALLENGES WITH THE ALLOCATION OF TEACHER POSTS

Although the above graphs show that most provinces currently spend 80% or less of their total education budgets on personnel costs, this is largely due to the rise in conditional grants in recent years, which have boosted provinces' non-personnel budgets. Without conditional grants, personnel costs would constitute over 90% of PED expenditure in KwaZulu-Natal and Limpopo.

Over time, the system of provincial post allocation has led to disparities between provinces, with Eastern Cape, Limpopo and KwaZulu-Natal in particular overspending their personnel budgets.

This has been due in part to a failure to plan and implement procedures to redeploy teachers from rural schools experiencing decreasing learner populations to schools in urbanising areas with population growth.

The DBE commissioned a report in 2013 on provincial post provisioning allocation and expenditure. This followed sharp increases in personnel costs that led to overspent personnel budgets, which caused other education obligations, such as textbooks in Limpopo, to go underfunded. That report revealed



...every school in the country is ranked into quintiles (each representing one fifth of schools) based on the income and wealth of the community that surrounds each school.

significant overspending on personnel costs in nearly all provinces. The National Education Evaluation and Development Unit (NEEDU) has attributed the rise in personnel expenditures to:

- Growth in urbanisation, leaving rural schools with declining learner populations but static teacher posts, due to refusal by teachers and unions to move posts to schools where they are more needed. This causes urban schools to hire temporary teachers, resulting in provincial systems having to pay excess teachers. NEEDU has estimated that at least half of the 48 124 temporary teachers in the system are effectively double-parked
- Pressure from interest groups, especially trade unions, has led to undue influence on the process of post provisioning through the mandated consultation process. As a result of this process, trade unions have been able to exert pressure on PEDs to maintain constant or increasing teacher numbers, regardless of provinces' needs or budgeting allowances.
- Pressure from unions has also led to rising wages at the provincial level that exceed incremental increases awarded at the national level
- Failure to follow national post provisioning policies causes provinces to implement unaffordable post-establishment models. The Deloitte report concluded that rather than first determining the personnel-to-non-personnel and teacher-to-support staff ratios, and then dividing the educator budget by the average cost of an educator, overcommitted provinces start with the number of educators they intend to hire without regard for cost, and then determine the personnel-to-non-personnel and teacher-to-support staff splits after determining the costs of educators
- Lack of timeous and accurate data collection at the national level, and no universally used online system aligned to a clear, gazetted post provisioning policy. The Deloitte report points out that the National Norms and Standards for School Funding called for enhanced data collection back in 1998; these shortcomings and subsequent reports of poor funding-allocation mechanisms demonstrate that these systems are still not in place.

In order to overcome these challenges, the DBE should improve systems used to track the allocation of teacher posts, teacher and administrator vacancies at schools, and school staffing needs. These systems should either be funded by the DBE directly or through conditional grants to provinces. The push for all PEDs and schools to be fully and accurately using the South African School Management and Administration System (SA-SMAS) is a good start in this regard.

The national government should also enact provincial reporting regulations, so that monitoring of teacher-post allocations can take place at a national level, and irregularities can be identified and addressed prior to the start of the school year.

Norms and standards for post provisioning should also be established, to ensure that provinces have effective personnel-to-non-personnel and educator-to-support staff ratios in place.

PEDs should be trained to initiate procedures set out in Collective Agreement No. 2 of 2003 governing the transfer of serving educators in terms of operational requirements. Among other things, that agreement requires provincial heads of department to inform schools of educator-post establishments, and empowers provinces to reduce posts to schools based on learner-enrolment rates and operational requirements, as well as laying out procedures for transferring educators made excess as a result of post provisioning determinations.

The role of organised labour in the post provisioning process should also be reviewed, to ensure that the interests of learners are of paramount importance when provinces make post provisioning determinations. The legal developments in respect of post provisioning are discussed in detail in Chapter 14 of this handbook.

NON-PERSONNEL FUNDING

After conditional grants and personnel funding, provinces have between 10% and 20% of their equitable-share allocations left to spend on non-personnel costs.

Table 2.6: The quintile system.

Quintile one (poorest 20%)	Fee free
Quintile two	Fee Free
Quintile three	Fee Free
Quintile four	Fee charging
Quintile five (wealthiest 20%)	Fee charging

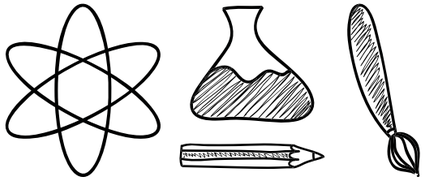
In 2005, the **Education Laws Amendment Act (Act No. 24 of 2005)** amended the Schools Act to provide for a process to establish norms and standards for school funding, by means of a quintile system that seeks to categorise schools according to poverty rankings. The **National Norms and Standards for School Funding (NNSSF)** were subsequently gazetted in 2006, to regulate non-personnel funding in South Africa.

The NNSSF provide for greater levels of non-personnel funding to schools serving poor communities, to compensate them for revenue they do not collect through school fees. This funding is used to pay for non-personnel expenses, including learning and teacher-support materials such as textbooks; libraries and laboratory equipment; stationery; school maintenance and repairs; IT and internet access; and essential services such as telephones, security, electricity and water and sanitation.

The quintile system

Under the NNSSF, every school in the country is ranked into quintiles (each representing one fifth of schools) based on the income and wealth of the community that surrounds each school. Schools located in the poorest communities are classified by PEDs (based mainly on national data) as Quintile 1, all the way to schools serving the wealthiest communities which are classified as Quintile 5. The area surrounding the school that is used for this classification is usually (but not always) the same as the school's catchment area.

The idea behind the quintile system was to ensure that non-personnel costs would be distributed to schools on a progressive basis, in order to ensure redress and promote greater equality in access to quality schooling. To achieve this, the poorest schools would therefore receive more funding than wealthier schools.



NO-FEE SCHOOLS

The system described above was supposed to work on the basis that all schools were able to charge fees, and that schools in wealthier areas which were able to generate the most income through fees would therefore receive the least funding from the state. Meanwhile, schools in poorer areas that were not able to generate significant income through fees would receive more funding from the state.

However, in 2009 all schools in quintiles 1, 2 and 3 where classified as 'no-fee' schools. This classification prohibited the SGBs of these schools from charging fees, though such a school is still able to accept voluntary contributions from parents and other parties interested in the well-being of the school.

The then-Department of Education explained this decision in the Amended NNSSF:

> Ironically, given the emphasis on redress and equity, the funding provisions of the [Schools] Act appear to have worked thus far to the advantage of public schools patronised by middle-class and wealthy parents. The apartheid regime favoured such communities with high-quality facilities, equipment and resources. Vigorous fund-raising by parent bodies, including commercial sponsorships and fee income, have enabled many such schools to add to their facilities, equipment and learning resources, and expand their range of cultural and sporting activities.

The establishment of quintile 1 to 3 schools as no-fee schools means that in the 2014 updating of the NNSSF, the quintile formula for non-personnel funds to be distributed to schools would then be at an equal level for quintile 1, 2, and 3 schools, as follows:

- Quintile 1 schools receive 27% of non-personnel funding
- Quintile 2 schools receive 27% of non-personnel funding
- Quintile 3 schools receive 27% of non-personnel funding
- Quintile 4 schools receive 14% of non-personnel funding
- Quintile 5 schools receive 5% of non-personnel funding.

No-fee schools are entitled to receive a minimum per-learner amount of funding, which is known as the 'no-fee threshold'. This minimum amount of funding is supposed to ensure that these schools have enough funding to cover non-personnel costs. In 2016, the no-fee threshold of minimum funding was set at R1 175 per learner. Quintiles 1, 2 and 3 schools must therefore receive funding from PEDs at this minimum amount, while quintile 4 schools must receive at least R588 per learner, and quintile 5 schools must receive at least R203 per learner.

The development of no-fee-school policies has nevertheless resulted in a significant increase in learners who do not pay school fees: from just 2.9% in 2006, before this policy had come into effect, to 65.4% in 2014 (Statistics SA (StatsSA), 2014). Provincially, 92% of learners in Limpopo and 81.5% of learners in the Eastern Cape attended no-fee schools in 2014, while 40.7% of learners in the Western Cape and 45.3%% of learners in Gauteng pay no school fees.

Learners who attend no-fee schools continue to have educational costs by way of school uniforms, books, stationary and transportation. Moreover, there have been reports of quintile 1 to 3 schools continuing to charge school fees, despite their no-fee classification, indicating that improved monitoring systems need to be developed and implemented to ensure that attendance at no-fee schools is not predicated on school fees or other costs.

CHALLENGES WITH NO-FEE SCHOOLS AND THE QUINTILE SYSTEM

The DBE's 2011 School-Monitoring Survey Report (published in 2013) revealed troubling information showing that nationally, 53% of learners attended schools that were not funded at the minimum level of per-learner funding or higher. This problem was most acute in Mpumalanga, Eastern Cape, KwaZulu-Natal and Limpopo. The DBE's report concluded: 'Considering that the Quintile 1, 2 and 3 schools are non-fee schools and completely dependent on government funding, these figures are a serious concern and require further investigation to ascertain the source of the problem and determine a viable solution.'

Additional concerns have been raised around how schools have been classified into quintiles, and whether the system adequately allocates no-fee status and commensurate funding to all schools serving poor learners. Because the quintile classification is based on the socio-economic conditions of the surrounding school communities, rather than the circumstances of the learners who actually attend the schools, there is concern that schools which primarily serve poor learners in areas adjacent to wealthier neighbourhoods will be incorrectly classified.

This problem occurs particularly in urban areas where informal settlements or townships are situated near wealthier areas. The quintile system therefore ignores the reality that many learners travel from poorer communities to schools that are equipped with better-qualified teachers and facilities.

Another problem is that the DBE uses census data to determine each school's poverty score, which often quickly becomes outdated in areas with high rates of migration. The result is that many schools have learner populations that do not necessarily reflect the populations of the surrounding communities. This shortcoming causes poor learners either to pay school fees, or to go through the rigorous process of applying for fee exemptions, which can in turn cause their schools to be inadequately funded.

Despite the significant expansion of access to no-fee schools, school fees (in addition to other schooling costs) continue to act as barriers to learner enrolment, and have been found to contribute to South Africa's high drop-out rate prior to the completion of grade 12.

The 2014 General Household Survey found that 23.5% of persons aged 7 to 18 cited 'no money for school fees' as the main reason for not attending an education institution. This figure indicates that issues surrounding school fees, including quintile determinations, should be further explored, and that no-fee and fee-waiver policies and implementation efforts should be enhanced and monitored to ensure that learners are able to complete their schooling.

Issues surrounding school fees and other school costs should be further investigated, to better understand how quintile determinations may better reflect the poverty characteristics of the actual learners who attend schools, and not just the characteristics of the surrounding school communities. Findings should be used to implement improved measures that ensure that all learners have access to no-fee schools, or are able to gain fee waivers at schools that do charge fees.

SCHOOL-FEE EXEMPTIONS

The Schools Act contains redistributive mechanisms that enable learners from poor households to attend fee-charging schools through fee exemptions. These exist in order to allow the Schools Act to achieve its stated purpose: to 'redress past injustices in educational provision [and] provide an education of progressively high quality for all learners'.

The Schools Act prohibits schools from refusing a learner admission to a public school on the grounds that the applicant's parent is unable to pay the school fees determined by the SGB. Section 40 of the Schools Act provides that partial or total fee exemptions must be made available to parents unable to pay school fees.

Fee-paying schools are not compensated for admitting fee-exempt learners. Non-paying learners are thus effectively subsidised by learners whose parents are able to afford to pay school fees.

In 2006, the Department of Education amended the Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools. Among other things, those regulations set out the procedures that must be followed by parents and SGBs when parents apply for partial or total school-fee exemptions, and entitle parents to full exemption if school fees account for more than 10% of the combined annual gross income

of the learner's parents. The regulations further automatically exempt certain children from paying school fees, including orphans in orphanages and child-headed households, learners whose parents receive a social grant on their behalf such as the Child Support Grant, and learners in the care of foster parents.

Questions remain over whether schools that have an interest in admitting fee-paying learners are acting appropriately when determining whether to admit poorer learners and approve fee exemptions.

Also, Section 40(2) of the Schools Act entitles parents who have been denied fee exemptions to appeal the SGB's decision to the head of department.

Katarina Tomaskevski, the United Nations Special Rapporteur on the right to education, questioned the validity of these safeguards, because 'the procedure [to help poor parents get an exemption] assumes that all parents are literate and can cope with the necessary paperwork, which is not the case.'

While 6.7% of learners in 2013 reported benefiting from total or partial fee exemptions or partial bursaries, this figure includes learners attending both public and private schools. In 2014, 7.2% of learners benefited from fee reductions or partial bursaries (StatsSA, General Household Survey, 2015).

Provincial education departments should take steps to ensure that schools are acting transparently and appropriately when making admission and fee-waiver determinations, particularly given the incentive that schools have to deny admission to learners who are unable to pay school fees.

Measures should include the development of databases used to track admission and fee-waiver applications to schools, demographic information about applicants applying for admission and fee waivers, and admission and fee-waiver determinations made by schools. Education districts should monitor determinations made, and proactively offer support to parents of learners who have been improperly denied admission or fee-waivers.

Further efforts should also be made by national and provincial education departments to ensure that parents understand their rights when it comes to applying for fee waivers.

FUNDING FOR LEARNERS WITH DISABILITIES

While Section 3 of the Schools Act makes basic education compulsory for learners aged 7 to 15 or through Grade 9, it carves out an exception for compulsory attendance for learners with special education needs, by empowering the Minister of Basic Education to set the age of compulsory attendance for special-needs learners. At the time of publication of this manual, the Minister of Basic Education had yet to determine the age for compulsory attendance for learners with special needs.

Moreover, unlike Section 3(3) of the Schools Act, which requires the MEC for education in each province to ensure that there are a sufficient number of school places available for every child to attend school, Section 12(4) seeks to dilute the right to basic education for learners with disabilities by obligating the MEC to provide education for learners with special education needs at ordinary public schools, and provide relevant educational support services for such learners 'where reasonably practicable.'

Section 12(5) of the Schools Act obliges

South Africa's courts have recognised the rights of learners with disabilities to access basic education services, despite government claims that budgetary constraints prevent immediate universal implementation of inclusive educational policies.

all MECs to take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.

The Department of Education published its 'Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System' in 2001. The White Paper commits to building an inclusive education and training system capable of accommodating and supporting learners with a diverse range of special needs, and provides a framework governing the establishment of the special-needs education system, along with funding strategies necessary for implementation.

Children with moderate disabilities are accommodated at full-service schools, which are essentially ordinary public schools equipped with additional specially trained personnel, infrastructure and other resources needed to accommodate learners requiring specialised support. Learners requiring highly intensive support are accommodated at special schools.

Policies on inclusive education have made little provision for how programmes for learners with disabilities would be funded by provinces and/or the DBE. Nor do they provide performance benchmarks outlining the extent to which inclusive education programmes must be made available to learners.

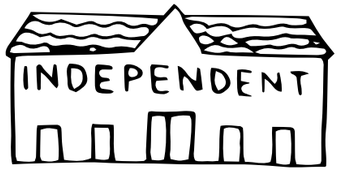
South Africa's courts have recognised the rights of learners with disabilities to access basic education services, despite government claims that budgetary constraints prevent immediate universal implementation of inclusive educational policies.

In *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*, the applicant sued the government on behalf of learners with severe intellectual disabilities who had been denied access to schools capable of meeting their needs, due to the government's failure to fund and provide schools for learners with profound intellectual disabilities.

The Western Cape High Court found that the government's failure to adequately fund and provide special-needs education for these learners violated their rights to a basic education, to protection from neglect or degradation, to equality, and to human dignity. The court ordered national and provincial authorities to ensure that every child in the Western Cape who is severely and profoundly disabled has affordable access to basic education of an adequate quality. The province was also directed to adequately fund organisations capable of carrying out the court's directive, provide appropriate transportation and make provision for training of persons to provide education for children with severe and profound intellectual disabilities.

The Schools Act should be amended to explicitly provide for free and compulsory education for learners with disabilities. There should also be requirements for provincial education departments to report annually on the extent to which they are accommodating learners with disabilities, the number of learners with disabilities who are not being accommodated, and their plans detailing how they intend to accommodate learners with disabilities in the future. Schools should be monitored regularly to ensure that they are staffed with the requisite number of educators who are qualified to screen, identify and support learners with disabilities.

Inclusive education policies should be improved, to better guide provinces in



terms of their roles and responsibilities to ensure that learners with disabilities are identified and adequately accommodated. Enhanced policies should specifically address the types of educational facilities and accommodations that must be made available to learners with disabilities, and should detail the specific resources that must be available to learners with disabilities and schools serving them, such as support staff and teacher post provisioning allocations and qualifications, transport and hostel accommodation, and school infrastructure. Norms and Standards should be developed to address how these facilities and ordinary schools should be funded to accommodate learners with special needs, and supported by districts and qualified district officials. Legal developments in respect of learners with disabilities are discussed in Chapter 5 of this handbook.

INDEPENDENT-SCHOOL FUNDING POLICIES

The Schools Act recognises two categories of schools: public and independent. While public schools are controlled by the government, independent schools are privately managed. Independent schools are therefore often referred to as 'private' schools. Around 4% of learners in South Africa attend independent schools.

While all independent schools rely on fees as their main source of funding, many also receive subsidies from provincial education departments. These subsidies are relatively small compared to the amount of funding that is provided to public schools. In addition, only independent schools that are registered with provincial education departments and operate on a non-profit basis are entitled to subsidies.

The subsidy available to a qualifying school is based on its level of fees, with schools charging the lowest fees receiving the highest subsidy. The subsidy is not allowed to be more that 60% of the equivalent cost of public schooling. This means that independent schools which charge fees that are 2.5 times higher than the provincial public-school average cost per learner do not receive any subsidies from the government.

While many independent schools charge high fees, in recent years there has been a rise in low-fee independent schools.

This has been driven by a perception among parents, educators and investors in these schools that public schools, especially in poorer areas, are failing to provide a quality education.

Figure 2.9 on the next page shows how much of their education equitable share provinces spent on independent-school subsidies between 2012/13 and 2016/17.

Figure 2.10: Independent school subsidies as a percentage of equitable share spending by PEDs, 2012/13 – 2016/17.

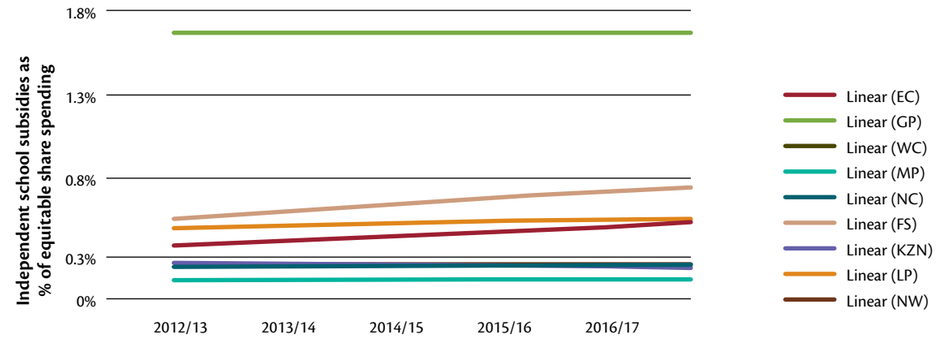


Figure 9 shows that Gauteng spends more of its education equitable share on independent school subsidies than other provinces, totalling around 1.7% of equitable-share spending.

Other provinces spend between 0.1% to 0.6% of their education equitable shares on subsidies for independent schools, with Mpumalanga spending the least. While Free State, Limpopo and Eastern Cape have been spending an increasing portion of their share on independent-school subsidies, these subsidies remain a very small part of their total education spending.

CONCLUSION: TOWARDS EQUITY IN SCHOOL FUNDING

Government has to make the budget process as transparent as possible, and ensure that members of the public can provide input and are listened to. This chapter should help those who are working in, or have an interest in education funding, to understand the education budget process and advocate for changes that will promote the right to basic education.

Ultimately, education funding must be judged against the aims and spirit of the Constitution, which guarantees equal access to quality education for all. This requires relatively more funding by the state for poorer and historically disadvantaged schools, in order to improve the teaching and learning taking place at those schools.

Some of the key issues in that regard which this chapter has explored are:

- The **equitable-share formula** that divides revenue between the provinces needs to take account of the relative poverty and unequal starting points of schools in different provinces, and the unequal costs of providing education in rural and urban settings. This would result in education funding to provinces that would promote the redress required by the Constitution, better enabling provinces to uplift their poorest and most disadvantaged schools
- Norms and standards for **post provisioning** should be established to ensure that provinces have effective personnel-to-non-personnel cost and educator-to-support staff ratios in place. Provincial education departments should be trained to initiate procedures set out in Collective Agreement No. 2 of 2003 governing the transfer of serving educators in terms of operational requirements. The role of organised labour in the post provisioning process should also be reviewed, to ensure that the interests of learners are of paramount importance when provinces make post provisioning determinations
- **Poverty classifications** of schools should better reflect the poverty characteristics of the actual learners who attend those schools, and not just those of the surrounding communities. Provincial education departments must ensure that learners are being funded at minimum levels, and the DBE must use its oversight role to monitor and enforce compliance with these
- Provincial education departments must take steps to ensure that schools are acting transparently and appropriately when making determinations on applications for **fee waivers**. Education districts should monitor determinations made, and proactively offer support to parents of learners who have been improperly denied admission or fee waivers. Further efforts should also be made by national and provincial education departments to ensure that parents understand their rights when it comes to applying for fee waivers.
- Norms and Standards should be enacted to address **funding for learners with disabilities**.

Daniel McLaren is a senior researcher at the Studies in Poverty and Inequality Institute (SPII).

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CHAPTER 3

SCHOOL GOVERNANCE

Sebastian Mansfield-Barry and Lithalethemba Stwayi

BACKGROUND

Under apartheid, South African schools were divided along racial lines. The government during those years provided five times more funding to schools for white children than it did to schools for black children.

This resulted in an unequal education system that we are still trying to fix today. However, there were some significant changes to our education system when South Africa became a democracy.

These changes included embedding certain values into education law, with the aim of improving the quality of education for all learners. One such value was to run schools democratically, such that parents, educators and community members could all get involved.

Another value is the idea that the people and groups who run a school should work in co-operation with each other and avoid power struggles.

Another change is that school rules and policies must be be in conformity with the Constitution, and must meet basic minimum standards established by national laws and policies.

The details of how the various groups and tiers of government in education work together is set out in laws on school governance such as the South African Schools Act 84 of 1996 (the Schools Act).

The Schools Act sets out important rules concerning who is involved in running a school and what they are responsible for.

ROLE PLAYERS IN SCHOOL GOVERNANCE

There are a number of different groups of people responsible for governing a school.

Various levels of **government govern at national, provincial, district and circuit levels**, while **school governing bodies (SGBs) govern at a school level**.

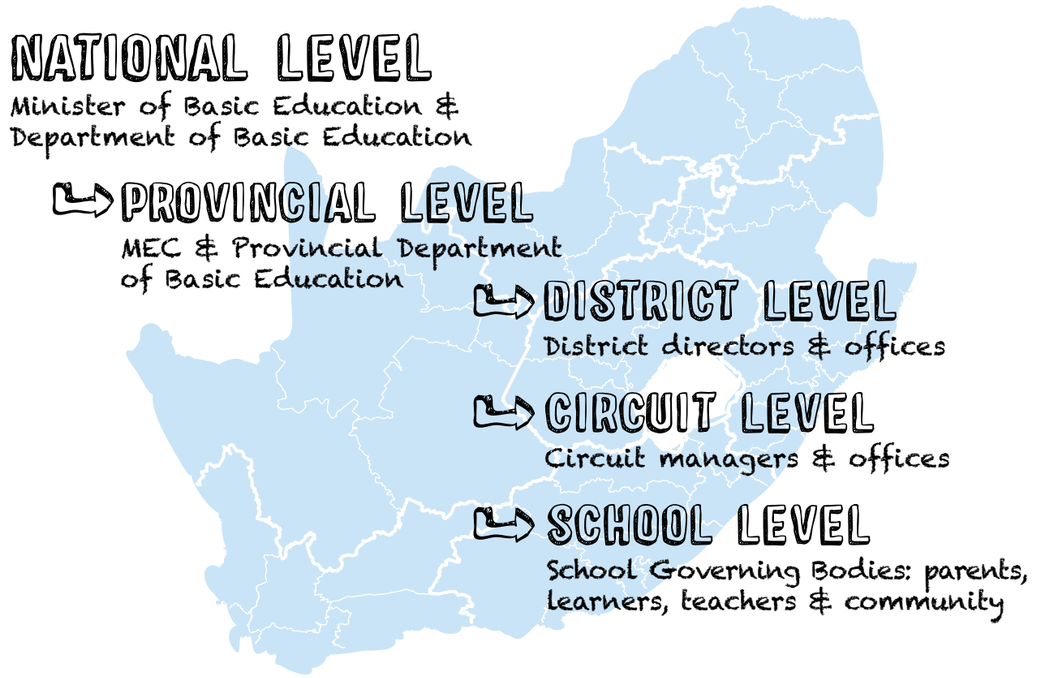
SGBs are made up of parents of learners, learners, educators at the school and community members where the school is located.

The Minister of Basic Education, representing the Department of Basic Education (DBE), is responsible for governing schools on a national level.

The head of the provincial department of basic education (provincial DBE) in each province is responsible for carrying out school governance on a provincial level.

Each province is divided into a number of education districts, which are run by district directors based at the district office.

Education districts are themselves divided into a number of education circuits, which are areas run by circuit offices and headed by circuit managers. Circuit offices act in terms of functions delegated by each district office, and play a key role in connecting schools with district offices and provincial DBEs.



RESPONSIBILITIES OF THE ROLE PLAYERS

All of these role players must work together to achieve every learner's right to education. The different jobs that these role players have are set out in the law, such as the Schools Act and its regulations.

The school governing body (SGB) in each school is responsible for the everyday management of the school. The SGB must decide on and carry out school policies that are suitable for the school. Having fair policies about admissions to and exclusions from school helps to protect the rights of children to education.

The work done by SGBs also aims to protect the rights of children in schools by facilitating the fair implementation of school rules. SGBS are required to have policies that protect and promote learners' rights in respect of the following: school discipline; pregnancy; school fees; language; religion and culture.

The SGB also has a supportive role to play in the school, in addition to the functions described above. It must make sure that the school is governed in the best interests of all the stakeholders. The SGB must not interfere in the professional management of the school, but should support academic staff in executing their duties.

The SGB should also encourage partnerships with people with expertise to assist the school. Fundraising is another supportive duty. The SGB can raise funds to supplement the school's income.

The role of the Minister of Basic Education is to create basic standards that all schools should meet in order to provide adequate education for everyone. For example, the Minister published the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, to which all provincial governments are required to adhere.

The provincial DBE has a duty to create enough schools for all the learners in the province. They must meet the standards that are set by the Minister. They also have other responsibilities, which will be described in more detail below.

District offices do not create any policies, but they support the provincial DBE by carrying out delegated functions. For example, district offices have the authority to dissolve ineffective SGBs and can allocate or withdraw certain functions of the SGB, on reasonable grounds.

MEMBERS OF SGBS AND HOW THEY ARE ELECTED

A school governing body is made up of automatic members, elected members and co-opted members. The school principal is automatically a member of the SGB. People who can be elected to the SGB include parents of learners at the school, teachers at the school, certain learners at the school, and members of staff who are not educators. Members of the community can also form part of the SGB, as they can assist the school with various kinds of special knowledge or skill. They may include people such as doctors, accountants or lawyers.

An SGB is expected to elect office bearers from among its members, including a chairperson, a treasurer and a secretary. The chairperson should be a parent member. An SGB election follows a specific procedure, as set out in the Schools Act. The school's electoral officer must send out notices announcing the nomination meeting and the election meeting. A school electoral officer is a person who has been trained by the Independent Electoral Commission (IEC) – this person may be a principal or teacher from another school.

The date, time and place of a meeting must be stated on the notice. The notices should be sent out at least 14 days before the meeting; a hard copy should be handed to every learner, which they must give to their parents. Other methods of communication (such as SMS) can be used, as long as they do not disadvantage any member of the school community.

A person who is willing to be a member of the SGB may only be nominated and seconded by a person belonging to the same SGB membership category. A nomination form, completed by the nominator, candidate (person who is willing to be a member of the SGB) and seconder must be handed to the electoral officer not more than seven days and not less than 24 hours before the election meeting.

A member can be proposed during the nomination section of the meeting, provided that another person from the same category seconds the nomination on the relevant template.

A quorum of 15% of parents on the voters' roll is needed for the election and nomination meeting to proceed; if this quorum is not present, the meeting must be set for another day (for example, if there are 200 parents in the school, then 30 of them must be at the meeting).

Voting happens on ballot papers. Each ballot paper should have the school stamp on it, or some other distinguishing feature to prevent tampering. A person with the right to vote must record their vote secretly and deposit it into the ballot box. After the votes are counted, each chosen SGB member must be informed of their election in writing.

The school principal must organise the first meeting of the SGB within 14 days of the election, so that the new SGB members may be elected. Once they have been chosen, the principal must inform the district manager in writing of people who have been elected.

KEY CONCEPTS

PARTICIPATORY DEMOCRACY

Participatory democracy means that people can be involved in a meaningful way in the decisions which affect them. Previously, education was seen as a benefit provided thanks to the state's generosity. Now education is viewed as a right that can be claimed from the state, and the state has a duty to provide it.

The Schools Act states that representatives of parents, learners and educators must all have a say in learners' right to education. This is done through the SGB. The Constitutional Court has referred to SGBs as an example of 'grassroots democracy', because they allow the people who are directly affected by the right to education to be involved in achieving this right.

DEMOCRATISATION OF EDUCATION

School governance is now seen as a democratic process. This is to redress the legacy of apartheid; there is a requirement for people to fix and change past inequalities.

The Schools Act ensures that SGBs are involved in making decisions for schools. They must do so in a democratic manner, by consulting with everyone whose needs are affected. In addition, the SGB is elected using a democratic process, whereby people are voted onto the SGB by the parents of the children at the school.

The Schools Act was designed to allow parents, learners and the community to have a greater role in managing the right to education. This is also linked to the idea of participatory democracy, which means that people can be involved in a meaningful way in the decisions that affect them.

CO-OPERATIVE GOVERNANCE

Co-operative governance means that all the parties involved in governing schools must work with each other in a supportive and collaborative way. This is a key feature of participatory democracy, because it ensures that all the parties are involved in achieving the right to education.

The Schools Act sets out how the parties must work together. Various cases in the Constitutional Court have elaborated on the concept of co-operative governance. In the *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* (the *Ermelo* case), the Constitutional Court explains:

> An overarching design of the [Schools] Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education, whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education, who bears the obligation to establish and provide public schools, and together with the Head of the Provincial Department of Education exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body, which exercises defined autonomy over some of the domestic affairs of the school.

In *Head of Department, Department of Education, Free State Province v Welkom High School* (the *Welkom* case), the Constitutional Court elaborates on how the various role players in school governance should work together:

> Cooperative governance is a foundational tenet of our constitutional order and has been incorporated into the Schools Act through the provisions of Section 22. It is incumbent upon HODs and governing bodies to act as partners in the pursuit of the objects of the Schools Act. In *Schoonbee and Others v MEC for Education, Mpumalanga and Another*, the cooperative mandate contained within the Schools Act was described as follows:
>
> *Having read the Act again, it seems to me that the new education regime introduced by the Schools Act, which came into operation on 1 January 1996, contemplates an education system in which all the stakeholders, and there are four major stakeholders – the State, the parents, educators and learners – enter into a partnership in order to advance specified objectives around schooling and education. It was intended, it appears, to be a migration from a system where schools are entirely dependent on the largesse of the State to a system where a greater responsibility and accountability is assumed, not just by the learners and teachers, but also by parents.*

The different role players in school governance must work together in good faith and with mutual trust. They must provide support to one another and consult with each other on various issues. The aim is to ensure that the right to education is achieved, and that the learners' best interests come first.

However, there are occasionally disputes between the various parties. While parties can go to court to resolve their disagreements, the law prefers this to be the last option. The courts prefer the parties to use all the internal processes available to resolve any disputes before turning to litigation.

MEANINGFUL ENGAGEMENT

Meaningful engagement forms part of co-operative governance. Courts have referred to meaningful engagement as a process used to resolve issues or disagreements that the parties may have with each other.

The parties are encouraged to talk with each other – and to do so in a constructive way, in order to provide clarity on a certain policy or issue. This is seen as the most effective way to resolve a dispute, as the parties are better suited to resolving the issue than the courts, whose area of expertise is not necessarily school governance. This is what courts have acknowledged as the practical value of meaningful engagement. In addition to this, the courts acknowledge the symbolic value of the parties working together, which is a means of exercising participatory democracy.

For example, in the Welkom case, the court ordered that the Welkom SGB engage meaningfully with the HOD when revising their pregnancy policies. The SGB had created a policy that was not constitutional and did not conform to provincial DBE guidelines. In order to resolve the issue, and to make use of the expertise of the various parties, they were encouraged to work together to create a better policy for the learners.

BRIEF OVERVIEW OF THE LEGAL FRAMEWORK

The Constitution guides all laws in South Africa. Laws on school governance must be consistent with the Bill of Rights in the Constitution. Anything that contradicts the Bill of Rights can be declared by a court to be invalid. Specific rights in the Bill of Rights that are relevant to school governance include Section 29(1), concerning the right to education: 'Everyone has the right to a basic education, including adult basic education.'

Another important provision in the Constitution is Section 41(1)(h), on co-operative governance. This sets out how the various parties involved in governing schools should interact together:

> All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith, by –
>
> i. fostering friendly relations;
> ii. assisting and supporting one another;
> iii. informing one another of, and consulting one another on, matters of common interest;
> iv. co-ordinating their actions and legislation with one another;
> v. adhering to agreed procedures; and
> vi. avoiding legal proceedings against one another.

Then there are specific laws that concern school governance. These include the South African Schools Act, which sets out the roles that different parties play in governing schools. There is also the National Education Policy Act.

These Acts are supported by regulations made by the Department of Basic Education. These regulations provide further guidance as to how each of these laws work.

The laws and regulations apply to all schools in the country.

Provincial governments create their own laws or rules, which apply to their province only. These are called provincial circulars and regulations.

A number of court cases have dealt with issues in school governance. These will be discussed further below. A list of relevant cases can be found in the 'Cases' section at the end of this chapter; the list includes the *Ermelo* case; the *Welkom* case; *MEC for Education in Gauteng and Others v Governing Body of the Rivonia Primary School and Others (Equal Education and Centre for Child Law as Amici Curiae)* (the *Rivonia* case); and *Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies for South African Schools* (the *FEDSAS* case).

POLICY-MAKING FUNCTIONS

This section reveals who is responsible for what in terms of the different policies under school governance laws.

ADMISSIONS POLICY

The SGB of a school can decide on the admissions policy of their school. However, this policy must conform to the standards set in the Constitution.

The Constitution stipulates that there must be no unfair discrimination against anyone on any of the following grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religious conscience, belief, culture, language or birth.

The SGB's policy must also conform with the South African Schools Act, regulations and any other relevant provincial law. The policy must also be flexible enough to allow for the MEC to intervene when reasonable.

When deciding on the admission of a particular learner, the principal of the school will only make such a decision provisionally on behalf of the provincial HOD. The MEC, who is the political head of the provincial education department, has the final say in admission decisions, and has the power to overturn decisions.

It has been noted in court cases, such as the Rivonia case, that even though MECs have this power, this must be exercised in a fair way and in a reasonable manner.

The Department of Basic Education has developed the 'Admission Policy for Ordinary Public Schools'. The MEC and the HOD must ensure that each SGB's admission policies comply with national norms and standards.

Schools may not discriminate when deciding on a learner's admission, and therefore admission policies must also be non-discriminatory. For this reason, schools may not administer any tests in order to determine the admission of learners (as stated in Section 5(2) of the Schools Act). This is because schools have the obligation to assist all learners, and not only the learners who will make their school results look impressive. This is especially important in light of South Africa's legacy of apartheid, and the current reality of unequal access to education. It is important that admission policies 'help achieve universal and non-discriminatory access to education'.

CASE STUDY

THE RIVIONA CASE

In the *Rivonia* case, there was a debate between the SGB of Rivonia Primary School and the Gauteng Department of Education. The HOD wanted to admit one learner to the school. However, the SGB had decided on their own capacity policy, and had determined that their classes were full. The capacity set by the SGB was lower than that of the national average in terms of the government's norms and standards; and so, according to the HOD, there was still space for that particular learner. The result was that the HOD removed the power to decide on school capacity and admissions from the SGB, and changed their admission policy.

The Constitutional Court decided that the way in which the HOD had changed the SGB's admission policy was not done fairly or reasonably. Despite this, the Court decided that the school could not be completely inflexible in their policies when deciding the fate of an individual learner, and that the MEC did have the final say in such a decision.

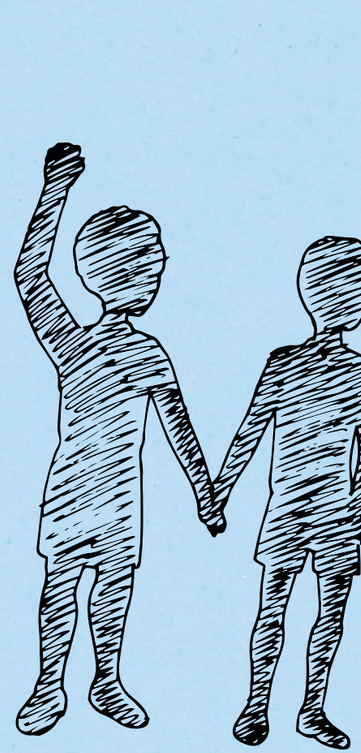
While the Court declared that the HOD did not act in a procedurally fair manner by placing the learner in the school, the HOD did have the power to order that the principal should admit the learner despite the SGB's admission policy.

CODE OF CONDUCT

The SGB is responsible for creating and adopting a code of conduct. However, as stated in Section 8 of the Schools Act, the SGB should only do so after consulting with learners, parents and educators. This gives effect to the principle of participatory democracy, by including the various rights-holders in the process.

The code of conduct must also conform to the Constitution, which means it may not infringe any of the rights in the Bill of Rights. When creating the code of conduct, schools can be guided by guidelines that have been developed by the DBE at a national level. These are called the 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners'. The code of conduct must specify the conduct that is permissible and the conduct that is prohibited, as well as the procedure for disciplinary procedures including suspensions, expulsions and the appeals process.

With regards to suspensions and expulsions, the SGB has the authority to impose suspensions on a learner. While the SGB may recommend an expulsion of a learner to the HOD, it is only the latter who can make the decision to expel a learner. The learner has the right to appeal the decision to expel them by appealing to the Member of the Executive Council of the provincial DBE.



CASE STUDY

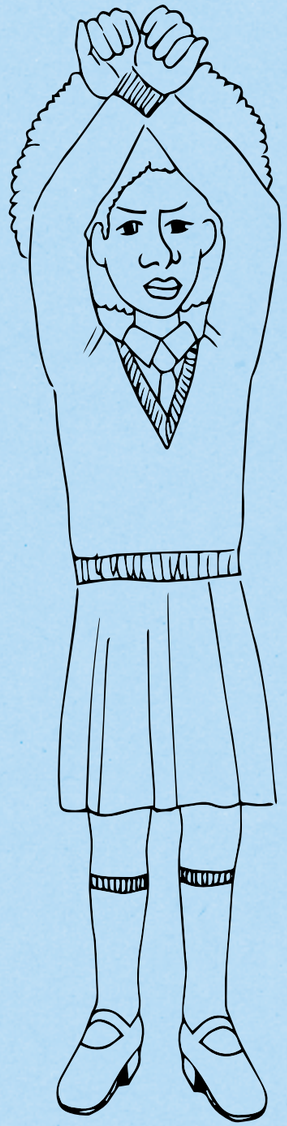
THE FEDSAS CASE

In this case the Federation of Governing Bodies for South African Schools (FEDSAS) brought an application challenging the validity of specific provisions of the Gauteng regulations to the admission of learners to public schools. The most contentious was a provision that until such a time that the MEC has determined a feeder zone for schools, parents must enrol their children in schools within a 5km radius of their homes or place of work. FEDSAS argued that the provision entitling the MEC to declare school feeder zones undermines the powers of school governing bodies to formulate their own policies. The Court held that the regulations, including the power of the MEC to declare feeder zones were valid; but simultaneously held that such feeder zones had to be finalised within one year from the judgment, thus ensuring that the default interim provision would not exist.

CASE STUDY

THE PILLAY CASE

A school's code of conduct may at times conflict with a learner's religious beliefs or cultural practices. In such a case, the school is required by the Constitution to take positive steps to make a reasonable accommodation for the learner concerned. For example, in *MEC for Education: KwaZulu-Natal and Others v Pillay* (the *Pillay* case), a learner wore a nose stud to school as part of her religion and culture. However, wearing jewellery other than that permitted by the rules was against the school's code of conduct, and so the learner was punished. The matter went to court, and the Constitutional Court found that the learner's cultural and religious practices should have been reasonably accommodated, and that an exemption should have been made for that learner.



CASE STUDY

PRETORIA GIRLS HIGH

In August 2016, black learners at Pretoria Girls High School received nationwide attention for protesting against institutional racism at the school. The major complaint of the learners was in respect of the implementation by the school of its Code of Conduct – in particular, its policy on hairstyles.

Following the protest, many other schools have sought to pre-empt similar protests by revising their own codes of conduct.

Pretoria Girls High School's Code of Conduct describes 'ubuntu' and 'equality and inclusivity' as the school's core values. These must be used to interpret the code. It then goes on to say that 'all hair must be brushed', and that 'all styles should be conservative, neat and in keeping with the school uniform'.

According to the learners, this hair policy has been interpreted by the school in such a way as to prevent black learners from wearing their hair in Afros, because this type of hairstyle was viewed as 'exotic'. Black learners argued that the prohibition against Afros amounted to racial discrimination. The learners stated that for a black girl, an Afro is just one of the many ways in which natural black hair can be treated, and it should be up to them to decide how to wear their hair. The girls therefore wanted to be allowed to wear an Afro if they chose to do so.

These learners also noted some of the prejudicial statements that had been made about black hair. In previous years, learners had been told they would not be allowed to write exams if they didn't 'fix' their hair. Learners say comments were made by staff about black girls' hair. These included '[Your hair] looks like a bird's nest', 'Comb your hair, it looks terrible', and '[Your dreadlocks are] dirty old braids'; and a learner alleged that in two separate incidents, teachers had referred to her hair as 'kaffir hair'.

Learners at the school also reported that they had been reprimanded for wearing 'doeks', which they consider to be culturally significant, and told to 'stop making those funny noises' when speaking isiXhosa at school. The chapter in this handbook on religion and education in schools covers in detail learners' religious and cultural rights in terms of dress, hair and practices.

Following the protests at the school, the Gauteng MEC for Education intervened and suspended the provision in the Code of Conduct dealing with hairstyles. He instructed the school governing body (SGB) to develop a new hair policy, which he said had to be workshopped before being introduced.

The Department of Basic Education's 1998 Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners acknowledges that the 'freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression, as seen in clothing selection and hairstyles'.

In *A v Governing Body, The Settlers High School and Others* the High Court indicated that the values entrenched in the Department's Guidelines and schools' codes of conduct must be used in interpreting codes of conduct.

It is therefore important for all school governing bodies, when developing codes of conduct, to consider the religious, cultural and racial diversity of the school populations they serve; and then develop rules – after proper consultation with these different groupings – that are inclusive, and which accommodate and reflect this diversity. This is because what is considered neat cannot be based on the subjective views of one particular group; what is considered neat must be negotiated and discussed with the entire school population.

LANGUAGE CASE STUDY

THE ERMELO CASE

In the *Ermelo* case, Ermelo High School was an Afrikaans-medium school which was not filled to capacity according to the national average. The HOD of the Mpumalanga provincial education department requested that the school admit English-speaking learners to the school, as other schools in the area were filled beyond capacity.

The SGB of Ermelo School refused to admit the learners for tuition in English, as it was the school's policy to provide education in Afrikaans. The HOD subsequently tried to remove the power of the SGB to determine language policy, and appointed an interim committee that altered the school's language policy to be dual medium.

The matter was eventually heard in the Constitutional Court. The Court decided that the HOD had acted unprocedurally when trying to resolve the dispute. However, the learners who were subject to the proceedings were permitted to complete their studies. The Constitutional Court ordered the school to revise its language policy to take cognisance of the broader community in which the school was based:

> It is correct, as counsel for the school emphasised, that Section 20(1) compels a governing body to promote the best interests of the school and of all learners at the school. Counsel also emphasised, rightly, that the statute places the governing body in a fiduciary relation to the school. However, a school cannot be seen as a static and insular entity. Good leaders recognise that institutions must adapt and develop. Their fiduciary duty, then, is to the institution as a dynamic part of an evolving society. The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our Constitution. (*Ermelo* case para 80)

In addition, the Court ordered that the SGB take reasonable steps to satisfy the likely demand for English places in the following year, and file a report in that regard.

LANGUAGE POLICY

SGBs have the power to determine a school's language policy. This is set out in the Schools Act, and has been confirmed in case law in the Constitutional Court. Chapter 11 of this handbook deals with language in schools in detail.

Like all the other powers of the SGB, this power is not absolute, and must be subject to the Constitution and the Bill of Rights. The courts have also held that the HOD can intervene in the language policy of a school, under reasonable grounds, in order to uphold the learners' right to education.

Section 29(2) of the Bill of Rights provides that everyone has the right to receive education in the language of their choice where reasonably practical, taking into account the need for historical redress because of past racially discriminatory laws under apartheid. In addition to this, the language policy of the school must take into account the broader needs of the community in which the school is located. This has been confirmed in case law, such as in the *Ermelo* case.

PREGNANCY POLICY

SGBs can make pregnancy policies. The courts have recognised that SGBs are better suited than the provincial or national DBEs to make policies for their individual schools. Again, like all the other policy-making functions of the SGB, this ability to make policy on pregnancy is not absolute. Chapter 8 of this handbook deals in greater detail with issues around learner pregnancy.

The policy must be consistent with the Bill of Rights, and in particular the policy must ensure that the learner's right to education is upheld, and that there is no discrimination against the learner based on her pregnancy status. The policy must also be consistent with any guidelines drawn up by the relevant provincial education department (such as the Management and Governance Circular No 18 of 2010 created by the province in the *Welkom* case).

Pregnancy is dealt with in detail in Chapter 8.

RELIGIOUS POLICY

Culture and religion in schools is dealt with in detail in Chapter 10 of this handbook.

SGBs can make rules regarding religious observances, but these rules must also be consistent with the Constitution, which protects everyone's right to freedom of thought, conscience, religion and opinion. This means that the religious policies of individual schools must be in accordance with the DBE's National Policy on Religion in Education, and must promote understanding and respect for South Africa's diverse religious beliefs.

In addition, attendance at a school's religious observances should be done on a free and voluntary basis. The national education department has drawn up a policy in this regard, called the National Policy on Religion and Education.

An example of the reasonable accommodation of someone's religion was found in the *Pillay* case, in which the learner's wearing of a nose stud was seen as part of her religion. While wearing earrings and piercings was contrary to the school's policy, the school was ordered to take reasonable steps to accommodate this and thus provide an exception to the school rules for the learner.

SCHOOL FEES

School fees supplement funding provided by government. School fees are determined at a public school by a resolution adopted by a majority of parents at a general meeting. The SGB must implement the resolution as determined at this meeting. This is set out in Section 39 of the Schools Act.

Schools are designated fee-paying schools or no-fee schools. A fee-paying school is required to inform parents of the school-fee exemption policy. The school-fee exemption policy provides that parents who earn less than a certain income can receive a full or partial exemption from school fees. Parents need to apply for such an exemption in the required manner.

Other exemptions apply automatically. Caregivers of children in foster care and caregivers who receive the child-support grant are exempted from paying fees. This occurs automatically and such caregivers do not have to apply specifically for this.

No-fee schools are certain schools where fees are abolished for learners from Grade R to Grade 9. No-fee schools are taken from the poorest schools in the country.

School fees are dealt with in detail in Chapter 7.

PREGNANCY CASE STUDY

THE WELKOM CASE

An example of the clash between the SGB and the HOD when it comes to the pregnancy policy can be seen in the *Welkom* case. This concerned two schools, namely Welkom High School and Harmony High School. Both schools had adopted pregnancy policies that provided that any learner who becomes pregnant is automatically excluded from the school, and cannot return until at least one year after the birth of the baby.

The conflict in the case centred on whether the HOD of the Free State provincial education department had followed the correct procedure in trying to remedy the policies, and not on the content of the policies themselves. Therefore the Constitutional Court could not make a formal decision on whether the pregnancy policies went against the Constitution. However, the Court did acknowledge that at face value, the policies infringed on the constitutional rights of pregnant learners to education, dignity, privacy and bodily and psychological integrity. The Court ordered that the schools review their policies, in light of constitutional values and of the guidelines set out by the head of the Free State provincial education department.

RESOLVING DISPUTES BETWEEN THE VARIOUS STAKEHOLDERS

The Schools Act makes provision for various methods of resolving dispute that might arise between people involved in the running of a school.

Co-operative governance, a key principle in school governance, requires parties to resolve matters in good faith, and to engage meaningfully with each other. They must also go through all the internal processes provided for resolving disputes before turning to the court. Court action must be a last resort. As confirmed in case law, such as the *Rivonia* case, the starting point for resolving disputes is the best interests of the learner.

The internal processes that are provided in the Act include, for example, learners or parents being able to appeal decisions of suspension to the provincial head of education, and decisions of expulsion to the education MEC. The process for these procedures is set out in a school's code of conduct, which must also be constitutional.

CONCLUSION

While there are a number of different role players in school governance, their roles are intertwined, and co-operation is required between them to put the learner's best interests first.

There has been criticism of the various judgements concerning school governance, particularly that they have been too focused on procedure and power struggles between the parties. Despite this, there is a strong theme in case law and the legislation that the starting point must always be the learner's best interests, and that parties must co-operate.

Sebastian Mansfield-Barry is a project coordinator at the Centre for Child Law, where they were previously a candidate attorney.

Lithalethemba Stwayi is an attorney who works at the Centre for Child Law, where she is part of the strategic litigation unit.

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CHAPTER 4

EQUALITY AND UNFAIR DISCRIMINATION IN EDUCATION

Chris McConnachie

INTRODUCTION

Unfair discrimination has shaped the South African education system, producing inequality in our schools and society.

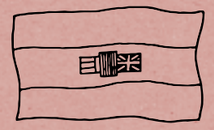
Under apartheid, schools were strictly segregated by race. White learners received most of the funding and resources, resulting in an inferior education for the majority of black learners. In *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo*, the Constitutional Court described this system and its consequences (para 46):

> [W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been, and by and large remain, scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main, and were supported by, relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.

Race remains the most visible marker of inequality in our education system, but other inequalities also persist. Unfair discrimination on the basis of gender, religion, language, sexual orientation and disability, among many other grounds, has been a constant feature of education in South Africa. Often these forms of unfair discrimination have combined, resulting in deeper inequalities.

In this section of the handbook, we address different forms of inequality and unfair discrimination in our schools, and the efforts needed to address these problems. This chapter lays a foundation by introducing the legal principles and concepts that will feature in the chapters to follow.

The chapters in this section all underline an important point. Addressing inequality and unfair discrimination should not only be seen as a duty; this task should also be seen as an opportunity to make schools more welcoming, inclusive places that make all children feel valued.



APARTHEID SPENDING ON SCHOOLS

One of the clearest indicators of the inequalities in apartheid education was the government's spending per learner.

In 1982, the apartheid government spent an average of:

- **R 1 211 on every white child**
- **R 771 on every Indian child**
- **R 498 on every coloured child**
- **R 146 on every black child**

THE CONSTITUTION AND THE EQUALITY ACT

Section 9 of the Constitution guarantees the right to equality. This right has three important parts:

- First, a right to equality before the law, and equal protection and benefit of the law (Section 9(1))
- Second, permission for the state to take positive measures to protect and advance groups that have been disadvantaged by unfair discrimination (Section 9(2))
- Third, a prohibition on unfair discrimination by the state (Section 9(3)) and by private individuals (Section 9(4)).

Parliament has passed legislation to give effect to this right. The most important statute for our purposes is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The Equality Act prohibits unfair discrimination by the state and all individuals. It also prohibits related wrongs, such as hate speech, harassment and the publication of unfairly discriminatory material.

The Equality Act has created a network of Equality Courts around the country. These courts are meant to provide a quick, informal and effective way of resolving unfair discrimination disputes. As a result, the Equality Act is one of the primary sources of rights and remedies when a learner experiences unfair discrimination in school. The process of bringing a claim in the Equality Court is discussed in more detail below.

Other laws, regulations and policies contain more detailed requirements for the prohibition of unfair discrimination and the promotion of equality in particular areas of the education system. These will be discussed in the chapters to follow.

THE CONSTITUTIONAL RIGHTS

Section 9 of the Constitution

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

INTERNATIONAL LAW

There are many international instruments that expressly prohibit discrimination in education and require positive measures to promote equality. These include:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on Economic, Social and Cultural Rights (ICESCR),
- The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The Convention on the Rights of People with Disabilities (CRPD)

THE CONCEPTS

THE DIFFERENT IDEAS OF EQUALITY

The demand for equal education has great power. But this demand often means different things to different people. Let us untangle some of these different meanings.

Equality is not a single idea. There are many types of equality, and not all types are valuable – or valuable for the same reasons.

One idea of equality we must reject is that equality requires 'sameness' in all circumstances. Identical treatment can be deeply harmful, particularly for those who have different needs. For instance, forcing all learners to take a written test would exclude partially sighted and blind learners. Treating everyone identically in this way often results in learners being denied access to a basic education.

When we talk about equality in education, there are at least three valuable forms of equality that we have in mind:

- First, equality requires the equal enjoyment and protection of constitutional rights. This idea is endorsed by Section 9(2) of the Constitution. This means that equality requires all learners to receive a basic education.
- Second, equality is about accommodating and valuing difference, rather than treating everyone identically or promoting uniformity. Schools that attract learners from diverse backgrounds can promote understanding and tolerance. Learners in diverse schools are also better equipped for life in a diverse country
- Finally, equality requires us to break down patterns of group disadvantage, and to prevent new patterns of disadvantage from forming. Many learners are not only denied the right to a basic education; they continue to suffer stigma, stereotyping, socio-economic disadvantage, violence, and powerlessness as a result of their race, gender, disability, sexual orientation or other group membership. Equality in education requires that we end these patterns of disadvantage.

These valuable forms of equality are often referred to as 'substantive' equality. When someone talks about substantive equality, they are referring to some or all of these forms.

The prohibition of unfair discrimination is an important tool in promoting these valuable forms of equality. In particular, this prohibition helps to prevent patterns of group disadvantage being perpetuated or created in schools.

It is important to remember that this prohibition on unfair discrimination is just one of the many tools available to promote equality in schools. For example, school feeding schemes, free education, improvements in teacher quality, and many other actions all help to promote equality by breaking down patterns of group disadvantage.

THE RIGHT TO A BASIC EDUCATION AND EQUALITY

The Section 29(1)(a) right to a basic education is closely linked with the right to equality and the prohibition of unfair discrimination.

The state must provide a basic education to all, without unfairly discriminating against any learner. For example, the state cannot provide an education to some learners but not to others on the basis of their race, gender or sexual orientation.

Unfair discrimination in schools will also have an impact on a learner's ability to receive a basic education. Racism, sexism and homophobia, among many other forms of unfair discrimination, all prevent learners from realising their full potential.

As a result, almost all forms of unfair discrimination against learners will also deprive them of their right to a basic education.

WHAT IS UNFAIR DISCRIMINATION?

In everyday language, we use the word 'discrimination' to mean a very serious type of wrong. In South African law, we use this word in a slightly different way. Discrimination is not wrongful in itself; it is only wrong if it is unfair.

In the next two sections, we explain the concepts of discrimination and unfairness in greater detail.

DISCRIMINATION DEFINED

Section 1 of the Equality Act defines discrimination as:

> '[A]ny act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –
>
> (a) imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'

In *Harksen v Lane* 1998 (1) SA 300 (CC), the Constitutional Court defined discrimination under Section 9(3) of the Constitution in slightly different terms, as 'differentiation' that is directly or indirectly based on prohibited grounds (paragraph 47).

DISCRIMINATION

Discrimination involves actions or omissions that impose burdens or withhold benefits, directly or indirectly, on the basis of prohibited grounds.

PROHIBITED GROUNDS

Treating people differently only becomes discrimination if it is based on prohibited grounds. Differences in treatment that are not based on these grounds are merely called 'differentiation'.

The prohibited grounds are characteristics that identify certain groups in our society. Section 9(3) of the Constitution and Section 1 of the Equality Act list a number of these grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These are the 'listed grounds' of discrimination.

These grounds have been used to categorise people for good and bad reasons. Not all distinctions made on the basis of these grounds are wrong. But all of these grounds have been used and continue to be used to oppress and marginalise people.

In addition to the listed grounds, courts have the power to recognise other grounds that are 'analogous', meaning that they also deserve protection. Some of the analogous grounds that have been recognised by our courts include citizenship, refugee status, and HIV status.

DIRECT AND INDIRECT DISCRIMINATION

Discrimination can occur directly or indirectly on the basis of prohibited grounds.

Direct discrimination occurs when prohibited grounds are used as the criteria for different treatment. For example, the apartheid education system directly discriminated on the basis of race, by allocating resources to schools according to the racial classification of their learners. We can say that race was used as the criterion of distribution.

Indirect discrimination occurs when rules or practices are 'neutral', meaning that they do not select people for different treatment on prohibited grounds, but they produce results that leave certain groups worse off than others. For example, a public school in a wealthy, mainly white neighbourhood has a rule that it will only admit learners who live less than 10 kilometres from the school. This policy does not select learners based on their race. However, it would exclude many black learners who live outside the wealthy neighbourhood. The result of this policy would be the same as if the school had a rule that said 'only 20% of our learners may be black'. This is indirect racial discrimination.

MULTIPLE AND INTERSECTIONAL DISCRIMINATION

Discrimination may occur on one or more grounds. This can involve 'multiple discrimination' and 'intersectional discrimination'.

Multiple discrimination occurs when a learner faces discrimination on separate protected grounds. For example, a black, female, Muslim learner may experience racism, sexism and religious prejudice at different times while at school. These different forms of discrimination add to the burdens that the learner experiences.

Intersectional discrimination occurs when a learner is discriminated against because of a combination of protected grounds. For instance, a school that prohibits learners from wearing the *hijab* in schools would discriminate on the overlapping grounds of religion, culture and gender, among other grounds. This is because this rule does not discriminate against all Muslim learners, or all female learners, or even all female Muslim learners. Instead, it discriminates against Muslim female learners whose particular cultural and religious practices require the *hijab*.

Intersectionality is an important idea in discrimination law. We are not defined by single identities. Instead our identities are shaped by our membership of overlapping social groups. Experiences of discrimination and inequality are equally complex, and generally cannot be reduced to a single protected ground.

UNFAIRNESS

We have already seen that discrimination is only wrongful if it is found to be unfair.

Unfairness is a complex concept. The Equality Act sets out a long list of factors that help in identifying whether discrimination is unfair (see the box below). The courts have also added their own guidelines and considerations, which help to identify unfairness.

These considerations assist in answering two different questions:

- First, what is the **impact** of this discrimination on the learner or group of learners, taking into account the context and historical or existing patterns of group disadvantage?
- Second, is this impact **justified** by some legitimate purpose for the discrimination?

In this approach, discrimination is unfair if it has a severe impact on the learner or group of learners that is not justified. The factors listed in the Equality Act are merely a guide to answering these questions. No factor is decisive.

THE BURDEN OF PROOF

Under the Equality Act, the person alleging unfair discrimination must set out the facts that indicate that discrimination has occurred. The person who is accused of unfair discrimination must then prove that no discrimination has occurred, or that the discrimination is fair.

This burden of proof is placed on the discriminator, no matter whether the ground is listed in the Equality Act or is an analogous ground. For example, HIV status is not listed in the Act, but it is an analogous ground of discrimination. As a result, if a school discriminates against learners on the basis of HIV status, then the school will have to prove that this discrimination is fair.

This burden of proof is slightly different under the Constitution, although it is not necessary to go into the details here. The Equality Act applies to all cases of discrimination except a few narrow exceptions, such as if you want to challenge a discriminatory law or if you want to challenge the Equality Act itself. Only in those cases would you need to rely on Section 9(3) of the Constitution directly.

FAIR DISCRIMINATION

Some forms of discrimination in schools are fair. For example, all schools divide learners by age for sports teams and other extra-mural activities. That is age discrimination; but it is fair, in most cases. For example, you would not want to see 18-year-olds playing competitive soccer against nine-year-olds.

While some forms of discrimination may be fair, we should still consider each case of discrimination very carefully. Many of the forms of discrimination that we have taken for granted in the past are now unthinkable. Discrimination against black people, women, gay people, transgender people and many other groups was all thought natural and normal at one time. The test for unfair discrimination makes us think long and hard about whether different forms of discrimination are justified.

HOW DO WE IDENTIFY ANALOGOUS GROUNDS?

Section 1 of the Equality Act provides that a ground will be considered to be analogous if it:

> '(i) causes or perpetuates systemic disadvantage;
>
> (ii) undermines human dignity; or
>
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a [listed ground].'

These considerations are very broad and open-ended. How would you apply these considerations to grounds that are not listed, such as class, weight, or physical appearance?

UNFAIRNESS FACTORS

Section 14(3) of the Equality Act sets out the following factors to consider in deciding whether discrimination is unfair:

> '(a) Whether the discrimination impairs or is likely to impair human dignity;
>
> (b) the impact or likely impact of the discrimination on the complainant;
>
> (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage, or belongs to a group that suffers from such patterns of disadvantage;
>
> (d) the nature and extent of the discrimination;
>
> (e) whether the discrimination is systemic in nature;
>
> (f) whether the discrimination has a legitimate purpose;
>
> (g) whether and to what extent the discrimination achieves its purpose;
>
> (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
>
> (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
>
> (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
>
> (ii) accommodate diversity. '

REMEDIES FOR UNFAIR DISCRIMINATION

Section 21 of the Equality Act gives Equality Courts wide-ranging powers to grant appropriate remedies. These remedies include:

- Declaratory relief, declaring the rights of the parties;
- Damages;
- An unconditional apology;
- Interdicts prohibiting certain actions or requiring action to be taken;
- Reporting duties.

See Chapter 1 for more information about remedies.

BRINGING A CLAIM IN THE EQUALITY COURT

If you or someone you know has suffered from unfair discrimination, it is best to approach the South African Human Rights Commission or a public interest law organisation. They will be able to provide you with free advice or assistance.

You do not need a lawyer to bring a claim in the Equality Court, but these cases can become very complex. A lawyer can help to guide you through the process and present your case in a persuasive way.

The Legal Aid Board has prepared a comprehensive guide to the process of bringing an Equality Court claim. You can find this guide at the following link: www.legal-aid.co.za/wp-content/uploads/2015/11/Equality-Court-Handbook-2015.pdf

APPLYING THE TEST FOR UNFAIR DISCRIMINATION

Let us now put these concepts to use by considering how the unfairness test would be applied to a real-life situation.

A school has a policy that all pregnant learners must leave school when they fall pregnant, and that they may only return in the year after they have given birth. A learner falls pregnant in January of her Grade 11 year and gives birth in October. She is forced to miss a whole year of school as a result. She brings a claim of unfair discrimination against the school in the Equality Court.

The school's policy clearly discriminates on the basis of pregnancy, a listed ground in the Equality Act and the Constitution. This is also a form of sex and gender discrimination. The school will bear the burden of proving that this discrimination is fair. In the Equality Court, the school argues that this discrimination is necessary to deter learners from falling pregnant.

To assess whether this discrimination is unfair, the Equality Court will consider the two parts of the unfairness analysis: impact and justification.

The **impact** of this discrimination is severe, and takes different forms. It has had a serious impact on the learner, as she was forced to miss a full year of education. It will have a similar impact on all other learners who fall pregnant. This discrimination also has a wider impact on society. The school's policy suggests that young women are to blame for falling pregnant, reinforcing stigma and harmful double standards. It also entrenches the socio-economic disadvantage that women experience in society. The failure to accommodate pregnant women and the burden of childcare responsibilities stand in the way of many women accessing education and meaningful work opportunities. This policy continues this pattern of disadvantage and exclusion.

Having assessed the impact of the discrimination, the Equality Court would then consider whether the school can **justify** this impact. There are obvious problems with the school's attempt at justification. If the aim is to stop learners from falling pregnant, it is not clear why pregnant learners are singled out for this harsh treatment, while the fathers of their children are allowed to continue their schooling. There is also no basis to believe that this policy will in fact prevent learners from falling pregnant. Better education and greater availability of contraceptives are far more effective strategies to limit teenage pregnancy. Finally, even if the policy had some deterrent effect, this could not outweigh the significant harm of depriving learners of a full year or more of education and reinforcing stigma against women and girls.

As a result, the Equality Court would have little difficulty in finding that the school has discriminated unfairly against the learner.

REASONABLE ACCOMMODATION AND INCLUSIVE EDUCATION

As explained above, equality in education requires the accommodation of difference, not strict uniformity. The failure to reasonably accommodate those whose needs are different will often result in unfair discrimination. Reasonable accommodation is required to achieve inclusive education. An inclusive education is an education that welcomes learners from diverse backgrounds, caters to their diverse needs, and makes all learners feel safe and valued.

In *MEC for Education, KwaZulu-Natal v Pillay*, the Constitutional Court explained this concept of reasonable accommodation (para 73):

> At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.

What the Court is saying is that schools and the government must be prepared to make some effort to accommodate learners from diverse backgrounds. This may cost time and money. But this is a price worth

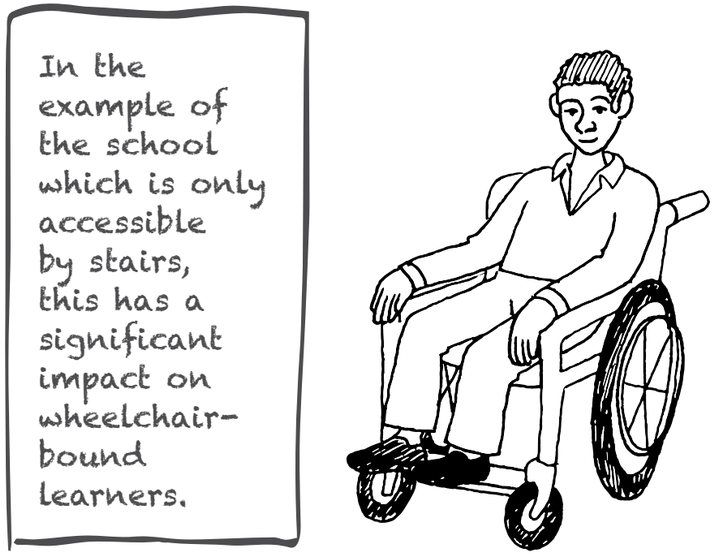
DISABILITY AND REASONABLE ACCOMMODATION

Reasonable accommodation has a particularly important role in determining the rights of learners with disabilities.

In the *Pillay* case, the Constitutional Court quoted the following passage from the Supreme Court of Canada's decision in *Eaton v Brant* [1997] 1 SCR 241 at para 67:

> Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes, to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

The rights of learners with disabilities are discussed more extensively in the next chapter.



paying to allow people to participate in schools and in their communities.

The same test for unfair discrimination applies where a school or the state has failed to accommodate the needs of a learner or group of learners.

First, the failure to make accommodation will generally be a form of indirect discrimination, as neutral rules or practices may disproportionately exclude or have an impact on certain learners. For instance, if a school is only accessible by stairs, this will indirectly discriminate against learners in wheelchairs.

Second, the unfairness analysis will focus on the consequences of the failure to accommodate learners and the justification for this failure. This will often involve a balancing enquiry, weighing the impact of the discrimination against the cost of making the accommodation. As the Court indicated in *Pillay*, 'the essence of reasonable is an exercise in proportionality' (para 86).

In the example of the school which is only accessible by stairs, this has a significant impact on wheelchair-bound learners. They may be denied entry to the school entirely, or they may have to go through the humiliation of being carried up and down the stairs each day. This impact must be weighed against the cost of installing a ramp for wheelchairs. This cost of that action will probably be limited in comparison with the benefits it will bring for the learners. As a result, it would be unfair discrimination to refuse to install a wheelchair ramp, unless there are strong reasons not to do so.

POSITIVE DUTIES TO PROMOTE EQUALITY AND AFFIRMATIVE ACTION

The prohibition of unfair discrimination is an important tool in promoting equality, but it has its limits.

This prohibition does not directly address existing patterns of disadvantage caused by historical unfair discrimination. For example, a black learner at a poorly resourced township school may not face any immediate acts of unfair discrimination. The prohibition on unfair discrimination can offer her no immediate solutions. Other positive steps must be taken to undo the disadvantage that she experiences as a result of apartheid.

The prohibition on unfair discrimination is also backward-looking, as it responds to unfair discrimination that has or is about to occur, rather than putting in place measures to prevent unfair discrimination from occurring in future. It also generally relies on the courage and resources of individuals who have to bring unfair discrimination claims to court.

This does not make the prohibition of unfair discrimination any less important. What it shows is that other tools are needed to promote equality.

POSITIVE MEASURES

Chapter 5 of the Equality Act places positive duties on the state and all other persons to promote equality. This part of the Equality Act is still not in force, but it does indicate the type of actions that schools should adopt to promote greater equality. These measures may include:

- Putting in place plans and policies to address unfair discrimination and to promote equality
- Proactively monitoring policies and practices to ensure that they do not unfairly discriminate
- Promoting access for learners from all backgrounds
- Providing adequate training and assistance to teachers and staff members
- Integrating equality and unfair discrimination issues in lessons.

The next chapters will discuss other concrete positive measures that can be taken to address inequality in different areas of the education system.

AFFIRMATIVE ACTION

Positive measures to protect or advance groups that have experienced historical discrimination are referred to as 'affirmative action'. Section 9(2) of the Constitution expressly allows for affirmative-action measures when it says '[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

The Equality Act makes it clear that legitimate affirmative measures are not unfair discrimination. Section 14(1) of the Equality Act provides: 'It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.'

In *Minister of Finance v Van Heerden*, the Constitutional Court developed a three-part test for assessing whether an affirmative action measure is legitimate under Section 9(2) of the Constitution:

- First, it must be targeted at a group that has experienced unfair discrimination in the past, such as black learners or learners with disabilities
- Second, it must be reasonably likely to benefit that group, meaning that the affirmative action measure should be capable of protecting them or advancing their interests
- Third, the measure must promote equality, meaning that the benefits it brings to the beneficiaries should outweigh the costs it may impose on others. It should also not be used to mask abuses of power.

If an affirmative action measure passes this test then it cannot be challenged as unfair discrimination.

There is still some uncertainty about whether this test applies under the Equality Act. The courts will be required to settle this question in future cases.

CONCLUSION

Unfair discrimination and inequality are complex social problems that can take many different forms. This is reflected in the detailed laws that have developed in response.

While these laws are intricate, they exist to serve clear aims: to ensure that all learners receive a basic education, to accommodate difference, to promote diversity, and to break down patterns of group disadvantage.

The next chapters will assess how these aims are being realised in law and in practice in different areas of the education system.

Chris McConnachie completed his doctorate on unfair discrimination at the University of Oxford. He is an advocate at Thulamela Chambers, Johannesburg and an honorary research associate at Rhodes University.

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CHAPTER 5

THE RIGHT TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES

Silomo Khumalo and Tim Fish Hodgson

INTRODUCTION

The apartheid government created a racially segregated education system that offered black children poor-quality education in urban townships or designated 'homelands'.

Education for children with disabilities followed a similarly racialised trend. White learners with disabilities had the potential benefit of higher-quality education in special schools designed for specific disabilities, with adequate resources and well-trained teachers.

By contrast, for decades after special schools were opened for white children, black, Indian and coloured children with disabilities were left without any schooling at all. When 'special schools' were eventually established, it was often by faith-based missions and charities with inadequate resources and poorly trained teachers.

All in all, the Department of Basic Education (DBE) estimates that only 20% of children with disabilities accessed education during the apartheid era. Almost exclusively, these children accessed schooling through 'special schools', which admitted only children with disabilities and were further divided racially. After the transition to democracy there was therefore a double apartheid that needed to be resolved in the education system: a racial apartheid, and an interconnected disability apartheid.

Education White Paper 6, titled Special Needs Education – Building an Inclusive Education and Training System (WP6), was a bold move towards resolving this dual discrimination in education.

White Paper 6 is a policy developed by the Department of Basic Education, which envisions an inclusive education system premised on the principles of non-discrimination and the human dignity of all children. It seeks to remedy the problems inherited from the apartheid education system and eradicate all forms of barriers to learning.

Despite this progress, a recent DBE progress report on the implementation of WP6 reports that there are still approximately 600 000 children with disabilities who are out of school. This high number indicates a crisis in the provision of basic education for children with disabilities. When the policy was first drafted, this number was estimated by the DBE to be 280 000 – less than half the current estimation.

The obvious question is: what has gone wrong? The purpose of the chapter is to try to answer this question, and to provide the necessary information for disability rights advocacy groups and communities to effect the right to basic education for children with disabilities.

The chapter provides a brief overview of the right to equitable access to quality basic education for children with disabilities in South Africa. It considers the South African inclusive education system envisaged in WP6, and the problems encountered and successes achieved in implementing it. The chapter discusses some of the cases and legal processes that have helped pave the way towards realising the right to basic education to which children with disabilities are entitled.

Children with disabilities are simply children. They are therefore vulnerable to all of the other challenges in South Africa's education system described in this manual, including those of infrastructure, access to learning materials, post provisioning, threats of violence, and lack of transport.

In an attempt to contribute to further mainstreaming disability rights in the education system, this manual attempts to deal with disability in each and every chapter. This chapter should therefore be read with the rest of the manual, in order to develop a full understanding of the specific and acute challenges faced by children with disabilities in receiving an equal education. It is hoped that this chapter will give the reader the tools for understanding disability and inclusive education when reading the rest of the manual.

KEY TERMS: WHAT IS DISABILITY?

Correct and accurate terminology is particularly important to disability rights activism. Incorrect terminology can be alienating for, and hurtful to, people with disabilities. Though people with disabilities do vary in their opinions, in the South African context, for example, there is a general preference not to be referred to as 'handicapped' or 'disabled' people, but rather as 'people with disabilities'.

More recently, developments in the education policy environment in South Africa have also acknowledged the need to speak more broadly than just on disability, and acknowledge that inclusive education is premised on providing appropriate support for children with disabilities, children with other 'barriers to learning', and each and every child who as an individual may require focused, individualised support.

The following definitions may be useful to the reader, in the context of this chapter and of the manual more broadly:

- **Disability** Disability is an umbrella term for impairments, activity limitations and participation restrictions. Disability is potentially an issue both at the level of a person's body and as a result of an unaccommodating social and physical environment. This approach to defining disability seeks to shift the focus from the so-called cause of disability towards the impact of a disability.
- **Medical model of disability** The medical model followed by the apartheid government assumed that disability is caused by the physical or intellectual impairment of an individual. It regarded people with disabilities as suffering from an inherent deficiency that requires or is capable of a medical cure or treatment. The medical model of disability has contributed to widespread stigma about people with disabilities as somehow sub- or inhuman; and in the context of education, as 'ineducable'. Under the medical model of disability, people are often isolated in specialised institutions such as 'special schools', away from 'normal' children.

PRACTICAL EXAMPLES: SOCIAL MODEL OF DISABILITY

Yoliswa developed an eye condition called glaucoma. This condition damaged her optic nerve, resulting in a total loss of her sight. According to this social definition of disability, Yoliswa's glaucoma did not conclusively result in disability by itself. The medical condition which caused Yoliswa to become blind combined with the lack of reading material in Braille (text specially modified to be read by a blind person) at her school to produce what we call a 'disability'.

Zweli lives in a rural area in KwaZulu-Natal. As a result of a car accident he is partially paralysed, and cannot walk. He therefore moves around using a wheelchair he received from his local hospital. Zweli's local primary school does not have ramps that he can use to access classrooms or toilets. In addition, he lives three kilometres from school, there is no public transport system, and the roads are made of soft sand, which makes it difficult for him to use his wheelchair.

Tabane lives in Tshwane and has always attended her local school. Her teacher says that she is a 'slow learner' and that she struggles with reading, writing and counting, and cannot cope at school. Doctors say that Tabane has two conditions: dyslexia and dyscalculia. Both are sometimes called 'learning difficulties' or 'learning disabilities', and may be caused by a combination of genetic and environmental reasons. Neither condition means that Tabane is any less clever or capable of learning – she just needs teachers who understand her conditions, and adapt their teaching to suit her needs.

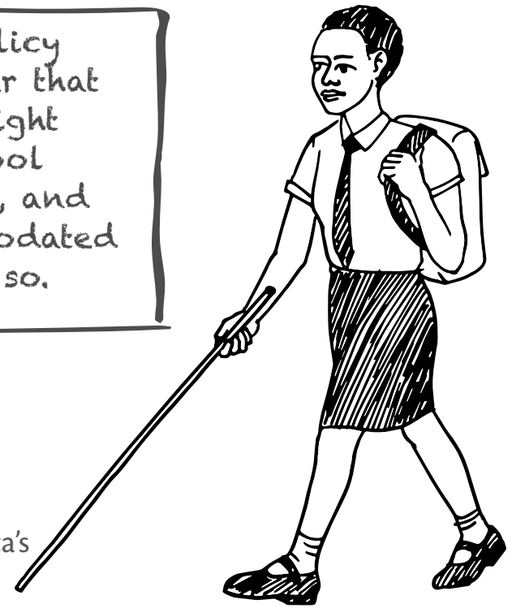
- **Social model of disability** According to the social model, disability is not a uniform problem caused entirely by the impairment or condition of an individual. Rather, disability is a complicated social phenomenon that requires both medical and social interventions to enable an individual to participate meaningfully in society. The social model came about in the 1970s, as a result of people with disabilities rising up against their exclusion and marginalisation in society. The disability rights movement used the expression or slogan 'Nothing about Us without Us' to demand the inclusion of people with disabilities in all aspects of society.
- **Multiple disabilities** Children may have more than one disability, as the example of Tabane (see sidebar) shows. These can vary in combination, and make the accommodation needed to ensure that their schooling is effective more challenging. It is possible for a child with a learning difficulty such as dyslexia to also be hearing impaired, for example; or for a child with a severe intellectual disability also to need a wheelchair to be able to move around.
- **Severity of disability** Not all disabilities are the same. For example, a totally deaf child is not able to hear at all. Other children may be seriously hearing impaired, and only capable of communicating in sign language – like totally deaf children – even though they can hear some sounds. Another child might need only a hearing aid and for the teacher to stand closer to her in order to hear properly. WP6 describes this variety by distinguishing between 'severe' and 'moderate' disabilities. More recent policies refer to 'high', 'moderate' and 'low' levels of support that a child may need because of a 'barrier to learning'.

The **inclusive education** approach followed today in South Africa is based on the social model of disability, and seeks to remove all barriers to learning.

Though inclusive education systems vary depending on their context, the basic premise is the inclusion of people with disabilities in schools and classes with children who do not have disabilities. Inclusive education requires that the necessary support be provided for a learner in an 'ordinary' school to overcome barriers to learning caused by the medical condition/impairment, as well as by the learning environment.

The inclusive education approach attempts to move away from the isolation of learners with disabilities in 'special' schools towards their inclusion in neighbourhood 'ordinary' or 'mainstream' schools.

...the inclusive education policy and the Schools Act are clear that ultimately, a child has the right to attend a mainstream school in his or her neighbourhood, and must be reasonably accommodated in his or her attempts to do so.



OVERVIEW

The segregated apartheid education system has had a major impact on what South Africa's inclusive education looks like today.

At the end of apartheid there were only about 380 special schools, which segregated learners with disabilities from the mainstream schooling system almost entirely. The current inclusive education framework seeks to convert some of these special schools to 'resource centres', intended to support the 'full-service' (explained below) and 'mainstream' schools with expertise and resources, so they can reasonably accommodate learners with disabilities. Although special schools were a hallmark of the discriminatory medical model, they remain a key part of South Africa's inclusive education strategy to strengthen special schools.

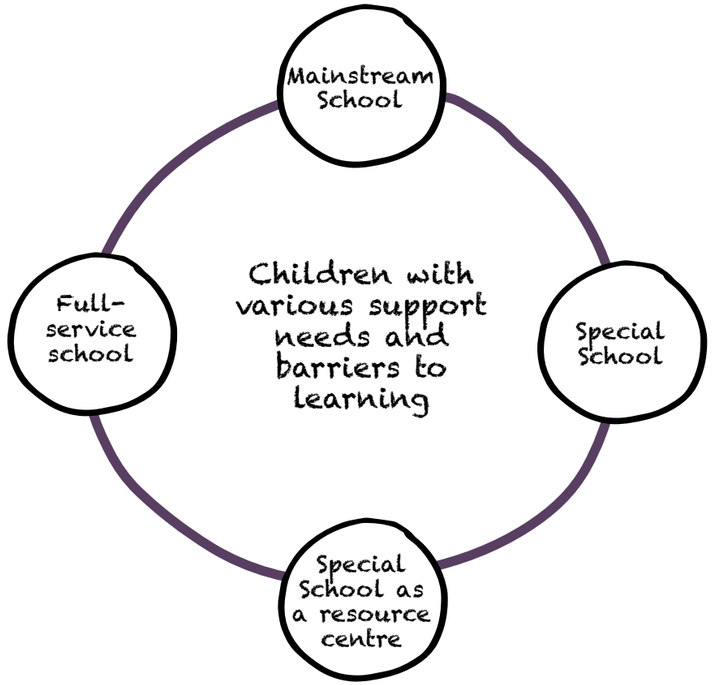
To ensure that children with disabilities do not remain isolated in special schools, South Africa's inclusive education approach creates 'full-service' schools. These schools are specially resourced mainstream schools that can more easily accommodate children with disabilities than most mainstream schools might initially be capable of doing.

Finally, the inclusive education policy and the Schools Act are clear that ultimately, a child has the right to attend a mainstream school in his or her neighbourhood, and must be reasonably accommodated in his or her attempts to do so. Only if this accommodation is not possible may a child be transferred to a full-service or special school by the Department of Basic Education.

Parents of children with disabilities have the option to choose the type of school they want their children to attend. This is to keep in line with the idea that eventually, all children – including children with disabilities – must be able to attend schools in their neighbourhood. At the same time, the idea is that the special-schooling system remains an option for those children whose educational needs might not effectively be catered for at this stage in full-service and mainstream schools.

Table 5.1: Types of schools that should accommodate children with disabilities and special learning needs in South Africa

TYPE OF SCHOOL	WHAT IS IT?	SPECIFIC POLICIES AND GUIDELINES
Mainstream/ Ordinary School	• A mainstream school is an ordinary neighbourhood school that all children attend. • Mainstream schools are required to 'reasonably accommodate' children with disabilities. • According to the SIAS policy, all children should attend their local neighbourhood school first, regardless of their disabilities.	• Equality Act • *Lettie Hazel Oortman v Thomas Aquinas Private School* • Schools Act Section 12(4)
Full-Service School	• Full-service primary and high schools are specially designated and converted mainstream schools that are specially resourced and equipped by government to accommodate learners with a wide range of disabilities and learning needs. • They may accommodate learners with 'high' learning needs, but most often accommodate learners with 'moderate' or 'low' needs according to the SIAS policy.	• Guidelines for Full-Service/ Inclusive Schools (2010) • Conceptual and Operational Guidelines for the Implementation of Inclusive Education: • Full-Service Schools (2005)
Special School	• Special schools are primary and high schools that are equipped to deliver a specialised education programme to learners requiring access to highly intensive educational support. • Special schools are required to specialise in education for children with specific 'severe' disabilities. Children should only attend special schools once they have been screened through the SIAS policy process at a mainstream school, and should only be placed in special schools specialising in the accommodation of their particular disability. • Children in special schools are often required to stay in hostels during the term because of the long distances between their homes and the special schools.	• Guidelines to Ensure Quality Education and Support in Special Schools and Special-School Resource Centres (2014) • Guidelines to Ensure Quality Education and Support in Special Schools and Special-School Resource Centres (2007)
Special School as a Resource Centre	• Some special schools in each province should be defined as 'resource centres' and equipped to provide significant support and a range of support services to other special schools, full-service schools and ordinary schools in their areas. • Resource Centres have various important support roles in terms of the SIAS policy, and should work closely with District-Based Support Teams.	• Guidelines to Ensure Quality Education and Support in Special Schools and Special-School Resource Centres (2014) • Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Special Schools as Resource Centres (2005)



In addition to WP6, the DBE has formulated various other guidelines and policies to explain how special, full-service and mainstream schools must operate. A convenient list of these documents is provided at the end of this chapter. The only other document we will discuss here is the Screening, Identification, Assessment and Support Policy (SIAS), which was published in 2014 and must be implemented in phases between 2015 and 2018 to give effect to WP6.

The SIAS policy describes the specific type of support that must be provided to learners with high-level, moderate, and low-level support needs. These requirements cut across all learning barriers and disabilities.

IN THE WORDS OF INCLUSIVE EDUCATION WHITE PAPER 6:

'Learners who require low-intensive support will receive this in ordinary schools and those requiring moderate support will receive this in full-service schools. Learners who require high-intensive educational support will continue to receive such support in special schools.'

CURRENT PROBLEMS IN THE PROVISION OF EDUCATION FOR CHILDREN WITH DISABILITIES

The implementation of WP6 has been too slow. WP6 was first introduced in 2001 and 15 years later, there has not been much progress in the implementation of the inclusive education system.

Hundreds of thousands of children remain out of school, and those who do attend schools complain about serious problems relating to the quality of education that children with disabilities receive in many – if not most – special, full-service and mainstream schools throughout the country.

The education system for children with disabilities is therefore still very reliant on special schools. Children with disabilities are still required to leave their families and communities to attend far-away special schools and live in hostels under poor conditions.

Families are often required to pay school fees, hostel fees and transport fees that they cannot afford for their children to attend faraway special schools. They complain bitterly about only seeing their children during school holidays, and miss them dearly.

The DBE has published progress reports on the implementation of WP6 in 2015 and 2016 that detail some other serious problems. They honestly and bluntly identify a situation which many activists working on inclusive education and disability rights describe as a 'crisis'.

SOME OF THE MOST SIGNIFICANT PROBLEMS NOTED IN THE DBE'S REPORT INCLUDE:

- Neither teachers, nor principals, nor district and provincial officials understand the essence of the White Paper, its intention, or how to execute its directives
- There are at least 231 vacancies in inclusive education directorates at provincial and district level
- Many special schools are simply 'day-care centres'. The national curriculum is not being taught to learners effectively, in an appropriate manner
- The hostels are in extremely poor condition
- There is a high rate of child abuse in the hostels
- There aren't enough teachers.

These problems point to the systematic failure of the department to realise the right to access quality basic education for scores of children with disabilities in South Africa.

Worse still, at the moment the department – at national, provincial and district level – seems to lack the expertise and resources to turn this situation around. This is despite a Constitution that guarantees the right to basic education for all children, including children with disabilities.

In the pages following is a brief discussion of the legal and policy framework that informs the right to education for children with disabilities in South Africa. We discuss South Africa's Constitution, international law, the Schools Act, and the Equality Act; and then explain what is required by WP6 and the SIAS policy.

THE LEGAL FRAMEWORK

THE CONSTITUTION

THE RIGHT TO EDUCATION

The Constitution gives 'everyone' the right to basic education (Section 29). The reference to 'everyone' in the Section means just what it says; namely, that everyone – including people with disabilities – has a right to basic education.

Importantly, the right to basic education is not qualified by the 'availability of resources' or 'progressive realisation', as are the rights to adequate housing and access to healthcare services. The fact that the right to basic education is not qualified means that the government has the obligation to 'immediately realise' the right. This requires the government to provide access to education for children with disabilities on the same basis as with other children, regardless of how expensive that might be. And it must do so now.

RIGHTS TO EQUALITY, DIGNITY AND FREEDOM FROM ABUSE AND NEGLECT

The failure of the government to provide access to education for children with disabilities amounts to discrimination on the basis of disability (Section 9).

The terrible conditions and lack of reasonable accommodation at special, full-service and mainstream schools is a violation of the rights to dignity of children with disabilities (Section 10). Widespread abuse faced by children staying in special-school hostels violates their right to be free from abuse and neglect, and their right to freedom and security of person (Section 12).

INTERNATIONAL LAW

Many international human rights conventions outlaw discrimination against people with disabilities. Many conventions include provisions protecting people with disabilities specifically, or 'vulnerable persons' in general. The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which came into operation in 2007, sets out specific protections for people with disabilities.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD)

Article 24 of the UNCRPD deals specifically with education for children with disabilities, and for the first time entrenches in international law the right to an 'inclusive education system'. This right must be realised 'without discrimination and on the basis of equal opportunity'.

The UNCRPD echoes other international conventions indicating that the purpose of education for children with disabilities is to fully develop human potential and allow people with disabilities to participate effectively in society. It makes clear that 'persons with disabilities are not excluded from the general education system', and must accordingly receive appropriate support within the general education system.

Children with disabilities therefore have the same right to quality education as other children, as well as the right to access this education in the communities in which they live. This level of support must put children with disabilities on an equal footing with other learners, both academically and socially, and may require 'individualised support'.

In the words of the UNCRPD:

> Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

The UNCRPD also emphasises that any 'reasonable accommodation' of an 'individual's requirements' must be made to ensure that each and every child with a disability is effectively educated.

We discuss 'reasonable accommodation' for children with disabilities in terms of South African law below, in our discussion of the Oortman case.

Finally, the convention places special emphasis on children with disabilities being equipped with the ability to read, write and communicate, and develop other 'life and social-development skills'. It specifically highlights that for some children, this will require the learning of Braille and orientation and mobility skills, while for others, it could mean learning sign language; and that schools that these learners attend must employ teachers who are qualified in sign language and Braille.

According to the Convention, teachers, professionals and staff who work at all levels of education must be trained comprehensively – not only in skills such as Braille and sign language, but also, for example, on 'disability awareness' and 'educational techniques and materials to support persons with disabilities'.

When courts and other branches of government interpret the right to basic education in relation to persons with disabilities, Article 24 of the UNCRPD is the most relevant and comprehensive standard of international law to consider.

The Constitutional Court has already emphasised the importance of the UNCRPD in the promotion of the rights of persons with disabilities and interpreting South African law (*De Vos NO and Others v Minister of Justice and Constitutional Development and Others*).

THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (EQUALITY ACT)

The Equality Act is an important law passed by parliament in order to combat discrimination and eliminate poverty. It says that not supporting people with disabilities, or not giving them the facilities they need to function equally in society, is a form of unfair discrimination. If people with disabilities can't enjoy equal opportunities – because the obstacles that restrict or limit them have not been removed – that is also unfair discrimination.

For example, a court deciding whether there has been unfair discrimination against a child because of the conditions at and actions of a school will have to decide whether the school failed to take 'steps to reasonably accommodate the needs' of the child or children with disabilities. These considerations were explored in the *Oortman* case discussed in the case law section below.

THE SOUTH AFRICAN SCHOOLS ACT

The Schools Act is the law passed by parliament to give effect to the right to basic education. It establishes an education system that, in practice, makes education compulsory for all children between the ages of 7 and 15, which generally means from Grade R until Grade 9. However, if a learner turns 15 before they finish Grade 9, they can still legally leave school, because the Schools Act says that children must be in school until they finish Grade 9 or until they turn 15, 'which[ever] occurs first'. This requirement for compulsory education applies equally to children with disabilities.

Moreover, this requirement does not mean that children over 15 years of age or who have completed Grade 9 no longer have a right to continue with their schooling if they choose to do so. Importantly, for various social and systemic reasons, children with disabilities and barriers to learning in particular are often 'over age' for their grade, and these children should also be allowed to continue to attend school, despite being older than 15. Children with disabilities also have an equal right to basic education beyond the compulsory ages and grades of schooling, including being afforded the opportunity to complete their matriculation qualification.

The Schools Act applies equally to children with disabilities, and has various sections dealing with disability directly. Where it is necessary to distinguish between children with disabilities and other children, the Act refers to learners with 'special educational needs'. For example, the Act indicates that a public school may be an 'ordinary' mainstream school, or a school for learners with special educational needs.

> THE LETTER OF THE LAW – SCHOOLS ACT, SECTION 12(4)
>
> 'The Member of the Executive Council must, where reasonably practicable, provide education for learners with special education needs at ordinary public schools and provide relevant educational support services for such learners.'

SCHOOL GOVERNING BODY MEMBERSHIP AND CHILDREN WITH DISABILITIES

MAINSTREAM AND FULL-SERVICE SCHOOLS

In terms of the Schools Act, a governing body at a mainstream school that provides education to children with disabilities must 'co-opt a person or persons with expertise regarding the special education needs of such learners.'

SPECIAL SCHOOLS

The Schools Act says that the governing body at a special school must, in addition to standard membership of SGBs at mainstream schools, include representation from:

- Organisations of parents of learners with special education needs
- Organisations of people with disabilities
- People with disabilities
- Experts in appropriate fields of education for children with disabilities.

ADMISSIONS

The Act says that 'a public school must admit learners and serve their educational requirements without unfairly discriminating in any way' (Section 5). In keeping with the spirit of affording children with disabilities an education on the same basis as other children, the Act also indicates that when deciding where to place a child with special education needs, 'the rights and wishes' of their parents must be considered (Section 6).

INCLUSIVE EDUCATION – TO WHAT SCHOOLS SHOULD CHILDREN WITH DISABILITIES GO?

Attempting to keep up with the principles of equality and non-discrimination, the Act shifts focus away from the provision of education that divides the learner population.

This means that as early as 1996, when the Schools Act came into force, provincial ministers of education had a responsibility to take all reasonable steps within their power to make sure that children with disabilities could be included and provided for in mainstream schools. The Schools Act therefore required an inclusive education system years before the publication of an inclusive education policy in the form of WP6.

ACCESSIBLE FACILITIES

The Act also requires that all 'physical facilities' at mainstream schools are 'accessible' to people with disabilities. For more about the law on school infrastructure and the effect of inadequate infrastructure on children with disabilities, see the chapter in the manual on infrastructure.

SCHOOL GOVERNANCE

The Act sets out some special rules for Representative Councils of Learners (RCLs) and School Governing Bodies (SGBs) at special schools.

A provincial minister may exempt a school from having an RCL by public notice if it is 'not practically possible' as a special school (Section 11). At special schools, unlike at mainstream schools, learners are only required by the Act to participate as members of the SGB where 'reasonably practicable'. It is important to note that these recommendations could potentially limit the rights of learners with disabilities, and should only be implemented cautiously. (See sidebar.)

THE POLICY FRAMEWORK

EDUCATION WHITE PAPER 6 (WP6)

WP6 is the policy framework that seeks to give effect to the Schools Act, and attempts to remedy the segregated education system inherited from the apartheid government. WP6 aims to build an inclusive education system within 20 years of its implementation; i.e. by 2021.

Central to WP6 is the concept of human rights, and the idea that all children can learn and that all children need support. The most important consideration is that every child – not just a child with disabilities – is different, and so has different learning needs. Children with disabilities are just a very good example of when those needs are clear and urgent.

This was recently emphasised in a judgment of the Constitutional Court about school admissions policies.

WP6 also affirms the roles played and contributions made by communities and the home environment in the learning experience.

Below, we briefly discuss and assess six of the core parts of WP6's strategy to develop an inclusive education system:

1. Mobilisation of out-of-school children and youth with disabilities
2. Strengthening of Special Schools
3. Establishment of Full-Service Schools
4. Establishment of District-Based Support Teams and School-Based Support Teams
5. Awareness and training
6. Funding for the establishment of an inclusive education and training system

THE REALITY OF SOUTH AFRICA'S INCLUSIVE EDUCATION SYSTEM: PROBLEMS WITH THE IMPLEMENTATION OF WP6

1. MOBILISATION OF OUT-OF-SCHOOL CHILDREN AND YOUTH WITH DISABILITIES

When WP6 was drawn up in 2001, it was estimated that around 280 000 children with disabilities were not in school. Since then (though DBE estimates vary), the number may have increased to nearly 600 000.

One reason for this increase is national and provincial departments' failure to conduct mobilisation campaigns to ensure the enrolment of children with disabilities who are not in school at all. Mobilisation campaigns, which must be organised and run by government departments, are described by WP6 as a 'central feature' of the policy, and a 'key strategy' in building an inclusive education system.

Recently, the DBE and the Department of Social Development established a protocol that plans to use social-grant processes as a point for early identification of children with disabilities who are out of school. It is hoped that this will help, but it cannot replace the need for big, government-run public campaigns using community radio, television, billboards and community meetings to raise awareness about disability and inclusive education.

Mobilising to move forward: what can we do?

In order to recruit the children who are not in school at all for enrolment in appropriate schools, parents, communities and schools need to be informed about the introduction of the inclusive approach to education.

District-Based Support Teams, School-Based Support Teams and School Governing Bodies must be used as vehicles to share information with communities in their own home areas.

Communities and activists, in turn – and particularly, parents of children with disabilities – can put pressure on the local and provincial departments of education to run consistent and comprehensive disability awareness and enrolment campaigns. These campaigns should respond to the specific issues raised in particular provinces, municipalities and communities, and should be planned by consulting communities. Among the questions they might deal with are:

- What is disability?
- What kind of disabilities could my child have, and how do I get that information?
- What is inclusive education?
- Where should my child go to school if she has a disability?
- What are my child's education rights?

2. STRENGTHENING OF SPECIAL SCHOOLS

Special schools are schools traditionally designed and designated to cater for the educational needs of learners with specific disabilities. In 2014, the DBE developed guidelines for special schools about how they should operate, and to what additional resources they should have access to.

ABUSE IN HOSTELS: MOBILISING TO MOVE FORWARD

Because of the long distances between their homes and special schools, many children with disabilities who attend special schools are required to stay in special-school hostels during term time.

Media reports late in 2015 about two different special schools in two different districts in KwaZulu-Natal revealed that children face abuse and neglect in the hostels they live in during term time at special schools.

This problem also appears to occur countrywide. A DBE progress report published In 2015 notes that 'there is a high rate of child abuse in special-school hostels. Especially learners who are deaf or intellectually disabled are doubly vulnerable.' The report continues to describe the situation as 'alarming', and indicates that it is 'critical' that a hostel policy for special schools is finalised. For more on sexual and physical abuse of learners, see the chapters in the manual on corporal punishment and sexual violence.

Abuse and neglect, like corporal punishment, are violations of learners' rights – and can often also be reported to the police, because they may be criminal. Parents, children, schools and activists looking to advocate for children's rights can do so effectively by demanding that all levels of government investigate claims of abuse very seriously, and move swiftly towards the adoption of a hostel policy for special schools. Children in hostels should also be provided with food, beds and hygienic conditions to live in.

Special schools provide critical education services to learners who require intensive or high levels of support that mainstream and full-service schools cannot currently provide. WP6 planned to strengthen special schools, and convert many of them into resource centres to support mainstream and full-service schools with expertise and resources. In 2005, the DBE published guidelines about the operation of special schools as resource centres.

But currently, the conditions in special schools don't meet the standards set in guidelines and required by WP6. The result – in the context of schools for visually impaired learners, for example – is a failing education system that is putting children's futures at risk.

Strengthening special schools so that they can act as resource centres and support the entire inclusive education system means training staff on curriculum differentiation, assessment and instruction; as well as improving already-existing facilities, to bring them in line with the inclusive education approach.

Unfortunately, many special schools report serious problems that have not been adequately addressed since the publication of WP6. Common problems include:

- Inadequate teaching and support staff
- Insufficiently flexible curricula
- Inappropriate infrastructure
- Poor living conditions and abuse of children in hostels
- Lack of access to learning and teaching resources and assistive devices
- Chronic underfunding
- Abuse, corporal punishment and neglect in special-school hostels
- Lengthy waiting lists to even get into special schools.

One of the most urgent problems caused by a failure to strengthen special schools consistently with WP6 is the high rate of child abuse in special-school hostels.

Mobilising to move forward: join the Right to Education for Children with Disabilities Campaign

Disabled people's organisations – such as the South African National Council for the Blind, and DEAFSA – consider the strengthening of special schools to be vital.

The Right to Education for Children with Disabilities Campaign is a coalition of organisations working towards a complete implementation of WP6. The campaign wants special schools to be strengthened, full-service schools to be expanded and improved, and children with disabilities to be included in neighbourhood schools. It has produced a list of demands for the improvement of the inclusive education system that cover many of the issues described in this chapter; it is included in this report's reference list.

Justice Zakeria Yacoob, himself a blind man, wrote a foreword to a 2015 report written by SECTION27 on system failures in the education system:

> I have had the privilege and the benefit of being educated at a school where the necessary facilities were largely available. I am pained to say that if the facilities at the school at which I was a pupil had been as paltry as in most of the schools described in the report, I would never even have completed school successfully. I therefore make a humble personal appeal to all the concerned authorities to treat this matter as one of urgency, and not to let the lives of a whole generation of blind children, mainly African and poor blind children, go to waste.

Children, parents, School Governing Bodies and activist organisations are encouraged to join this campaign, and assist it in advocating for the education rights of children with disabilities throughout South Africa.

3. ESTABLISHMENT OF FULL-SERVICE SCHOOLS

Full-service schools are mainstream schools equipped and capacitated to cater for the full range of learners' needs.

They should receive support in the form of physical and material resources, professional development of staff, and special attention from the district support teams.

The DBE has developed guidelines for full-service schools that detail how they should operate.

WP6 aimed to begin with 30 schools and 500 mainstream primary schools converted to full-service schools by 2021. During this time, it was hoped that the DBE would be able to develop models for system-wide application of full-service schools, so that it can realise its commitment to a fully inclusive education system.

But the reality is that many full-service schools are not yet really transformed and equipped.

Problems with inadequate support for full-service schools and learners with disabilities who attend them are widespread.

Instead of being 'beacons of our evolving inclusive education system', as WP6 describes them, sometimes full-service schools are merely a sign of how poorly accommodated learners with disabilities remain in South Africa's education system.

The establishment of full-service schools means that children with low and moderate support needs should have the opportunity to attend schools in their neighbourhoods. However, because full-service schools are currently often far away from children's homes, they are either totally inaccessible or require children to travel far at their own expense each day, or to seek accommodation outside of their homes.

Mobilising to move forward: what can we do?

Communities can advocate to provincial departments of education that mainstream schools not designated as full-service schools should be equipped to accommodate learners with disabilities. This is especially important if there are no high schools in a particular district that are full-service schools.

The 2010 guidelines for full-service schools, which are included in the reference list at the end of this chapter, set clear standards for what conditions and resources children, teachers, principals and learners should be able to expect at full-service schools. It is important to use community meetings, municipal disability forums, school governing body meetings, parent-teacher meetings and traditional leaders' forums as platforms from which to insist that the promises of these guidelines are kept.

If assistance is required, communities, parents and schools may also want to contact Inclusive Education South Africa, which is an organisation with a lot of experience in working at improving how full-service and mainstream schools accommodate children with disabilities in South Africa

WHAT'S WRONG WITH FULL-SERVICE SCHOOLS?

SECTION27's research into the 11 full-service schools in the rural Umkhanyakude District in northern KZN reveals problems that are indicative of the situation in many schools across the country:

- Full-service schools regularly do not receive additional funding allocations for their programmes for learners with disabilities. When they do receive money, it is insufficient
- There are not enough teachers for the number of students requiring teaching. In some cases there are more than fifty learners in a class to be taught by one teacher. This is because when learner-teacher ratios are calculated, the provincial department does not take into account that teachers who have children with disabilities in their classes will require smaller classes, if they are to give children who need it extra and individual attention
- Schools often lack permanent specialised staff, such as Learner Support Educators and Learner Support Assistants
- The curriculum is inflexible. Curriculum differentiation is left up to schools; who, without Learner Support Educators, lack the capacity to create individual lesson plans, and provide the individualised attention that learners with disabilities need
- None of the special schools and only one of the full-service schools in the district offers any high-school grades. Since only primary schooling is available to most learners with disabilities, they are denied the right to access a National Senior Certificate, and the doors that this would open for them in life
- The vast majority of full-service schools receive no assistance for learner transport from the provincial Department of Education. Even learners with disabilities must walk long distances (sometimes crossing rivers, or traversing forests and rough dirt roads) to school, in the heat or rain, every day.

KEYWORDS

Differentiating curricula is the process whereby teachers take the core curriculum and adapt it for children with a range of learning barriers in their class, which is very important in full-service schools.

With the support of their school and District-Based Support Teams, teachers are also required by the SIAS policy to produce **individualised support plans** for each learner with a learning barrier, to show how the learner is being accommodated and is progressing. Parents can and should also be involved in this process.

4. ESTABLISHMENT OF DISTRICT-BASED SUPPORT TEAMS AND SCHOOL-BASED SUPPORT TEAMS

Recognising the difficulty that many schools would have in ensuring inclusivity, WP6 sets up support structures for the implementation of inclusive education. At school level, this includes 'Institutional-Level Support Teams' – sometimes called 'School-Based Support Teams' – and at district level, 'District-Based Support Teams'.

In 2005, the Department of Basic Education produced guidelines indicating the roles and responsibilities of both the district and school support structures.

School-Based Support Teams

These often include teachers, support staff, heads of department, principals and deputy principals. It is these teams' role to develop expertise on accommodating learners with learning barriers, and to lead the way in school-support efforts. According to WP6, these teams may also be supported by experts from the local community, district support teams, and higher education institutions.

It is important that these teams provide support not only to learners, but also to teachers, principals and the school more broadly.

District-Based Support Teams

District-Based Support Teams are crucial to the implementation of WP6. They are made up of staff from provincial district, regional and head offices, and from special schools. WP6 says that District-Based Support Teams must provide a 'full range of education support services' to both School-Based Support Teams and schools themselves.

They must work closely with School-Based Support Teams, in particular to identify and address learning needs and to accommodate a range of learning difficulties.

Mobilising to move forward: what can we do?

Communities should make sure that all schools, especially full-service schools, have School-Based Support Teams that meet regularly and are equipped with the expertise to support learners with disabilities; and that schools have constant interaction with the District-Based Support Team. Parents and SGB members might even volunteer to be put on School-Based Support Teams, and to assist these teams in bringing problems to the attention of district officials.

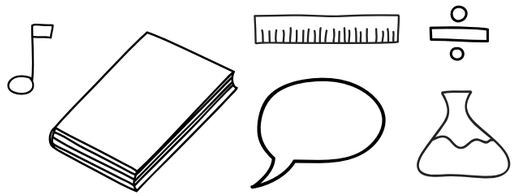
Communities can also advocate to make sure that District-Based Support Team hire enough experts and specialists and monitor progress at schools closely and frequently.

5. AWARENESS AND TRAINING OF TEACHERS

WP6 emphasises the need for extensive training of teachers, so that they have the skills to teach children with barriers to learning.

These skills include:

- understanding of disability and learning barriers
- understanding how policies about education for children with disabilities work
- training in how to differentiate the curriculum for children with disabilities and learning barriers
- training in specific skills that are required for the education of children with specific disabilities at their schools.



Practical examples

The DBE reports that many teachers who teach visually impaired children cannot read and write Braille at an acceptable standard; and many teachers who teach learners with hearing impairments cannot speak sign language.

Schools for children with intellectual disabilities also report that teachers often do not have the skills to teach the academic curriculum to children with the range of disabilities at their schools.

They also often don't know how to teach children practical skills such as woodwork, dressmaking, bricklaying and art – subjects that would allow children who struggle with the academic curriculum to be self-sufficient when leaving school.

Teachers at full-service and special schools report that their training is often overly theoretical and insufficiently frequent.

Their training doesn't show them how to differentiate curricula or develop individualised support plans; so despite their best efforts, they don't actually know how to teach children with disabilities. (See sidebar on the left.)

6. FUNDING AND NORMS AND STANDARDS

An inclusive education system that addresses the history of neglect of children with disabilities needs extra funding. WP6 suggests sources for additional funding, including a conditional grant (which was to have been implemented by 2006). This grant would:

- Be used in both special and full-service schools to provide facilities and necessary material resources to accommodate children with disabilities
- Provide some of the non-educational resources necessary to allow access to the curriculum, such as medication, wheelchairs, crutches, hearing aids, guide dogs, interpreters and voice-activated computers, and social workers.

This conditional grant was never set up – funding for inclusive education has largely been haphazard and inconsistent. This has resulted in a serious challenge to the implementation of WP6, particularly in poorer provinces.

As discussed in other chapters of the handbook, the DBE has also not drawn up norms and stands for funding of inclusive education, or norms and standards for post provisioning in special and full-service schools. This is a legal requirement in terms of the SIAS policy, as detailed below.

Mobilising to move forward: what can we do?

To increase available funding, communities and schools should advocate for the setting up of the conditional grant, and the finalisation of the norms and standards for the funding of inclusive education and post provisioning, as legally required by the SIAS policy. These policies are the responsibility of the national Department of Basic Education.

On a more local level, it is important to monitor and understand where the money that the school receives is being spent. The best way to do this may be to attend SGB meetings, and request this information. Schools can also ask community members to assist them in lobbying provincial departments of education for additional allocations of resources.

POLICY ON SCREENING, IDENTIFICATION, ASSESSMENT AND SUPPORT (SIAS): PLACEMENT OF LEARNERS

The Department of Basic Education's Screening, Identification, Assessment and Support (SIAS) policy was approved and adopted on 19 December 2014. Its purpose is to provide for the standardisation of procedures and processes to identify and assess all learners requiring additional support. The SIAS policy provides a useful guide for schools, parents and learners on how to identify particular barriers to learning, and decide the level of support that is needed.

Most importantly, it also contains clear guidelines on the enrolment and admission of learners with barriers to learning.

QUESTION:
My child has a disability, and is approaching school-going age. What must I do to make sure she goes to a school that can accommodate her learning needs?

ANSWER:
The SIAS policy requires that every child, irrespective of her disability, must be admitted to their neighbourhood, mainstream school. The screening and identification process will then take place at this school, and should be organised by the school itself.

WHAT HAPPENS NEXT?
Screening and Assessment
It is then the responsibility of every school to screen and assess learners to identify barriers to learning, with the help of their School-Based Support Teams and the District-Based Support Team. To do this, the school might need to call on the expertise of various medical professionals, including occupational therapists, psychologists and social workers.

Through a process spelled out in the SIAS policy, the appropriate support for each individual learner is determined by the school. The purpose of this process is to determine whether the local neighbourhood school can make provision for the needs of a particular child.

Accommodation, placement and referral
It is only when a child's neighbourhood mainstream school cannot provide the appropriate support, after attempting to do so, that a learner can transferred to a special or full-service school.

This means that usually, the child must be admitted to a school and start attending classes while the screening and assessment process is under way.

The school should be able to indicate how it has attempted to accommodate a child or why it cannot do so before referring her to another school. If a referral is necessary, it should be explained to you, as a parent or caregiver, why your child is being referred to the school in question; what type of school it is (full-service or special school); and how it will be able to accommodate your child's learning needs better.

Parent involvement in the process
It is also important to remember that as far as possible, both parents and child should have a say in where the child goes to school. Parents should be able to make inputs to this process.

The **SIAS policy must be followed by all schools**. If a school does not do any formal assessment in terms of the SIAS policy, then you have a right to insist that the school does so, and may complain to the school governing body or district department of education that this has not happened. It is possible that schools have still not yet been appropriately informed about and trained on the SIAS policy, so it is important to insist that it is followed.

The SIAS policy itself includes standard forms that can be used in the identification and referral process if necessary. If you are concerned that the process is not being followed, you may want to have a look at the SIAS policy and get the assistance of a local legal advice office or a human rights organisation.

If a parent is presented with forms that they do not understand, the school, and those conducting the assessment of the child, must explain the forms to the parents and assist parents to fill them in.

Mobilising to move forward: what can we do?
Parents of children with disabilities must always take their children to neighbourhood mainstream schools first, and insist that their child is admitted to the school. After that, it is the school's responsibility to ensure the child is screened formally, following the requirements of the SIAS policy.

Communities should make sure that all principals, SGBs and School-Based Support Teams know about and implement the SIAS policy. If they need support from the District-Based Support Team or medical professionals at local hospitals and clinics, they must get this support.

Again, parents of children with disabilities must insist on taking their children to neighbourhood mainstream schools first, and insist on their child's right to be admitted and that the SIAS policy is followed before they are transferred to any other special or full-service school.

RELEVANT CASE LAW

LETTIE HAZEL OORTMAN V THOMAS AQUINAS PRIVATE SCHOOL

Lettie Hazel Oortman's daughter Chelsea, who is in a wheelchair, attended a private school in Witbank. Although the school took many actions to accommodate Chelsea, she still experienced such serious problems at school that she dropped out. Her mother approached the Equality Court, which focuses on equality and discrimination issues.

Thomas Aquinas, the school Chelsea was attending, had made sure that all her classes were on the ground floor, had ensured that she had access to a toilet, had provided her with a wheelchair and a special table, and had even made plans to ensure that she could use the school tuck shop. However, she still encountered other problems at the school, which resulted in her dropping out:

- **Infrastructure** A high step in front of all classrooms and toilets. Without ramps, Chelsea could not enter these rooms without assistance. The library was on the first floor, and the only way to get to it was up a staircase
- **Sanitation** The toilet allocated to Chelsea, which was a 'normal', unmodified toilet, was locked most of the time, and she often had to ask a teacher to unlock the door. She could not reach the wash basin to wash her hands
- **Teachers** These problems meant Chelsea needed a lot of help from her teachers to get around on a daily basis. Chelsea complained that her teachers were not always helpful, and some became 'impatient' with her. None of her teachers had any training in working with or teaching children with disabilities.

The Equality Court made its decision in terms of the constitutional right to equality and the Equality Act. The Equality Act defines as 'unfair discrimination on the ground of disability' any 'failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities, or failing to take steps to reasonably accommodate the needs of such persons'. The judgment noted that there were at this time no other schools in Witbank at all for children with disabilities.

The judgment read: 'Several praiseworthy steps were taken by [the school] to accommodate Chelsea, but unfortunately not all reasonable steps were taken to remove obstacles to enable her to have access to the classes, toilet and washbasin.'

Noting that the steps needed to accommodate Chelsea would not be expensive, the court found that the school had unlawfully failed to take 'necessary and reasonable steps' to 'renovate the building' in order to do so.

The judge encouraged the principal to 'have discussions' with the teachers who were impatient, and acknowledged that it was within the principal's power to 'instruct some teachers to attend a course on how to work with disabled persons'.

Furthermore, the judge found that it was an 'unnecessary burden' on Chelsea to require her to ask for permission and assistance before being able to use locked toilets.

In concluding that the school had unfairly discriminated against Chelsea on the basis of her disability, the judge decided that the school must:

- Not refuse to readmit Chelsea
- Take reasonable steps to remove obstacles to her education, including building ramps and an appropriate toilet and washbasin
- Investigate the strained relationship between Chelsea and some of

her teachers, and ensure that the schools' teachers get the necessary training for and experience with teaching children with disabilities.

There are a few important things to notice about this case. First, the Equality Act and the Constitution prohibit discrimination by both the government (as we will see the next page in *Western Cape Forum for Intellectual Disability*) and private entities such as private schools (for example Thomas Aquinas, as seen in *Oortman*). Both public and private schools must 'reasonably accommodate' children with disabilities.

Second, *Oortman* makes clear that 'mainstream schools' must take steps to accommodate children with disabilities, even if only for the needs of one child.

Third, courts will not excuse schools from making further accommodations, just because they have made some – even many – positive accommodations. Schools must make as many accommodations as are reasonable and necessary for children with disabilities to enjoy the right to education.

Mobilising to move forward

The *Oortman* case shows that Equality Courts, found on the premises of your local Magistrate's Court, can be used effectively to ensure that schools reasonably accommodate children with disabilities. Parents, teachers, SGB members and principals must be informed about the obligation to reasonably accommodate learners with disabilities, and must insist on financial and other support from the provincial and local departments of education.

WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

The Western Cape Forum for Intellectual Disability ('Forum'), with the assistance of the Legal Resources Centre, approached the Western Cape High Court for an order declaring the exclusion of children with 'severe and profound intellectual disabilities' from appropriate schooling to be unlawful.

The Forum's members provide care for 1 000 of the 1 500 children with severe and profound intellectual disabilities in the Western Cape, in special care centres subsidised by the Department of Health.

The government's policy at the time the case was brought to court was to accommodate children with 'moderate to mild' intellectual disabilities in special schools. Their disability was determined based on an IQ of between 30 and 70.

Children with severe intellectual disabilities (defined as having an IQ of between 20 and 35) and profound intellectual disabilities (an IQ of lower than 20) were explicitly excluded from admission to special schools in terms of Department of Education policy. This policy has since been replaced with the SIAS policy described above.

The Forum argued that the exclusion of children with severe and intellectual disabilities contradicted WP6, and violated the children's right to basic education, equality and dignity, and their right as children to be protected from neglect and degradation.

The government put up various defences, including an argument that it was doing all that it currently could within its available resources; and that if there was a limitation of these children's rights, it was because government was forced to prioritise where to allocate its resources, especially because of the large backlog in access to education for children with disabilities.

In court, the government also argued that ultimately, the exclusion of children with severe and profound intellectual disabilities could be explained by the fact that no amount of education could assist these children, and that the special care centres were sufficient for their development.

The Court decided that the government was infringing the constitutional rights of children with severe and profound intellectual disabilities. This is because it was both failing to provide schooling (positive obligation) and refusing to admit children (negative obligation) to existing schools within the existing schooling system. The judge said:

> As I have attempted to show, there is in my view no valid justification for the infringement of the rights of the affected children to a basic education and to equality. From what has been set out in this judgment, it must in my view also follow that the children's rights to dignity have been infringed, since they have been marginalised and ignored, and in effect stigmatised. The failure to provide the children with education places them at risk of neglect, for it means that they often have to be educated by parents who do not have the skills to do so, and are already under strain. The inability of the children to develop to their own potential, however limited that may be, is a form of degradation.

The Court granted an order in favour of the Forum that provides extensive protection for the rights of children with intellectual disabilities.

The order is important because it shows how far courts will go in requiring 'reasonable accommodations' from even ordinary schools. The government was instructed by the court to take reasonable measures to give effect to the rights of children with severe and profound intellectual disabilities, including:

- Ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality
- Providing adequate funds to organisations that provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres
- Providing access to schools with the use of adequate facilities and adequate staff who are properly trained, paid and accredited
- Providing appropriate transport for the children
- Planning and providing for the training of persons to provide education for children with severe and profound intellectual disabilities.

Western Cape Intellectual Disability Forum is therefore a good example of the use of litigation in order to protect children's rights to basic education.

Mobilising to move forward: what can we do?

The Legal Resource Centre has noted that there are many positives for children with intellectual disabilities in the Western Cape that came out of this case after the judgment. This is because the provincial government officials and various NGOs within the Forum were able to work well together in monitoring, implementing and evaluating the implementation of the judgment. This happened because the order that the court made included a 'structural interdict' which required the government to report back to it on progress in implementing the judgment, and allowed for the participation of the Forum in this process.

Both of these cases illustrate the power of courts, along with community activism, to contribute to the improvement of access to quality inclusive education for children with disabilities.

CONCLUSION

This chapter aimed to give the reader an understanding of the importance of a truly inclusive education system in South Africa, in which each and every child can find a place to have her needs appropriately accommodated.

As we have illustrated, there is a place for special, full-service and mainstream schools in this kind of education system, and all three types of schools must be strengthened, resourced and supported by national, provincial and district departments of education.

The lack of capacity of the national, provincial and local departments of education and their collective failure to implement even the short-term aims of WP6 – including even basic short-term goals, such as the establishment of a conditional grant, and the execution of comprehensive mobilisation campaigns for out-of-school learners – is of serious concern.

Communities and schools must put pressure on the government to ensure that the core aspects of WP6 are implemented as soon as possible. The same is true of the SIAS policy discussed above, and the various guidelines produced by the national Department of Basic Education – including guidelines on Special Schools, Full-Service Schools, and District-Based Support Teams.

This chapter may be most effectively used by reading it together with the chapter in this book on mobilisation strategies (Chapter 21), bearing in mind that because children with disabilities are just like any other children, general advocacy of strategies such as protest, social audits, media articles, lobbying parliament and the departments of education, and (where necessary) litigation is equally relevant.

Throughout this chapter, in boxes headed 'Mobilising to move forward', we have provided some ideas for parents, teachers, principals, learners and SGBs about actions they can take to ensure that children with disabilities can access their right to quality inclusive education. The best plans and strategies are those that follow the disability-rights movement slogan 'Nothing about Us without Us!', and are formed at school or community level to respond directly to the urgent needs of children with disabilities, as expressed by them, their parents, and disabled people's organisations.

Above all of this, most importantly, there must be a societal shift in the understanding of disability and people with disabilities as 'others' who are fundamentally different. Both personally and interpersonally, this will take daily activism and introspection in each and every one of our lives, towards thinking, acting and shaping our surroundings in a way that is more conscious of the complexities of disability, and of the many challenges faced by people with disabilities.

Systemically, the first step in this direction is a truly inclusive education system, grounded in the constitutional rights to basic education and equality. To build an inclusive South Africa, we must first build an inclusive education system.

Silomo Khumalo is a Junior Researcher at SECTION27; he holds an LLB and an Honours Degree in Public Policy from UKZN, and has been appointed as a Law Clerk for Justice Johan Froneman from July 2017. He is totally blind.

Tim Fish Hodgson is a Legal Researcher at SECTION27, a former Law Clerk for Justice Zakeria Yacoob, and a Master's degree candidate at the University of Oxford.

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CHAPTER 6

THE RIGHTS OF REFUGEES AND MIGRANT LEARNERS

Kaajal Ramjathan-Keogh

This chapter will provide an overview of the law, policy and relevant case-law relating to refugee and migrant learners. The chapter should assist refugee and migrant learners in accessing schools.

OVERVIEW

Global forced displacement increased to record-high numbers in 2015. By the end of the year, 65.3 million individuals had been forcibly displaced worldwide as a result of persecution, conflict, generalised violence, or human rights violations.

This is 5.8 million more than in 2014 (59.5 million). By the end of 2015, about 3.2 million people were waiting for a decision on their application for asylum. As in the previous two years, in 2015 Syrians lodged the largest number of asylum claims worldwide (373 700 new claims). In general, recognition rates for Syrian asylum-seekers were above 90 per cent in most countries.

At the end of 2015 the number of new asylum applications was relatively low, at 62 200. In 2015 South Africa hosted just over 1 million asylum seekers and 121 645 refugees. The large number of asylum seekers is due to the serious backlogs in South Africa's refugee status determination procedure, which leaves persons in asylum limbo for prolonged periods. (UNHCR Global Trends 2016)

Globally, asylum protection is intended to protect those who have been uprooted from their homes, which has left some 60 million people displaced worldwide in 2016.

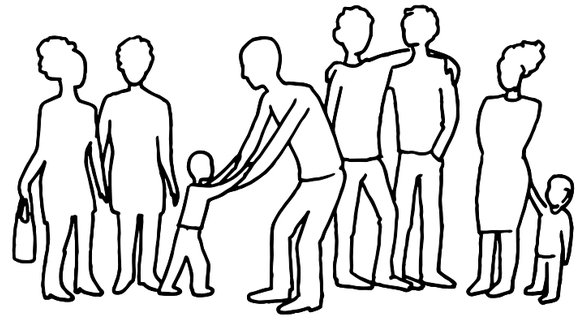
Women and girls are often denied equal access to essential health services and education opportunities. Girls are almost 2.5 times more likely to be out of school in countries affected by conflict, and studies show that girls are less likely to have access to education in situations of displacement than boys. (UN Women 2016)

Very few people sought asylum and protection in South Africa before 1994. The first large-scale movement into South Africa was the movement of Mozambicans in 2000 following catastrophic flooding in Mozambique, when more than 220 000 people were displaced. After the birth of democracy, South Africa drafted its Refugees Act in 1998, and it became operational in 2000.

WHY PEOPLE MIGRATE

People migrate for many different reasons. These reasons may be classified as economic, social, political or environmental.

- **economic migration**: moving to find work and better economic opportunities
- **social migration**: moving somewhere for better quality of life, or to be closer to family or friends
- **political migration**: moving to escape political persecution or war
- **environmental migration**: causes of migration include natural disasters such as flooding, drought and earthquakes



WHY DO PEOPLE MIGRATE?

Some people choose to migrate voluntarily; for example, someone who moves to another country for better career opportunities. Some people are forced to migrate because the circumstances in which they live have become unbearable; for instance, someone who moves due to war or famine. A refugee is someone who has been forced to leave their home and does not have a new home to go to. Often refugees do not carry many possessions with them, and do not have a clear idea of where they can find protection.

PUSH AND PULL FACTORS FOR MIGRATION

People have moved from their home countries for centuries, for all sorts of reasons. Some are drawn to new places, by 'pull' factors; others find it difficult to remain where they are, and migrate because of 'push' factors. Migration usually happens as a result of a combination of these push and pull factors.

Push factors are the reasons why people leave an area. They include:

- Lack of basic services
- Lack of safety/high crime
- Crop failure
- To escape from natural disasters such as drought and flooding
- To escape poverty
- To escape conflict, violence and war.

Pull factors are the reasons people move to a particular area. They include:

- For jobs, business and educational opportunities
- Better services, such as healthcare and education
- Good climate
- Safety; less crime
- Political stability
- More fertile land
- Lower risk from natural hazards
- To reunite with family members.

In 2015, the top five refugee-producing countries were: Syria, Afghanistan, Somalia, South Sudan and Sudan. Refugees from these countries came to South Africa in 2015: Zimbabwe, Ethiopia, Nigeria, and the Democratic Republic of Congo.

CONFLICTS THAT BROUGHT REFUGEES TO SOUTH AFRICA

- The Somali civil war, spanning more than 20 years since the early 1980s, grew out of resistance to the Siad Barre regime and evolved into clan-based conflicts, invasions, and more recently, resistance to Al-Shabaab. Peace and stability remain tenuous.
- Burundi (1993): Genocide and mass killings caused displacements and migration.
- The Rwandan genocide (April-July 1994) was a genocidal mass slaughter of Tutsi in Rwanda by members of the Hutu majority government.
- The First Congo War (1996-1997) was a foreign invasion of what was then Zaire, led by Rwanda, which replaced dictator Mobutu Sésé Seko with the rebel leader Laurent Kabila.
- The Second Congo War (1998-2003) in the Democratic Republic of the Congo was driven by the trade in 'conflict' minerals (any mineral or its derivative determined to be financing conflict in the Democratic Republic of the Congo, or any adjoining country). Although a peace agreement was signed in 2002, violence and instability continued in many regions of the country, especially in the eastern region.
- Burundi (April 2015): Displacements followed protests against the president's decision to run for a contested third consecutive term. The security situation has deteriorated, with more than 400 people killed and 200 000 fleeing to neighbouring countries since April 2015.

Figure 6.1: Distribution of populations of concern to UNHCR (*graphic courtesy of UNHCR*).

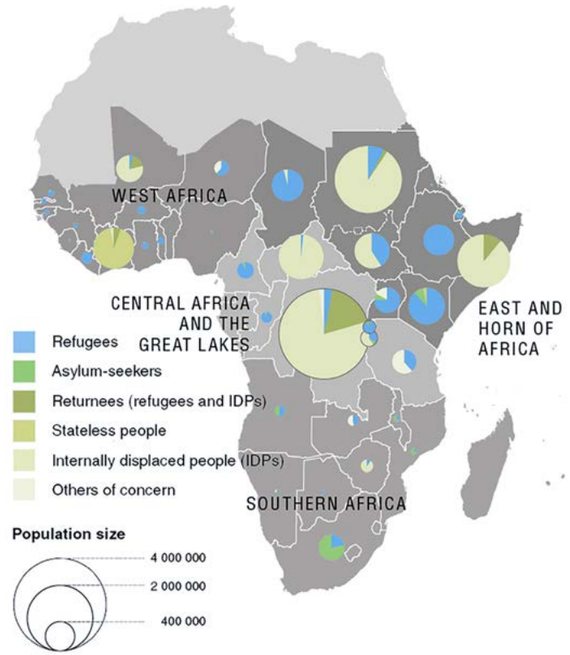


Table 6.1: Snapshot of African countries and number of refugees they host (at end 2015)

COUNTRY	REFUGEES	ASYLUM SEEKERS
South Africa	121 645	1 096 063
Zimbabwe	6 950	259
Zambia	26 447	2 411
Malawi	9 019	14 470
Mozambique	5 622	14 825
Botswana	2 130	135
Kenya	553 912	39 969
Ethiopia	736 086	2 131
Chad	420 774	2 749

INTERNATIONAL ASYLUM PROTECTION LAWS

Regardless of how they arrive in a country and for what purpose, migrants', refugees' and asylum seekers' rights are protected by international law:

- The Universal Declaration of Human Rights (Article 14) states that everyone has the right to seek and enjoy asylum from persecution in other countries
- The 1951 UN Refugee Convention protects refugees from being returned to countries where they risk persecution.

LAW AND POLICY

OVERVIEW OF REFUGEE AND IMMIGRATION LAWS

Every day, all over the world, people make the most difficult decision of their lives: to leave their homes in search of a better life. Others are forced to flee due to conflict, wars and persecution.

South African refugee policy is regulated by the Refugees Act, which allows refugees to 'seek' and 'enjoy' asylum.

South Africa is the only African country with an urban refugee policy that refugees are not confined to refugee camps. There is no automatic detention of asylum seekers or refugees. Many other countries have encampment policies or detention regimes. This urban refugee policy makes South Africa an appealing place to seek asylum. However, there are proposed changes to the Refugee Act, which if passed in their current form could have a serious impact on asylum seekers' and refugees' right to free movement and access to certain other rights.

In Africa, the right to seek and enjoy asylum is largely respected, with millions of refugees having found in exile the safety and protection they have lost at home. The generosity of hosting countries in Africa has been outstanding.

But in recent years, some core values of asylum protection have been challenged, with instances of refoulement. This is when refugees or asylum seekers are forced to return to a country where they are liable to be subjected to persecution.

In Southern Africa, an increase in mixed migratory movements has also led to growing hostility towards refugees, putting pressure on asylum seekers, host countries and protection space.

REFUGEE LAWS

Refugees are a special category of migrant who seek international protection. South Africa has a progressive refugee policy that includes the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services.

However, there may be practical barriers to fully accessing these rights. The current socio-economic environment – high unemployment, poor service delivery, and economic inequality – has strained relations between refugees, asylum-seekers and host populations. The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest signs of civilisation. 'Civilisation' is defined as the process by which a society reaches an advanced stage of social development and organisation.

South Africa's laws allow for refugees to be able to access basic services such as health and education. These laws also allow for local integration. In practice, however, local integration does not always work very well.

Failed or rejected asylum seekers may be returned to their country of origin. These are persons for whom a final decision has been made to refuse

WHO IS A REFUGEE?

The United Nations Refugee Convention spells out that a refugee is someone who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.'

WHO IS AN ASYLUM SEEKER?

An asylum seeker is someone seeking international protection, but who has not yet been granted refugee status.

WHO IS A MIGRANT?

A migrant is any person who has moved away from the place where they were born. This could refer to rural-urban in-country migration, or the crossing of international borders. A migrant may be either documented or undocumented.

DUTIES AND RESPONSIBILITIES OF REFUGEES

Refugee Convention Article 2 states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations, as well as to measures taken for the maintenance of public order.

WHO IS A DEPENDENT?

The Refugees Act limits the definition of "dependent" to include only unmarried minor biological children who are younger than 18 years old, as well as children legally adopted in the asylum seeker/refugee's country of origin.

This excludes children who have not been adopted, but who are under the care of a refugee or asylum seeker; as contemplated by the decision in *Mubake*, which held that separated asylum-seeker children should be considered dependents of their primary caregivers in terms of the definition of 'dependent' in the Refugees Act. This will provide legal protection for separated children, and ensure that they are issued with asylum or refugee permits.

WHO ARE UNACCOMPANIED AND SEPARATED CHILDREN?

An unaccompanied child is someone who is not in the care of an adult caregiver, guardian or parent. A separated child is in the care of an adult caregiver who is not their parent or guardian. Both unaccompanied and separated children have a right to seek asylum.

REFOULEMENT

Refoulement refers to the forcible return of refugees or asylum seekers to a country where they may be persecuted.

asylum protection. If they are then unable to regularise their status via the Immigration Act, they may be declared an illegal foreigner and be deported.

Dependents of asylum seekers and refugees are able to access the same status as their parents/caregivers if they are able to prove they are dependent.

IMMIGRATION LAWS

Immigration laws regulate the entry, residence and departure of foreign nationals.

Nationals of certain countries, such as the Southern African Development Community (SADC) countries (for example, Botswana and Zimbabwe), are permitted to enter South Africa for a limited short-term period (up to a maximum of 30 to 90 days) without needing to apply for a visa in advance.

All other foreigners must have a visa issued to them before arriving in South Africa. This excludes people who want to apply for asylum. An asylum applicant may arrive in a country without a visa and still apply for asylum. Migration laws are complex, and differ from country to country. An asylum applicant may not be prosecuted for not having a valid passport in their possession. Asylum seekers and refugees may also not be subjected to refoulement.

PROPOSED CHANGES TO THE REFUGEES ACT

The current amendments to the Refugees Act make some far-reaching changes, which are intended to discourage non-genuine asylum applicants. Of particular concern is the deviation from the urban refugee policy, which has been the cornerstone of South African refugee protection since its inception in 1993.

LIMITED PRESCRIBED APPLICATION PERIOD

The Bill's amendment in Section 13 (amending Section 21 (a) of the principal act) provides that an application for asylum must be made in person, in accordance with the prescribed procedures, within five days of entry into the country. Individuals who fail to lodge their claims within the prescribed period will be excluded from refugee status.

The South African administrative process for granting asylum is difficult, and subject to serious delays. It is also plagued by corruption. This results in asylum seekers remaining in limbo for long periods.

LIMITATION ON THE RIGHT TO WORK

The Section 15 amendment seeks to introduce provisions that would divide asylum applicants into two groups: those who can sustain themselves and their dependents financially for a period of four months, and those who can't. There are plans to include an assessment of an applicant's ability to sustain themselves and their dependents, though no information has been provided as to how this ability will be assessed.

The effect of this amendment is to limit the right of asylum seekers to work. Those who are in a positon to sustain themselves financially will be denied the right to work for a four-month period. Asylum seekers who cannot sustain themselves may be offered shelter and basic support by the United Nations High Commissioner for Refugees (UNHCR). If they are able to obtain assistance, these persons will also be denied the right to work.

The issue of the right to work and study has previously been pronounced on by the Supreme Court of SA in *Minister of Home Affairs v Watchenuka and Others*. The case concerns the prohibition on the rights of asylum seekers to work and study while they are waiting to be recognised as refugees. The court found that the Minister of Home Affairs could not prohibit asylum seekers from holding the right to work and study.

This power to determine conditions of work and study vests in the Standing Committee for Refugee Affairs. The Standing Committee's general prohibition of employment and study for the first 180 days after a permit has been issued is in conflict with the Bill of Rights. A general prohibition of work and study was found to be unlawful and was set aside. The court held that the freedom to engage in productive work is an important component of human dignity.

The court stated that while an asylum seeker is in the country, he or she must be respected, and is also protected by Section 10 of the Bill of Rights. It went on to say that the freedom to study is also inherent to human dignity, because without it, a person is deprived of the potential for human fulfilment. It is expressly protected by Section 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.

The court held that human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human, and they are therefore protected by the South African Bill of Rights.

The right to work is currently under review, and may be limited by the state at a future date.

INTERNATIONAL LAW ON THE RIGHT TO EDUCATION

Article 22 of the Refugee Convention is very clear: refugees *must* receive the same basic education as nationals.

ACCESS TO EDUCATION FOR REFUGEES, ASYLUM SEEKERS AND MIGRANTS

In South Africa, basic education is available to everyone. The Refugees Act makes specific reference to this.

Access to education is also guaranteed by the Constitution's Bill of Rights, in Section 29:

> '(1) Everyone has the right –
>
> To a basic education, including adult basic education;'

The education system is further regulated by the South African Schools Act and regulations.

Section 3(1) states that it is compulsory for every parent to ensure that every learner attends school from the age of seven years to the age of fifteen years or the ninth grade, whichever comes first.

Section 5(1) of the SA Schools Act regulates admission to public schools, and holds that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. Section 5(2) states that the governing body may not administer any test related to the admission of a learner to a public school.

INTERNATIONAL INSTRUMENTS THAT PROHIBIT DISCRIMINATION

There are many other international instruments that expressly prohibit discrimination in education and require positive measures to promote equality. These include:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on Economic, Social and Cultural Rights (ICESCR),
- The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The Convention on the Rights of People with Disabilities (CRPD)

BASIC EDUCATION AND THE REFUGEES ACT

Section 27 of the Refugees Act: Protection and general rights of refugees

A refugee -

(a) is entitled to a formal written recognition of refugee status in the prescribed form;

(b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;

(c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;

(d) is entitled to an identity document referred to in Section 30;

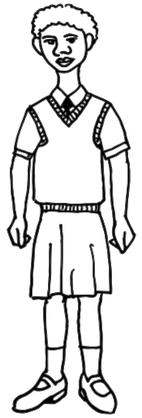
(e) is entitled to a South African travel document on application as contemplated in Section 31;

(f) is entitled to seek employment; and

(g) is entitled to the same basic health services and *basic primary education** which the inhabitants of the Republic receive from time to time.

*[Author's emphasis]

The Department of Education's A Public School Policy Guide states that 'every child has the right to be admitted to school and to participate in all school activities'.



NON-DISCRIMINATION IS GUARANTEED IN THE ADMISSIONS POLICY FOR ORDINARY SCHOOLS

- Section 7 of the Admissions Policy for Ordinary Schools states that the policy is determined by the governing body of the school in terms of Section 5(5) of the South African Schools Act. The policy must be consistent with the Constitution and the SA Schools Act, as well as the applicable provincial law
- Section 9 of the policy states that the admission policy of a public school and the administration of admissions by an education department must not unfairly discriminate in any way against an applicant for admission
- Section 19 of the Admissions Policy states that this policy should apply equally to learners who are not citizens of the Republic of South Africa and whose parents are in possession of a permit for temporary permanent residence issued by the Department of Home Affairs. This would include asylum-seeker and refugee children
- Section 21 states that when persons classified as illegal aliens apply for admission for their children or for themselves, they must show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the relevant legislation (Immigration Act or Refugees Act, as applicable).

The Department of Education's *A Public School Policy Guide* states that 'every child has the right to be admitted to school and to participate in all school activities'. This policy stipulates that a school governing body (SGB) may determine the admission policy of a school. However, the admission policy must be based on the guidelines determined by the head of the provincial education department. If a learner is refused admission, the head of the provincial department (through the principal of the school) must inform the parent of the refusal, and the reasons for the refusal. If a child is refused admission to a school, the school principal must give a written explanation of why the child was not admitted.

Asylum-seeker and refugee children should be regarded as dependents of caregivers (who are not necessarily parents) and do not need to hold a study permit in addition to their refugee or asylum-seeker permit. In the case of *Mubake v Home Affairs*, the applicants – who were orphaned asylum seekers from the DRC – sought an order declaring that children who had been separated from their parents were dependents of their primary caregivers, in terms of the definition of 'dependent' in Section 1 of the Refugees Act. They contended that such children should automatically be recognised as dependents of the existing asylum seekers or refugee adults who accompany them into South Africa.

Initially, the applicants also sought orders against the Department of Basic Education, to provisionally allow the registration in public schools of the child applicants and other children who are dependants of asylum seekers and refugees, as well as an order for the Minister of Basic Education to review the admission policy for ordinary public schools by expressly making provision for child asylum seekers and refugees. That relief was granted by the High Court in 2013.

This case is important, as it resolved the difficulty that asylum-seeker children in particular were facing where they were unable to obtain asylum-seeker permits. They faced further challenges when schools insisted they obtain a study permit, in addition to the asylum-seeker permit. The case clarifies the position for separated or orphaned asylum-seeker children who are now guaranteed access to asylum, and admission to schools on their asylum status.

BARRIERS TO LEARNING

It is clear that both international and domestic law guarantee the right to basic education to all learners. The State is obliged to provide basic education to all children, irrespective of nationality, documentation status, or ability to pay for school fees. Unfortunately, this right is not being uniformly respected and promoted in South Africa. There are still many refugee and migrant learners who face significant barriers to learning.

ADMISSION BARRIERS

The South African Schools Act requires students to be admitted to public schools without any form of discrimination. This section goes on to say that the governing body of a public school determines its admission policy subject to the Schools Act, the Constitution, and applicable provincial law.

Unfortunately, many refugee or migrant learners are refused admission to ordinary public schools because they are not able to furnish documents such as birth certificates or immunisation cards. Sometimes it is not possible for a parent or child to ensure that all their documentation is in order before they flee from their home country. When schools require parents or learners to have all their documents in their possession, it creates obstacles for these learners.

Some schools have also refused to accept the documentation that the parents can furnish; but as discussed above, a parent or caregiver must show that they have applied to the Department of Home Affairs (DHA) to legalise their stay in South Africa.

WHAT THE LAW SAYS ABOUT ADMISSIONS

According to Section 39 of the National Education Policy Act, the governing body of a school must inform all parents of learners admitted to a school of their rights and obligations in terms of the South African Schools Act and any applicable provincial law.

Parents must specifically be informed about their rights and obligations in respect of the governance and affairs of the school, including the process of deciding the school budget, any decision of a parent meeting relating to school fees, and the Code of Conduct for learners.

Section 43 of the National Education Policy Act further sets out the rights of appeal. Any learner or parent who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council, in terms of Section 5(9) of the Schools Act.

Section 5(9) of the Schools Act states that any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council.

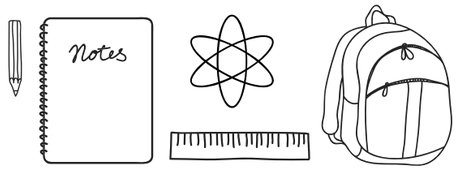
If your child is refused admission, you must ask for a written explanation from the provincial department, through the school principal. If you are not happy with the reasons given for the decision, you must lodge a written appeal to the MEC for Education in the province.

FINANCIAL BARRIERS

SCHOOL FEES AND EXEMPTION

A school fee is an agreed amount of money that parents pay to schools, aimed at improving the quality of education of the learners. School fees may not include registration fees, administration or other fees. The school may not charge further fees for additional subjects chosen by learners from the school programme. See Chapter 5 for more information on school fees.

There are often additional financial pressures on refugee or asylum-seeker parents. Schools sometimes demand payment in return for admitting a learner who is not a South African citizen, or ask for additional financial contributions from these parents. These financial obstacles can make it very difficult for refugees or asylum seekers who are already under financial stress to access schooling.



WHAT THE LAW SAYS ABOUT SCHOOL FEES

Section 5(3)(a) of the South African Schools Act of 1996 states that 'no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body'.

Parents who are unable to pay school fees can apply for a fee exemption. Parents will need to submit proof of their monthly income and expenses in order to qualify for an exemption. This can be done at any public school. This process is the same for asylum seekers, refugees and citizens. If your application for an exemption is denied, you can appeal the decision with the Head of Department in the province, who must explain to you the reason for the decision.

A learner cannot be excluded from participation in any official school programmes due to non-payment of school fees by the parent. A school may not retain a learner's report because the parent cannot afford to pay school fees. A learner may also not be excluded from school if they do not have the ability to pay for a school uniform or books.

LANGUAGE BARRIERS

As discussed earlier in the chapter, asylum seekers and refugees may come from a variety of different places, and do not always speak the language of the place at which they end up. This can be especially difficult for children, if they are being taught in a language they do not understand. Schools might be hesitant to accept a learner who does not speak the language of instruction.

WHAT THE LAW SAYS ABOUT LANGUAGE

A child may not be turned away from a school if they do not speak the language of instruction. The Department of Education is obliged to find a school in which to place the child.

If the child is unable to speak a South African language, it may be helpful to find a school that offers a bridging course. Not many schools do; it is not part of official school policy to offer a bridging course.

An alternative is to place the child in an environment where they are able to learn a local school language before they are placed into a formal school environment. Our Constitution, in Section 29(2), says that everyone has the right to receive education in the language of their choice in public educational institutions, where that education is reasonably practical.

OTHER BARRIERS

REQUIREMENT FOR SCHOOL REPORTS

Some schools may turn away children who do not have previous school reports. This requirement is only for the purpose of placing the child into the correct grade. If no reports are available, the school can carry out an assessment in order to place the child into the correct grade. They may also accept an affidavit from the parent or caregiver.

FAILURE TO RELEASE MATRIC EXAM RESULTS

Sometimes schools tell learners that they will not release matric exam results to learners who do not have passports or study permits. This is unlawful.

If you can prove that you have made or are making attempts to legalise your stay in the country, you are entitled to engage in all school-related activities, including writing examinations and receiving the results of those examinations.

UNDOCUMENTED MIGRANTS, AND THE ARREST AND DETENTION OF MINOR LEARNERS

Children may not be detained for being in the country illegally.

In a high court case, *Centre for Child Law v Minister of Home Affairs*, the court said that the detention of children (for immigration reasons) was unlawful. The court said that as a vulnerable group, children are entitled to protection under the Children's Act, regardless of whether they are documented or undocumented. This includes access to places of safety.

The South African Constitution states in Section 28(1)(g) that:

> every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:
>
> i. Kept separately from detained persons over the age of 18 years; and
>
> ii. Treated in a manner, and kept in conditions, that take into account the child's age.'

GETTING HELP

Where can foreign learners and parents of learners complain about unfair treatment and xenophobia related to access to education?

- Department of Education (Provincial and National levels): Department of Basic Education toll-free hotline 0800 202 933
- Consortium for Refugees and Migrants in SA
- Equal Education Law Centre
- SECTION27
- Lawyers for Human Rights
- SA Human Rights Commission
- Centre for Child Law

Kaajal Ramjathan-Keogh is the Executive Director of the Southern Africa Litigation Centre. She has expertise in asylum, refugee protection, citizenship and statelessness.

CASES

Minister of Home Affairs v Watchenuka 2004 1 All SA 21 (SCA); 2003 ZASCA 142.

Centre for Child Law v Minister of Home Affairs 2005 (6); SA 50 (T).

Mubake and Others v the Minister of Home Affairs and Others North Gauteng High Court case no 72342 (2012).

CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

Refugees Act 130 of 1998.

National Education Policy Act 27 of 1996.

South African Schools Act No 84 of 1996.

POLICY AND GUIDELINES

Department of Education policy, 'A Public School Policy Guide 4', 1996

Department of Basic Education 'Admission Policy for Ordinary Public Schools', 1998.

INTERNATIONAL AND REGIONAL INSTRUMENTS

Convention Relating to the Status of Refugees, 1951.

The Universal Declaration of Human Rights (UDHR), 1948.

The International Covenant on Civil and Political Rights (ICCPR), 1966.

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

The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), 1979.

The Convention on the Rights of the Child (CRC), 1989.

The United Nations Convention on the Rights of Person with Disabilities (UNCRPD), 2007.

SOURCE MATERIAL AND FURTHER READING

United Nations High Commissioner for Refugees (UNHCR) 'Global Trends: Forced Displacement in 2015', 2016.

UN Women 'UN Women statement on World Refugee Day', 20 June 2016.

R Amit 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination', 2012.

F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014).

J Hathaway *The Rights of Refugees under International Law* (2005).

CHAPTER 7

SCHOOL FEES

Sherylle Dass and Amanda Rinquest

INTRODUCTION

Many of the problems that beset the South African education system today are a direct consequence of apartheid and its use of education as a tool of oppression. The education system was segregated along racial lines, with the distribution of funding disproportionately weighted in favour of white learners, while black learners received the least funding of all race groups. This uneven distribution of school funding along racial lines meant that schools for black, coloured, and Indian learners had less money than those for white learners. The quality of education was significantly poorer in black schools.

Although apartheid policies have long been abolished, South Africa's public education system is still unequal. Not enough has been enough done to get black children into previously whites-only schools. The majority of black learners still attend overcrowded, under-resourced schools with poor infrastructure and inexperienced teachers.

The South African Constitution is based on the idea that every person is equally protected by the law; it aims to improve the quality of life of all citizens, and free their potential. Education can be a tool to achieve this ideal. The right to a basic education (Section 29(1)(b) of the Constitution), the right to equality (Section 9) and the right to dignity (Section 10) must therefore work to equalise the effects of apartheid and advance the quality of everyone's life. This will enable all people to become active citizens, capable of participating meaningfully in building a democratic and open society.

THE CONSTITUTION

The Constitution says that EVERYONE has the right to basic education, including adult basic education.

'Everyone' means that the right to basic education is not just available to South Africans, but also to refugees and asylum seekers.

Section 153 of the National Norms and Standards for School Funding states that 'school fees must not be allowed to become an obstacle in the schooling process, or a barrier preventing access to schooling.'

Section 9 and 10 of the Constitution state:

> 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

Figure 7.1: A comparison of the state's approach to school funding during and after Apartheid.

In order to achieve these ideals, in 1996 the government created the South African Schools Act. The main objective of the Schools Act was to provide for a uniform system for the organisation, governance and funding of schools.

Public education is funded by government through a pro-poor funding model. This means previously black schools receive more funding from the government than former white schools. The funding model creates five categories of schools, called quintiles. These quintiles determine how much government funding each school gets. The schools in the lower quintiles (1 to 3) are declared no-fee schools, and do not charge school fees. These schools get the majority of the government's funding.

Schools in quintiles 4 and 5 receive a small amount of funding from the government and are therefore allowed to charge school fees. Each school's fees are determined by the parents of the school. Parents who are unable to afford the school fees are given the right to apply for a school-fee exemption. This ensures that learners are not discriminated against because their parents are unable to pay the full fees.

This chapter will speak about the right of parents to apply for fee exemptions, and will discuss the experiences and challenges that parents face when applying for a school-fee exemption. It will also discuss some of the challenges for parents who are asked for 'compulsory donations' at no-fee schools.

THE LIMITATION OF RIGHTS

While the Constitutional Court has ruled that the right to education is immediately realisable, it is important to note that all rights in the Bill of Rights may be limited by a general limitation. Section 36 of the Constitution directs this limitation. It states that any law that limits a person's access to education (or other right in the Bill of Rights) must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This is a high standard, which any potential limitation must meet. Other factors that are taken into account when there is a limitation of a right include the importance of the limitation, the nature and extent of the limitation, and whether there is a less restrictive way to achieve the government's purpose.

INTERNATIONAL LAW

International law also recognises the need for governments to immediately realise the right to free education. South Africa has signed the International Convention on Social, Economic and Cultural Rights (ICESCR). The Convention calls for the removal of fees, especially for the poorest and most vulnerable.

International law calls for government to meets its obligation to provide the right to education, including access to public schooling, which must be economically accessible.

LAW AND POLICY

The charging of and exemption from school fees is guided by a number of constitutional and legislative directives, as well as international law.

ACCESS TO EDUCATION AND THE CONSTITUTION

Everyone has the right to a basic education.

- This right means that basic education is an immediately realisable right and is not dependent on the availability of government resources
- Government must provide access to basic education to everyone living in South Africa, immediately
- Education must be accessible, and this means public schooling must be free, or at least affordable.

Ideally, this right was intended to mean that all learners would have access to free education, and that government would have a duty to ensure that this would happen. In reality, the government had to recognise that in order to benefit the majority of school-going learners from previously disadvantaged groups, they would have to develop a funding model that would provide for cross-subsidisation of school fees, from parents of learners who were in a position to pay school fees. Cross-subsidisation means that government pays less money to a school that can raise money itself through school fees or other fundraising mechanisms.

THE FUNDING OF SCHOOLS THROUGH COLLECTION OF SCHOOL FEES

The South African Schools Act provides that schools must be funded through public funds. In order to address the past inequities in school funding, the Schools Act allows for certain schools in more affluent areas to raise their own funds, while government fully subsidises learners in poorer areas. The Act also allows for learners who attend partially subsidised schools, but who aren't able to pay school fees, to apply for full, partial or conditional exemptions from the payment of school fees.

THE SCHOOLS ACT

According to Section 39(7) of the South African Schools Act, by notice in the Government Gazette the Minister must annually determine the national quintiles for public schools, or part of such quintiles, which must be used by the Provincial Member of the Executive Council for Education to identify schools that may not charge school fees.

Section 34 of the South African Schools Act states that the State must 'fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.'

SCHOOL FUNDING THROUGH THE QUINTILE SYSTEM

The Schools Act requires that the Minister of Basic Education determine the national quintiles for public schools annually. This is how the system works:

- The Minister classifies schools according to the level of poverty in surrounding areas
- The factors that they consider include the surrounding infrastructure and how many homes in the area are made from brick, wood, iron sheeting, and so on
- Schools are then ranked between quintiles 1 and 5, with quintile 1 being schools in a very poor area and quintile 5 being schools in a wealthier area
- Schools in quintiles 1 to 3 are no-fee schools, and schools in quintiles 4 and 5 are fee-charging schools
- Government wholly subsidises schools in quintiles 1 to 3, and partially subsidises schools in quintiles 4 and 5
- For each province, the Minister must publish a list of no-fee-paying schools where learners are entitled to enrol without paying any school fees.

There are circumstances in which schools are incorrectly classified as quintile 4 and 5 schools. Despite the Norms and Standards allowing for a school to be reassigned to another quintile, in general schools find it difficult to change their classification.

However, Section 103(c) of the Norms and Standards for School Funding does say that special circumstances could exist that would warrant a school being reassigned to another quintile. Governing bodies may also apply for such a reassignment. The Norms and Standards require provincial education departments to establish a fair and objective administrative mechanism for considering such requests from school governing bodies and deciding upon them.

The consequences of a school being incorrectly classified could mean that poor children who attend schools in areas that are not rated among the poorest will be forced to attend schools that charge fees. The ability of a parent to apply for a fee-exemption is therefore critical, to ensure that a parent is not disadvantaged by the incorrect classification of a school.

This problem of misclassification is particularly serious in the context of special schools; where, because of the hostel-based system, even when schools are located in wealthy urban areas, learners come to the schools from poor areas around the country. It is often impossible for their parents to pay fees. A 2015 Human Rights Watch Report revealed that no special schools currently appear in any 'no-fee' schools list produced by the government.

What this means is that children with disabilities, whose education is already sorely disadvantaged by various other shortcomings in the education system, could be further denied access to schooling because of this failure to declare special schools to be 'no-fee' schools.

In a 2015 report, the Department of Basic Education recommended that, to remedy this situation, special schools should be permitted – through a process of 'voluntary classification' – to be reclassified as no-fee schools.

NO-FEE SCHOOLS

No-fee schools are prohibited from charging fees, but are allowed to raise extra funds for the benefit of the school through donations and 'voluntary contributions'. According to the Department of Basic Education, 'any parent, including those granted any type of exemption, can make voluntary contributions to the school fund'. School governing bodies are therefore permitted to encourage parents, learners, educators and other staff at the school to render voluntary services to the school.

Given the difficulty that no-fee-paying schools face in trying to access resources that fall outside of the funding they receive from the state, there are often instances in which schools try to force parents to pay a voluntary donation. This is sometimes referred to as a 'compulsory donation'. This practice is prohibited, and learners should not suffer any discrimination or victimisation if their parents are unable to pay a voluntary contribution. Here are some examples.

EXAMPLE OF REGISTRATION FEES

A mother has three children at a no-fee school. Every year she is asked to pay a registration fee of R300 per child. This means she must pay R900 every year, even though her children are already at the school. Registration fees are unlawful, whether a child is starting at a new school or already enrolled at the school.

EXAMPLES OF FEES FOR SPECIFIC SCHOOL ACTIVITIES

A school governing body (SGB) of a no-fee secondary school in the Mopani District in Limpopo met with parents early in 2015. Parents with learners in Grades 11 and 12 were informed that they were required to pay R60 per month so that the children could attend the 'Saturday school' and 'Winter school'. One parent said he felt obliged to pay, even if he could not afford this monthly contribution. He said: 'I don't want to put my daughter into trouble.'

Victimisation and discrimination for the non-payment of 'compulsory fees' is also prohibited. Victimisation or discrimination means there is some form of coercion to force a monetary contribution. The Schools Act and the

CONTRIBUTIONS

Contributions can be in the form of money, in kind, or in the form of any service a parent may render to a school.'

DIFFERENCES AT PROVINCIAL LEVEL

Some provinces, such as the Western Cape, have adopted practices that designate some schools that charge school fees of less than R400 a month as no-fee schools.

Admission Policy both state that a learner may not be deprived of his or her right to participate in any of the school programmes for not paying school fees.

These laws also ban schools from victimising learners for not paying school fees. Examples of such victimisation include schools withholding report cards, matriculation certificates or transfer cards; suspension from classes; verbal or non-verbal abuse; and denial of access to the school feeding schemes, or to school cultural, sporting or social activities.

EXAMPLE OF DISCRIMINATION OR VICTIMISATION

At a primary school in Mopani District, every Friday is 'Civvies Day'. This means that learners may come to school dressed in ordinary clothes instead of their uniforms, if they pay R2. This would be lawful if it was voluntary; the problem is that when learners come to school in their uniforms on a Friday, they are forced to go home, and are not allowed to return unless they pay the R2. This means that learners are prevented from attending school unless they pay R2.

FEE-PAYING SCHOOLS

Section 39 of the Schools Act empowers the parent body to determine the school fees to be charged at a public school. There is no cap on how much each school may charge for school fees. This amount is agreed by the parent body of the school.

The parent body must also agree on the criteria and procedure for determining the total, partial or conditional exemption of parents who are unable to pay school fees (the school governing body is required to implement such a decision of the parent body).

The Minister of Basic Education provides regulations stating what the criteria and procedures for determining fee exemptions should be. In order to prevent financial discrimination in school admissions, the Schools Act states that no public school, in any quintile, may charge any registration, administration or other fee, except school fees.

GOVERNING BODY RESPONSIBILITIES

The Schools Act, in Section 36(1), determines that a governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the state in order to improve the quality of education provided by the school to all learners at the school.

SCHOOL-FEE EXEMPTIONS

Parents who cannot afford to pay school fees at fee-charging school (schools in quintiles 4 and 5) may approach the school to request a fee exemption. The Schools Act and the Regulations Relating to the Exemption of Parents from the Payment of School Fees (the Regulations) provide for this.

Depending on the income of the parent, or whether the parent, guardian or a learner receives a social grant, a parent or guardian may be given an automatic exemption, a total exemption, a partial exemption, a conditional exemption, or no exemption.

Section 3 of the Regulations requires that the school principal tell all parents about school-fee exemptions and assist parents who want to apply for exemption. Parents must also sign a form that confirms that they were informed about the school fees and school-fee exemptions. The SGB must display the exemption regulations in a prominent place in the school (parents must be given copies of the regulations upon request).

Automatic exemptions are given to a person with the parental responsibility of a child who is in foster care, an orphanage, a youth care centre or a place of safety. Automatic exemptions are also given to a child who heads a household, a person who receives a social grant on behalf of a child, a caregiver of an orphan, or a child abandoned by parents. These categories of people must complete the fee-exemption form from the school, and provide a court order, or a sworn statement or affidavit – confirmed by the South African Police Service, a social worker, or any other competent authority – confirming their status.

A parent who qualifies for a partial exemption is one who gets a discount on school fees; the amount would depend on the income of the parents in relation to the school fees. The regulations in the Schools Act provide a formula for calculating the amount a parent will be required to pay if they qualify for a partial exemption.

EXAMPLE OF AUTOMATIC EXEMPTION

An example of an automatic exemption would be a grandmother who looks after her grandchildren and receives a child-support grant for them, or is their foster parent and receives a foster-care grant. The grandmother would need to submit proof to the governing body that she is receiving a social grant and would qualify for an automatic exemption. She could do this by giving documentary evidence in the form of:

(a) an affidavit explaining that she receives a child support grant for the child;

(b) a confirmation affidavit from a social worker or from any other competent authority; or

(c) a court order which has this information in it.

EXAMPLE OF CONDITIONAL EXEMPTION

An example of a conditional exemption would be where a parent, at the time of applying for a fee-exemption, didn't qualify because they earned too much; but during the course of the year, became unemployed. The school in this instance could even accept non-financial contributions towards school fees, such as assisting with building renovations.

This formula takes into account:

- The annual school fees for one child that a school charges
- Additional monetary contributions such as piano lessons, art classes, school outings and so on
- The combined annual gross income of both parents.

'If the school fees as a proportion of the income of a parent are greater than 10%, the parent qualifies for a full exemption from the payment of school fees. If the school fees are less than 10% of the income, they will qualify for a partial exemption on a graded scale.'

Section 4 of the Regulations requires a parent to furnish any relevant documents a school governing body may request when deciding on a fee-exemption. The application also requires parents to submit a salary slip or letter explaining how much the parent earns. If the parent is unemployed, or self-employed, an affidavit stating how much they earn and how they support the child is required.

A conditional exemption can be granted to a parent who qualifies for a partial exemption, but because of some personal circumstance cannot pay the reduced amount. A conditional exemption may also be granted to a parent who does not qualify for a fee exemption, but provides information that he or she is unable to pay the school fees.

Section 7 of the Regulations allows for the governing body to reconsider the decision to grant exemption and amend the amount that the parent must pay if they later obtain information that the parent's financial position has changed substantially. They must reconsider the decision to grant exemption, and amend the amount that the parent must pay from the date on which the change took place.

The following formula is applied

$$E = 100 \left[\frac{F + A}{C} \right]$$

E = school fees as a proportion of the income of the parent

F = the annual school fees for one child that a school charges in terms of Section 39 of the Act

A = additional monetary contributions paid by a parent in relation to a learner's attendance of, or participation in any programme of, a public school

C = combined annual gross income of parents

100 = the number by which the answer arrived at in brackets is multiplied so as to convert it to a percentage

The value E is then applied to a table designated in the Regulations that determines the percentage of exemption for which a parent would qualify.

Example *If the income of a mother and father is R2000 per month, their total income for the year is R24 000. The school fee at their son's school is R1000 for the year. The school also has a school trip every year costing R400. The formula will be worked out as follows:*

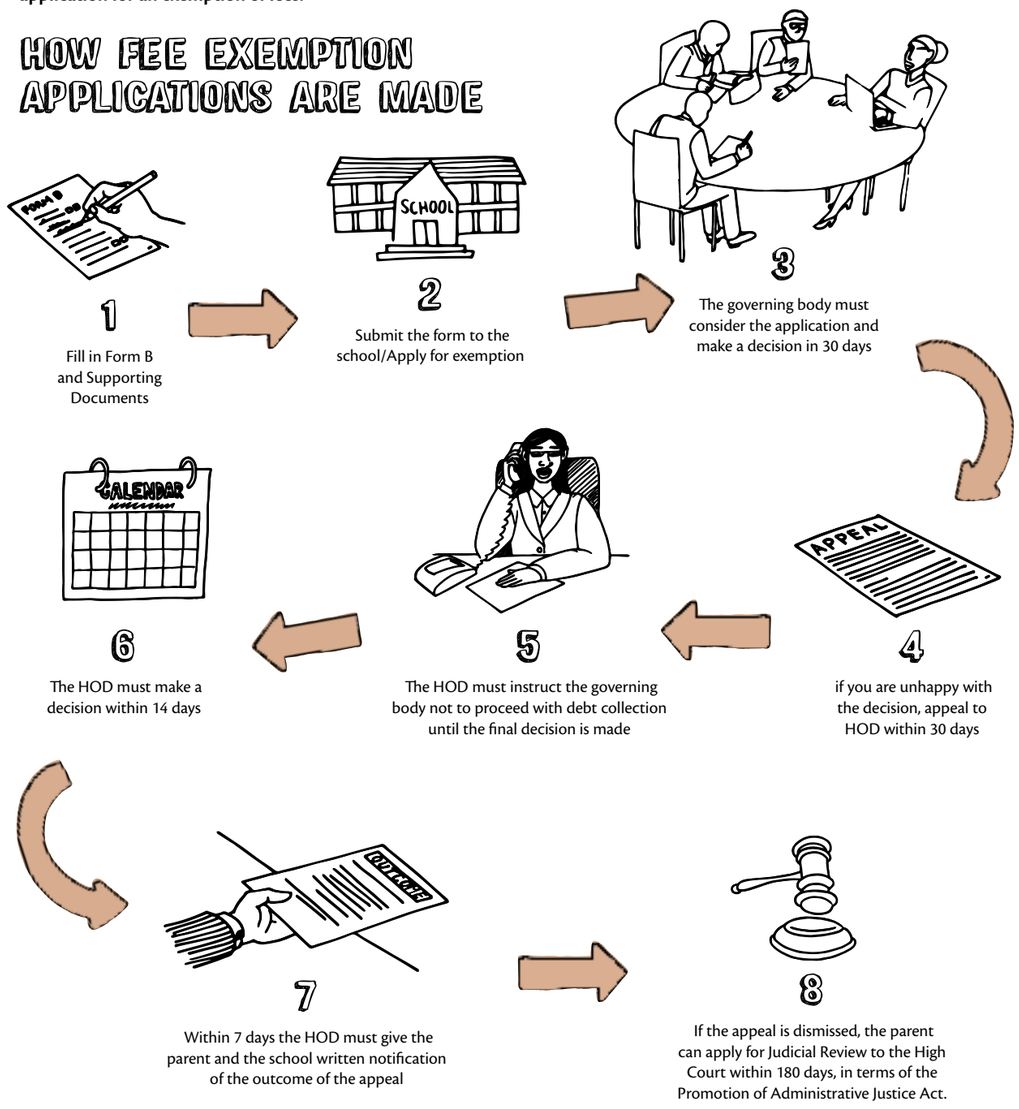
$$E = 100 \left[\frac{1000 + 400}{2400} \right]$$

E = 5,83% *(rounded off to 6%)*

In terms of the table from the Exemption regulations, these parents qualify for a 67% discount in their school fees. This means they would pay R1000 – R670 = R239

Section 8 provides that if a parent has been denied a fee exemption and they believe that the formula was not applied correctly or was applied unfairly, he or she can appeal to the head of the provincial education department to have their exemption application reconsidered by the provincial department. An appeal must be lodged with the head of department within 30 days of being notified of the rejection.

Figure 7.2: Explanation of the steps involved in an application for an exemption of fees.



COMPENSATION TO SCHOOLS GRANTING FEE EXEMPTIONS

To alleviate the limited funding that fee-charging schools get from the government, schools that grant fee exemptions are sometimes compensated by the government. This compensation is very limited, and fee-charging schools often don't receive compensation from provincial government, even though the department must budget for refunds to schools who grant fee exemptions. Provinces that do reimburse a school only refund a small portion of what a school would receive in funding if a parent paid the full fee.

This disparity between the compensation a school gets and the fees generated from full-fee-paying parents often leads to schools discouraging parents from applying for school-fee exemptions, or refusing admission to learners who they believe will be unable to pay school fees. Additionally, through their admissions policy, schools may create school feeder zones or catchment areas that include more affluent areas, and exclude bordering poorer townships.

When exemptions are granted, the Department of Basic Education has acknowledged that compensation is even more important in special and full-service schools, given the high costs of providing education for children with disabilities. As a 2015 report on education for visually impaired learners in special schools reveals: 'Often, even special schools located in wealthier communities accommodate many learners from areas far outside of these communities, where the average household is poor and relies on low-paying jobs and/or social grants.'

> COMPENSATION PAYMENTS BY THE WESTERN CAPE EDUCATION DEPARTMENT (WCED)

In 2012, 90 506 parents were granted fee exemptions at public schools in the Western Cape. The WCED paid out a total of R42 million in compensation to schools granting fee exemptions.

CURRENT CHALLENGES IN THE IMPLEMENTING OF SCHOOL-FEE-EXEMPTION REGULATIONS

The integration of former white schools into the new, unified and non-segregated public schooling system gave rise to what was commonly referred to as 'Model C' schools. These schools were schools situated predominately in former white areas and are seen as schools situated in more affluent and better resourced areas. The Model C system has been done away with, and most of these schools are now quintile 5 schools and are able to charge school fees.

The government does not limit the amount of school fees a school can charge. School fees are determined solely by the parent body of the school. This system gives rise to many challenges faced by parents who are unable to pay exorbitant fees. These parents are usually the minority group among the parent body, and are usually out-voted at parent body meetings.

Schools also adopt exclusionary practices to prevent the acceptance of learners who they believe may be unable to afford the school fees. These are some of the experiences parents have had when attempting to enrol their children and apply for fee exemptions at fee-paying schools:

> 'I applied for my daughter to be admitted into FHHS in 2010. From the outset I made it clear that I would be applying for a fee exemption. Initially, the school refused to accept my application when I made it clear that I could not afford the full school fees, and therefore I could not sign the undertaking to pay the full school fees.' – Parent applying at Fish Hoek High School in the Western Cape.

> 'Immigrants and refugees are not allowed to apply for Financial Assistance. Your school fees have to be paid in advance at the beginning of each year and all Study Permits, Passports and Visas have to be up to date.' – Letter received by a refugee from Tableview Primary School when he applied for a fee exemption.

A parent from Khayelitsha in the Western Cape tried to apply for the admission of her daughter at De Hoop Primary School in Somerset West. The school rejected her application. The school's admission application incorrectly states that: 'parents who reside in the feeder area of the school may apply for a full exemption or partial remission in respect of school fees…' The school's argument was that since the learner did not reside in the feeder area, her parents could not apply for school-fee exemption. The Schools Act does not prescribe that a parent must reside in the feeder area of a school in order to apply for a school-fee exemption. The school's admission policy in respect of exemptions from school fees was thus unlawful.

Parents are also sometimes dissuaded from applying for fee-exemptions.

> 'I was told to find another school to take my daughter to if I couldn't afford the school fees.' – Single mother trying to apply for a fee exemption at Sun Valley Primary School.

Some schools use language in their fee-exemption forms that discourage or shame parents into not applying for a fee exemption:

> 'Please note, however, that the loss of income due to the fee exemptions is borne by the fee-paying parents.' – Fish Hoek High School

> 'Parents must be aware that requests for exemption may place an additional financial burden on those parents who do pay their fees.' – Wynberg Boys' High School.

Finally, schools don't comply with the Schools Act when recovering outstanding school fees. They hand parents over to debt collectors or debt collection attorneys, who most often win a judgment against

SECTION 41 OF THE SCHOOLS ACT

A public school may only enforce the payment of school fees after it has ascertained that a parent does not qualify for a fee exemption.

the parent without ensuring that the school has determined whether or not a parent qualifies for a fee exemption.

Some parents also complain that they are never informed about the possibility of fee exemptions, or that the fee-exemption process is too complicated. The documents required are complex and often difficult for parents to obtain – especially if they are foreign nationals. Parents whose children are in special or full-service schools, which are often far away from their homes, also struggle to afford the travel involved in completing the exemption process.

LIABILITY FOR SCHOOL FEES

Both biological parents are liable for the payment of school fees. However, the Schools Act creates liability for other categories of 'parents', such as adoptive parents, legal guardians, custodians, and other persons who have undertaken parental responsibility over a child. This means, for example, that a grandparent who assumes the responsibility of a biological parent may be liable for school fees, and in turn may apply for a school-fee exemption. In recent years the courts have expanded the liability to pay school fees.

In *B, M (Born D P) v B, NG* the court said that not only biological parents could be held responsible for school fees. In this case, a stepfather who assumed the role of a biological father was held liable for the payment of school fees.

COLLECTION OF FEES

Debt-collection cases for school fees appear before magistrates' courts on a daily basis. Parents who are unable to pay fees are also unable to defend a summons for the attachment of their assets for their children's school fees. Often parents in this sort of situation are unaware that they may apply for fee exemptions. The Schools Act sets out strict obligations for schools in collecting school fees that are in arrears.

Section 41 of the Schools Act allows a public school to hand over a school-fee account that is in arrears to an attorney to issue a summons in two circumstances:

1. STEPS HAVE BEEN TAKEN TO ENSURE THAT A PARENT DOES NOT QUALIFY FOR A SCHOOL-FEE EXEMPTION.

Before a parent is handed over to an attorney for a fee account that is in arrears, the school must ensure that:

- they have ascertained whether or not a parent qualifies for a school-fee exemption
- if a parent did qualify for a fee exemption, then those deductions have been made to the total school fees payable
- the parent has completed and signed a form confirming that they were advised about the amount of school fees payable, that they are liable for the full payment of the fees, and that they are aware of their right to apply for a fee exemption.

A school must comply with these obligations before they can hand a parent over to a debt-collection attorney to enforce the payment of school fees.

2. WRITTEN NOTIFICATION HAS BEEN ISSUED.

The Schools Act also allows a school to hand over the arrear account if:

- The school has proof that written notification was sent to a parent by hand or registered post informing that parent that they have not applied for a school-fee exemption
- The parent has still not paid the school fees after three months from the date this written notice was sent.

Section 41 specifically provides that a residential property cannot be attached for the non-payment of school fees. A learner cannot be excluded from participating in all aspects of a public school despite non-payment of school fees. A learner's report card or transfer certificate cannot be withheld due to non-payment of school fees.

Despite these provisions, many schools adopt unsavoury debt-collection practices, flaunt the strict regulations regarding the collection of school fees, and often withhold report cards and victimise and exclude learners from school activities.

In *Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others*, the school was interdicted from proceeding with any further action for the recovery of outstanding school fees unless and until it had delivered to the applicant's attorneys proof that it had complied with its obligations in terms of Section 41 of the Schools Act.

CUSTODIAN PARENTS, AND JOINT AND SEVERAL LIABILITY

There has been much debate about the responsibility of both non-custodian and custodian parents to pay school fees.

A custodian parent is a parent with whom the child lives for most of the time, and who is responsible for the child's daily well-being. The collection of maintenance from a recalcitrant parent has presented many challenges to divorced and single parents. In most instances, a custodian parent is the mother.

South African common law places a 'joint liability' on both parents to maintain their children. This means that both parents are equally responsible for maintaining their children. A parent who has custody over their child, however, most often bears more of the financial burden in raising the child. But by law, a non-custodian parent is liable for 50% of the costs of maintaining their child. This includes costs towards a child's education. The law does not cater for the actual amount needed to educate a child, in terms of school fees. A divorce order might stipulate that a non-custodian parent is liable for half of the school fees, but a maintenance order will look at how much a non-custodian parent can afford to pay. A custodian parent therefore would not necessarily be able to recover half of the school fees from an ex-spouse, if the other parent is unable to afford that amount.

The Schools Act further treats ex-spouses or ex-partners as a family unit in calculating the amount of a fee exemption. Both the Schools Act and the Regulations require the combined annual income of both parents to determine whether a parent is entitled to a fee exemption. This is problematic for single and divorced parents, who are unable to provide the financial information of a non-custodian parent. All that they can provide is the amount of maintenance they receive from an ex-spouse or ex-partner. These provisions therefore discriminate against parents who do not fall within the traditional definition of a 'family'.

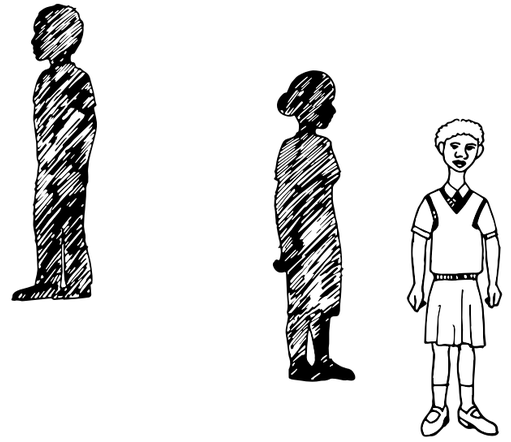
Several cases have attempted to address the discriminatory effect of the current fee-exemption regulations.

In *Bestuursraad van Laerskool Sentraal, Kakamas v Sersant van Kradenburg and Another* the court held that in respect of the collecting of school fees, the definition of 'parent' in the South African Schools Act does not include a parent who does not carry any parental responsibility, and therefore Sections 40 and 41 do not apply. However, the decision in this matter was overturned by another judgment: in *Fish Hoek Primary School v G W*, the Court held that a non-custodian parent does have liability for a child's school fees, and that such parents are not excluded from the meaning of the word 'parent'. The Court held that it is in the best interests of a child that a non-custodian parent should be held liable for payment of school fees.

The courts have also been asked to determine whether a non-custodian parent who agrees to pay 100% of a child's school fees in terms of a divorce order absolves the custodian parent from the payment of school fees.

In terms of our common law, both parents are jointly and severally liable for the payment of maintenance, which includes school fees. This means that a creditor (in this case, the school) can choose which parent they want to sue for the collection of the full school fees outstanding. The custodian parent then has a right to claim back what they paid from their ex-spouse.

This presents various challenges to a custodian parent. If a custodian parent cannot pay the full amount of school fees, it is highly unlikely that they would be able to recover what they paid from their ex-spouse by using expensive court processes. The amount of maintenance that the custodian parent gets may be limited, and/or capped at a certain amount; and this amount may not necessarily cover the full amount of school fees levelled by the school. It is also very common for a non-custodian parent to disregard their obligations to pay maintenance, as they often do not take an active role in the upbringing of their child.



> ...treating a separated family as a joint unit also infringes on a custodian parent's rights to dignity and equality, by expecting them to provide financial information about an ex-spouse or partner.

In *Meeding v Hoër Tegniese Skool Sasolburg*, which also dealt with the liability of custodian and non-custodian parents for paying school fees, the ex-husband had agreed in the divorce settlement to pay the full school fees. The mother of the child asked the school to recover the school fees from her ex-husband because of this divorce order. However, the court said that the divorce order applied only between Ms Meeding and her ex-husband; it did not apply to the school. The school could therefore choose to recover the school fees from either Ms Meeding or her ex-husband; if from Ms Meeding, she would then have to sue her ex-husband for the money she paid for school fees. This is what joint and several liability means. The court said that both Ms Meeding and her ex-husband were jointly and severally liable for school fees, and not jointly liable.

The Meeding case failed to address the practical challenges faced by single and divorced parents; and that the law, as it stands, gives rise to unfair discrimination. The courts should have considered that both parents are jointly liable for school fees. This would mean that each parent would be liable for half the school fees, and the school can therefore only sue a parent for half of the school fees. This would negate the discriminatory effect on single and divorced parents.

The insistence on treating a separated family as a joint unit also infringes on a custodian parent's rights to dignity and equality, by expecting them to provide financial information about an ex-spouse or partner.

The other notable challenge to the implementation of the fee-exemption regulations is that schools are refusing to decide on a fee-exemption application without the financial information of a non-custodian parent. In essence, they are declining applications for fee exemptions that do not include the financial information of a non-custodian parent. Therefore, a custodian parent who declares her full income, including the maintenance she receives from a non-custodian parent, may find her application declined – even though on her income alone, she would qualify for a fee exemption.

This practice of declining an application for a fee exemption on the basis that the application is incomplete is an incorrect interpretation and application of the regulations. Regulation 9 states clearly that a parent who applies for an exemption cannot be disqualified from such an application on the basis that their application is incomplete. Regulation 9 places an obligation on the principal to assist a parent in completing their application, which should include taking steps to obtain the financial information from a non-custodian parent.

It is clear that the Department of Education needs to re-visit the Schools Act and the Regulations, and consider amending these regulations so that they do not infringe on the rights of single and divorced parents. Currently there is a case before the Supreme Court of Appeal which seeks to highlight these challenges, and which asks for the courts to declare certain parts of the Schools Act and the Regulations unconstitutional. This case (*Michelle Saffer v HOD Western Cape Education Department & Other*) might provide more clarity on the rights of single and divorced parents.

'In my travels all over the world, I have come to realise that what distinguishes one child from another is not ability, but access. Access to education, access to opportunity, access to love.' – Lauryn Hill

CONCLUSION

'No-fee' schools, and fee exemptions in fee-charging schools, are there to ensure that there are no barriers to access to education, and that parents and their children are not discriminated against based on their inability to pay fees. Despite the challenges in the implementation of the Schools Act and the Regulations, these mechanisms nevertheless assist parents who have financial constraints to access schooling for their children.

Sherylle Dass is a former senior attorney at the Equal Education Law Centre.

Amanda Rinquest is a candidate attorney at the Equal Education Law Centre.

CASES

Fish Hoek Primary School v G W 2010 (2) SA 141 (SCA): 2009 ZASCA 144.

Meeding v Hoër Tegniese Skool Sasolburg 2012 ZAFSHC 137.

MB v NB 2010 (3) SA 220 (GSJ); 2009 ZAGPJHC 76.

Bestuursraad van Laerskool Sentraal, Kakamas v Sersant van Kradenburg and Another 2008 ZANCHC 18.

Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others 2007 ZAKZHC 6.

Michelle Saffer v HOD Western Cape Education Department and Other 18775/13

CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

South African Schools Act 84 of 1996.

National Education Policy Act 27 of 1998.

INTERNATIONAL AND REGIONAL INSTRUMENTS

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

SOURCE MATERIAL AND FURTHER READING

Human Rights Watch 'Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities', 2015.

Special Rapporteur on the Right to Education 'Preliminary report of the Special Rapporteur on the right to education', 1999.

Equal Education Law Centre 'Western Cape High Court hears argument on discrimination against divorced mothers when applying for school fee exemptions', 2016.

CHAPTER 8

PREGNANCY

Lisa Draga, Chandré Stuurman, and Demichelle Petherbridge

Punishing learners because they are pregnant is against the law and the Constitution.

OVERVIEW

According to recent statistics, in 2013 over 99 000 learners in South Africa fell pregnant. This figure clearly shows that many school-going girls in South Africa are at risk of falling pregnant. Both schools and learners need to be well informed to ensure that pregnant learners are able to get quality education that is free of prejudice and stigmatisation.

The purpose of this chapter is to explain how South African laws and policies address learner pregnancy, what the rights of pregnant learners are, what obligations rest on schools and the state in addressing this situation, and how current law and policy should be developed to protect pregnant learners.

BACKGROUND

The Constitution affords everyone the right to equality, human dignity, and a basic education.

These fundamental rights, together with various national and provincial laws and policies, have made positive and significant changes towards ensuring access to a basic education and promoting gender equality in schools.

South Africa has also signed a number of international and regional treaties and conventions that have helped strengthen the state's responsibility to protect and support learners and to promote action geared towards achieving universal access to basic education. In practice, however, gender inequality is still prevalent in South African schools, and pregnant learners still experience gender-specific barriers to basic education in a way that decreases their learning opportunities.

The promotion of gender equality in the case of pregnant learners means that the State must take more steps to ensure that these learners will complete their education rather than dropping out.

One of the strongest indications that pregnant learners are not receiving the support they need to re-enter the education system after giving birth and remain in school, is the low rate of attendance (or high drop-out rate) of female learners due to pregnancy.

A second indicator that pregnant learners face barriers that affect their access to education is the increase in reports of discriminatory practices. Pregnant learners often face reluctant teachers who are not willing to support them with access to books, notes, and homework while they are at home for the period necessary before giving birth, or for recovery afterwards. Catch-up classes are often not provided for either.

Pregnant learners are increasingly also being requested to provide the school with money, in case they need medical assistance while at school. Others have been forced to have a guardian accompany them to school at all times, with schools reasoning that the guardian and not the school would then be liable in case of a medical emergency. These practices generate stumbling blocks and cause great distress for pregnant learners.

There may be a number of reasons why discrimination against pregnant learners takes place in schools and communities. However, the most common reasons include stereotypes concerning the role of females at home and in the community.

Females are often considered to be caregivers, or more suited for domestic work, while less emphasis is placed on their educational needs. Recent data confirms the existence of this view, and shows that females are more likely to stay home due to family commitments such as housework and childminding.

Prejudicial and judgmental attitudes are also common, and in some cases principals and teachers have adopted a punishing attitude towards pregnant learners, rather than providing them with the support and understanding they desperately need. Often this happens even though some principals and teachers know what the law and the Constitution say about how they must help pregnant learners. However, many do not know that punishing learners because they are pregnant is against the law and the Constitution.

Discriminating against pregnant learners may have far-reaching effects on both the learner and society. Research shows that when a girl falls pregnant at a young age, her chances of completing formal schooling and higher education decrease. In addition, a learner who has not completed schooling has a stronger chance of unemployment, and may experience difficulties in finding a high-paying job.

Pregnant learners are clearly a vulnerable and marginalised group, often associated with immorality and shame. The South African government is obliged to take positive measures to make sure that they stay in school and complete their education.

LAW AND POLICY

INTERNATIONAL AND REGIONAL LAW

1. WHY MUST SOUTH AFRICA DECREASE THE DROP-OUT RATES OF FEMALE LEARNERS?

Under international law, South Africa must take steps to decrease the number of children dropping out of school, especially females. Two United Nations Conventions say so. South Africa has signed and ratified both.

South Africa has also signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13 of which protects everyone's right to education. The Committee on Economic, Social and Cultural Rights adopted General Comment 13, which explains Article 13 of the ICESCR in more detail, and states that education must be accessible to all, without discrimination.

General Comment 13, paragraph 6 (b): 'Accessibility – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party'.

What obligations do African legal mechanisms impose on South Africa to protect pregnant learners?

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) requires all African member states to take measures to promote keeping girls in schools.

The African Youth Charter requires signatory states to eliminate discrimination against girls, and states must make sure that there are no barriers in the education system that block pregnant learners from attending school.

The African Charter on the Rights and the Welfare of the Child also places an obligation on signatory states to take 'appropriate measures' to ensure that children who fall pregnant have a chance to continue their education.

Only the African legal mechanisms speak specifically about supporting pregnant girls. South Africa has signed and ratified all of these mechanisms. The government therefore has an obligation to make sure that pregnant learners, and learners who are mothers, are not unlawfully denied access to school.

Importantly, these legal mechanisms show that the government has a responsibility to make sure that pregnant learners are surrounded by a supportive and understanding environment in which their needs and circumstances are accommodated.

2. HOW IS THE GOVERNMENT FARING ON ITS INTERNATIONAL AND REGIONAL OBLIGATIONS?

According to recent data, 473 159 girls between the ages of 12 and 19 were not attending school in South Africa in 2014. Of these learners, 18% (85 182) said that they had fallen pregnant during the previous 12 months. This data indicates that the education of female learners is negatively and directly affected by pregnancy.

The 2015 General Household Surveys (GHS) reveals that 9.4 % of learners left school due to 'family commitments', including pregnancy. But the number of females dropping out for this reason was drastically high compared to the number of males (18.1% compared to just 0.4%).

While by no means decisive, these statistics show a seemingly substantial link between female drop-out rates and learner pregnancy, a link which is even clearer in poorer and rural conditions. This indicates that South Africa is falling short of its international and regional obligations to ensure that pregnant learners, a particularly high-risk group requiring special attention, do not fall out – and are not pushed out – of the basic education system.

NATIONAL LAW AND POLICIES

1. WHAT DO SOUTH AFRICAN LAWS AND POLICIES SAY ABOUT LEARNER PREGNANCY?

Section 9(3) of the South African Bill of Rights says that the State must not discriminate against any person based on aspects such as gender, sex, pregnancy and marital status. Section 9(4) states that no person may discriminate against anyone on these same grounds.

The Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) was introduced to prevent and prohibit unfair discrimination and to promote the achievement of equality in South Africa. Section 6 of the Equality Act provides that no-one, including the State, may unfairly discriminate against any person.

Section 8 of the Equality Act makes it illegal to discriminate on the basis of gender. In particular, Section 8(f) prohibits discrimination on the basis of pregnancy and 8(g) prohibits discrimination where the result is to limit women's access to social services, or benefits such as health and education.

Section 10 of the Constitution states that everyone has the right to dignity and to have their dignity respected and protected. Closely related to the right to dignity is the right to a basic education, which the Constitution guarantees to everyone, in Section 29(1)(a).

The Bill of Rights also makes special provision for children, in Section 28(2). This section states that the best interest of the child is the top-most priority in every matter concerning the child. Similarly, Section 9 of the Children's Act states that 'in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance must be applied'.

The South African Schools Act gives effect to the right to education guaranteed by the Constitution. In terms of Section 3(1) of the Schools Act, anyone whose child is due to turn seven in a given school year must

UNITED NATIONS GUIDELINES

Article 28(1)(e) of the UN Convention on the Rights of the Child (UNCRC) states that South Africa must:

> 'Take measures to encourage regular attendance at schools and the reduction of drop-out rates'

Part III. 10(f) of the UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) states that South Africa must:

> 'take all appropriate measures to eliminate discrimination against women . . . to ensure to them equal rights with men in the field of education and in particular to ensure . . . (t)he reduction of female student drop-out rates'

MAPUTO PROTOCOL

12(2)(c)states:

> 'State parties shall take specific positive action to (c) promote the enrolment and retention of girls in schools…'

AFRICAN YOUTH CHARTER (AYC)

23(G) states South Africa must:

> 'Provide educational systems that do not impede girls and young women, including married and/or pregnant young women, from attending.'

THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC)

Article 11(6) states:

> 'State parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.'

make sure that their child attends school. The period of compulsory attendance ends on the last school day of the year a learner turns 15, or their last day of Grade 9 (whichever one comes first).

Section 5(1) of the Schools Act states that '[a] public school must admit learners and serve their educational requirements without unfairly discriminating in any way'. This means that expectant learners, especially those who are of compulsory school-going age, must be enrolled and be allowed to attend school. A school cannot refuse to admit a learner because of their pregnancy, as this would go against sections 3 and 5 of the Schools Act. It would also violate a learner's rights to equality, dignity and a basic education.

Also, a school cannot deny a learner already in that school from attending because the learner is pregnant, as this would violate the learner's right to a basic education. Importantly, the school cannot punish or place any difficult requirements on a learner because of her pregnancy, as this would amount to discrimination on the basis of both gender and pregnancy. This would be in violation of Section 8 of the Equality Act and Section 9(3) and/or 9(4) of the Constitution.

The National Education Policy Act (NEPA) was introduced to provide for the making and applying of national education policy regarding schools. Section 3(4)(o) of NEPA states that the Minister of Basic Education may determine national policy dealing with education support services such as health, welfare, counselling and guidance, as part of the Department of Basic Education's (DBE's) responsibility.

2. IS SOUTH AFRICA COMPLYING WITH ITS OWN LAWS AND POLICIES?

There is currently no national policy relating to learner pregnancy in South Africa, even though NEPA allows the Minister to make one. In September 2013, the DBE Acting Director General said that the department was developing regulations on learner pregnancy. However, this process has been delayed because of government's mistaken opinion that the Minister does not have the power to make such regulations. The Schools Act was being reviewed, and would be changed to give the Minister this power. Currently the DBE's internal review process is still taking place, and there has been no indication how long this will take.

Some provincial education departments, such as the Western Cape Education Department (WCED), do have a pregnancy policy for their province. The WCED's Policy sets out guidelines for their schools in managing learner pregnancy. The guidelines say that pregnant learners are to be considered learners with 'special needs', and must be given counselling. It also says that School Governing Bodies (SGBs) are accountable for every learner's right to education – this includes enrolling expectant learners and learners who are parents.

Learner pregnancy is dealt with in different ways across provinces because there is no national policy. SGBs have been left to determine their own learner pregnancy policies without any guidance as to what is lawful. In many instances, these policies have been highly discriminatory. Pregnant learners are being subjected to unlawful practices at schools, which include being threatened with suspension or expulsion, or being refused a catch-up plan for missed lessons. Some learners are not allowed to return to school for at least a year after giving birth.

The effect of the lack of a national policy can be seen in a case brought by two Free State schools, Welkom and Harmony High (the schools), against the DBE, and specifically the Head of Department (HOD) in the Free State.

The SGBs of the schools adopted pregnancy policies that provide for the automatic exclusion of pregnant learners. In particular, learners who fall pregnant may not be readmitted into school in the year in which they give birth. The effect of these policies was that pregnant learners would be forced to repeat their current grade, should they decide to return. These unlawful policies were in line with a 2007 DBE national policy titled 'Measures for the Management and Prevention of Learner Pregnancy'. This policy encouraged discriminatory conduct by promoting the view that a pregnant learner takes a leave of absence of up to two years to 'exercise full responsibility for parenting'.

The Welkom and Harmony policies were applied even though both schools were aware of a national circular titled 'Management and Governance Circular'. This circular states that learners may not be expelled because they are pregnant, and that pregnancy policies and interventions must not punish learners, but be 'rehabilitative and supportive'. The circular also encourages learners to return to school as soon as possible.

Both schools had forced a learner to leave as a result of pregnancy. After being told of this, the HOD ordered the principals to allow the learners back immediately. The SGBs refused, and took the HOD to court to stop him from interfering with their policies.

In the judgment, the Constitutional Court stated that the pregnancy policies differentiate between learners on the basis of pregnancy and sex (because male learners are not negatively impacted by these policies). This differentiation amounts to unfair discrimination. The Court also stated that the policies infringe on a pregnant learner's right to basic education by requiring them to repeat up to an entire year. The policies violated the learners' rights to human dignity, privacy, and bodily and psychological integrity, by obliging other learners to report their pregnancy to school authorities, thus stigmatising them even more. It is clear that the 2007 DBE pregnancy policy on which the schools relied when drafting their policies is against the law and the Constitution.

...there remains an urgent need for a step-by-step policy, or legal regulations, specifically concerning learner pregnancy.

The Constitutional Court also stressed the importance of co-operative governance between HODs and SGBs, meaning they should work together to make sure that all learners can enjoy a quality education. The Welkom judgment highlighted the importance of SGBs and educators drafting policies that do not discriminate and do comply with the Constitution.

The Welkom judgment again shows the important need for a national learner pregnancy policy, to ensure a uniform standard that at its core has the best interests of the learners at heart.

The DBE released their 'Draft Policy on HIV, STIs and TB' in May 2015. The Draft Policy states that all learners must be educated about sex, as well as on sexual and reproductive health rights. However, the Draft Policy needs to be revised to ensure that all learners are provided with easy and discreet access to condoms in schools. While this type of policy is welcomed, it is strange that the word 'pregnancy' does not appear in the Draft Policy, despite the link between unprotected sex, teenage pregnancy and STIs. The DBE's own statistics show that learner pregnancy is a huge problem, and should be addressed. This reality should be taken into account when a decision is made on what age learners ought to be allowed to access condoms in a way that is easy and discreet.

The chances of achieving the aims of the Draft Policy are significantly diminished if learner pregnancy is not addressed as an additional policy or law with an aligning, cohesive and supportive framework.

The DBE has said that the Draft Policy was approved on 20 May 2016. The department is in the process of developing and costing an implementation plan. The Draft Policy has been submitted to the Department of Planning, Monitoring and Evaluation for review before it is it is gazetted (made official).

Regardless of when the Draft Policy is gazetted, there remains an urgent need for a step-by-step policy, or legal regulations, specifically concerning learner pregnancy. This policy, or these regulations, should inform schools on how to lawfully manage learner pregnancy, and should clearly set out the roles and responsibilities of everyone involved. This includes the obligation on schools to make sure that pregnant learners are provided with support to help them return to school and finish their studies.

CASE STUDIES

Lawyers were approached by a mother, Ms Andiswa Motsepe,* whose daughter, Angela,* was in Grade 12 at Slovo High School*. The mother needed help, because the principal had forced Angela to leave school after discovering that she was five months pregnant. Days earlier, the principal had handed a letter to Angela and told her to give the letter to her mother. The letter stated that the mother needed to contact the school. Ms Motsepe visited the school the following week and met with the principal and his deputy. The principal told her that he did not want pregnant girls at Slovo High because they were an embarrassment to his school, and he handed Ms Motsepe a copy of the school's pregnancy policy.

Slovo High's pregnancy policy states that pregnant learners must pay a R200 deposit for use in case of emergencies, including phoning an ambulance or parents. If the learner does not pay a deposit, she must stay home until she pays. The policy also states that a learner must leave school at the end of her fifth month of pregnancy, and will only be allowed back three months after giving birth. A learner will not be allowed to write exams during her last trimester. When the learner is back at school, she will not get time off to help her look after her newborn. For example, she cannot say 'My child is sick', or 'I had to take my child for a routine check-up'. The learner will not be allowed to have any contact with the father of the child on school premises, even if the father is also attending Slovo High.

Even though the Welkom and Harmony cases make it clear that a school can have its own pregnancy policy, it also says that the policy cannot discriminate against a learner because she is female or pregnant. Slovo High's policy is clearly aimed at punishing Angela because she is pregnant, and therefore discriminates against her. Far from supporting her, the policy makes it difficult for Angela to stay in school, because there is no understanding if she has to take time off when her baby needs her. It is in Angela's best interests to return to school as soon as she can and to get her education, so that she can become a productive member of society and are able to financially support her child.

South Africa has clear constitutional and international obligations that require the state to ensure that Angela is able to attend school for as long as possible, to return to school as soon as she can, and to get the support that she needs as a young teenage mother.

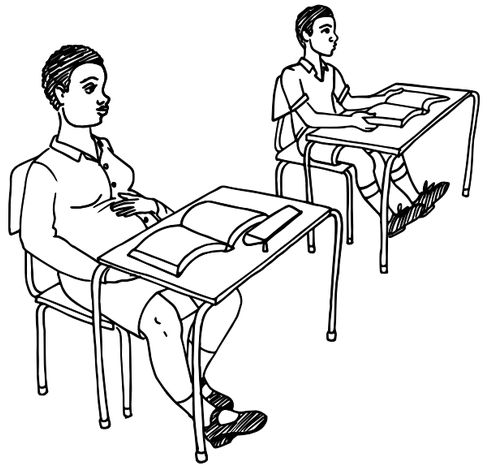
*Names have been changed

PRACTICAL STEPS THAT PREGNANT LEARNERS MAY TAKE TO ADDRESS ANY DISCRIMINATION THEY MAY EXPERIENCE AS A RESULT OF THEIR PREGNANCY

Should you as a pregnant learner or a learner with children experience any unlawful actions, there are certain steps you should follow to ensure that you are able to attend school and complete your education.

Examples of unlawful actions against pregnant learners or learners returning to school after giving birth include:

- being suspended from school by the SGB
- being recommended for expulsion by the SGB
- being forced to go home without being told when you may return
- if a school refuses to provide you with homework or tasks while you are away
- not being allowed to write exams
- told to pay a deposit to the school in case of a medical emergency
- told that you cannot attend school without a parent or someone responsible for you
- told to be at school until the day you give birth to your baby
- returning to school after giving birth, and the school refusing to provide a catch-up plan
- not being allowed to return to school, or only allowed to return some time after giving birth.



STEPS TOWARDS ENSURING THAT YOUR RIGHT TO EDUCATION IS PROTECTED IF YOU SHOULD FALL PREGNANT

1. Document your experience at school. Make notes of any conversations with the school principal or teachers.
2. Consider informing your parents/guardian about what is going on, and ask that they come with you to school for a meeting with the principal. You do not have to tell your parents/guardian if you are not comfortable with doing so.
3. You can – by yourself or with your parents – set up a meeting with the principal to discuss things. In that meeting, you are, or your parent/guardian is, entitled to ask that you be:
   (a) allowed to remain at school until the time that your medical doctor or nurse says that it is no longer safe for you to be there;
   (b) allowed to return to school as soon as you have given birth;
   (c) provided with a catch-up plan;
   (d) sent homework and tasks while you are at home.
4. Ask the principal that any agreement reached is written and signed.
5. If you or your parent/guardian is unable to reach an agreement with the school, you should approach your local education district office for assistance. Visit the national Department of Basic Education's website at www.education.gov.za to locate your provincial office, who will be able to provide you with the relevant district office's contact details. The district office is responsible for all schools in your area. The office is run by the District Director.
6. If the district office is unwilling to assist you or your parent(s), or fails to solve the problem, you or your parents can approach the civil society organisations as set out on page 388 of this book or approach your Provincial Education Department.

Lisa Draga is an attorney at the Equal Education Law Centre (EELC) and has worked there since it was founded in 2012. The EELC is a public interest law clinic that works closely with Equal Education, a social justice movement of learners, parents and community members advocating for quality and equality in the South African education system.

Chandré Stuurman is an attorney at the EELC.

Demichelle Petherbridge is an attorney at the EELC.

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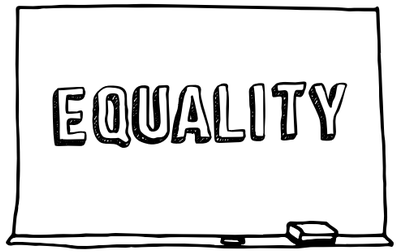
CHAPTER 9

SEXUAL ORIENTATION AND GENDER IDENTITY IN SCHOOLS

Nurina Ally and Tshego Phala



KEYWORDS

When we talk about gender identity and sexual orientation, there are terms that are sometimes used. It is helpful to understand these terms. It is important to bear in mind, however, that gender identity and sexual orientation is complex. The terms that are used here must not be treated as fixed and all-encompassing. This means that there are many ways in which we express our gender identity and sexual orientation, and not all of these ways may be captured by these terms.

Heterosexual A person who is heterosexual is physically or romantically attracted to members of the opposite sex.

Homosexual A person who is homosexual is physically or romantically attracted to people of the same sex. Men who are attracted to men may sometimes identify as gay. Women who are attracted to other women may sometimes identify as lesbian.

Bisexual A person who is bisexual is physically and romantically attracted to members of their own sex as well as members of the opposite sex.

Asexual A person who does not have strong feelings of physical attraction to either men or women.

Intersex Some people are born with physical and biological characteristics that are not exclusively male or female.

Transgender Transgender is a term that describes a wide range of gender identities and expressions. A person who is transgender has a gender identity that does not match their biological sex. Transgender individuals may feel that their true sex is not their biological sex.

Queer The term 'queer' may be used as an umbrella term to describe expressions of gender identity and sexual orientation that are not the society imposed norm. The term is used to be as inclusive as possible of the full spectrum of expressions of gender identity and sexual orientation.

LGBTI You will often hear or see people using the term 'LGBTI'. This is an acronym for the various sexual orientations and gender identities we have discussed. Lesbian (L), Gay (G), Bisexual (B), Transgender (T) and Intersex (I). You will also sometimes see people using the term LGBTIAQ, and other variations of this term.

When this chapter uses the term 'LGBTI', we are referring to all expressions of gender identity and sexual orientation, including asexual and queer.

INTRODUCTION

UNDERSTANDING SEXUAL ORIENTATION AND GENDER IDENTITY

As we grow older, we begin to form a sense of identity. We discover who we are and who we want to be in the world. As part of this process, we discover how we want to express our gender identity and our sexual orientation.

It is important for all people to respect each other and treat each other equally, even when they choose to express themselves differently from others.

GENDER IDENTITY

Gender identity is a person's innermost sense of themselves as being male, female, a combination or neither. Gender identity refers to how people perceive themselves, regardless of their biological sex. Biological sex refers to your physical attributes, as either 'male' or 'female'. A person's gender identity can be the same or different from their biological sex. Each person is unique, and an individual.

Gender identity can be expressed in various ways, such as by a person's behaviour, clothing, haircut and voice. It is important to remember that an individual's gender identity may differ from society's expectations and opinions of how different genders express themselves, so we should not make assumptions and judgments about someone's gender identity.

SEXUAL ORIENTATION

All of us go through a process during which we discover what it means to be attracted to others, and the types of relationships we want to form. Sexual orientation refers to the physical or romantic attraction that a person has to the male sex, to the female sex, to neither or to both.

LAW AND POLICY

THE CONSTITUTION

The Constitution is the supreme law in our country, and no law or conduct is allowed to be inconsistent with the Constitution. Chapter 2 of our Constitution contains the Bill of Rights, which applies to everyone. These rights protect each and every person.

The Bill of Rights guarantees that every person has the right to equality, the right to dignity and the right to privacy. The Constitution also guarantees freedom of expression. In the context of education, the Bill of Rights also guarantees that everyone has the right to basic education, and that a child's best interests are paramount in matters concerning children.

Let us look at some of these rights more closely.

EQUALITY

Section 9 of the Constitution states that all people are equal before the law, and have the right to equal enjoyment and the protection of the law. The **right to equality** includes 'the full and equal enjoyment of all rights and freedoms'.

In protecting everyone's right to equality, the Constitution specifically prohibits unfairly discriminating against someone on the basis of their 'gender', 'sex' or 'sexual orientation'.

Unfair discrimination is when you are treated differently from other people, and your dignity, equality and rights as a human being are impaired by such treatment. This means that neither the government nor any individual is allowed to discriminate against a person based on how they choose to express their sexual orientation or gender identity.

In the case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the Constitutional Court held that 'sexual orientation' must be afforded a broad, all-encompassing and inclusive interpretation. The Constitutional Court highlighted that this is because of the impact of discrimination on vulnerable LGBTI persons in our history, and the fact that LGBTI persons are a minority group in our society. In a number of cases, the Constitutional Court has affirmed that LGBTI persons must not be discriminated against in our country. Importantly, South Africa also guarantees the right of all people to be legally married, regardless of their sexual orientation. The right of LGBTI persons to enter into a marriage was confirmed by the Constitutional Court in the case of *Minister of Home Affairs and Another v Fourie and Another.*

The Constitutional Court has also held that school policies that have the effect of discriminating against learners are unlawful, and limit a learner's right to basic education. It is therefore important for all schools to ensure that school admissions policies and codes of conduct do not unfairly discriminate against LGBTI learners.

DIGNITY

Dignity is a founding value of our Constitution, and is entrenched in Section 10 of our Bill of Rights. A person's **right to dignity** means that every human being is worthy of esteem and respect. This is true regardless of your sexual orientation or how you express your gender.

In the matter of *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and constitutional Development and Another*, the Constitutional Court has explained that the right of children to dignity has special importance in our society:

> [D]ignity recognises the inherent worth of all individuals (including children) as members of our society, as well as the value of the choices that they make. It comprises the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context … **children's dignity rights are of special importance** and are not dependent on the rights of their parents. Nor is the exercise by children of their dignity rights held in abeyance until they reach a certain age. [Authors' emphasis]

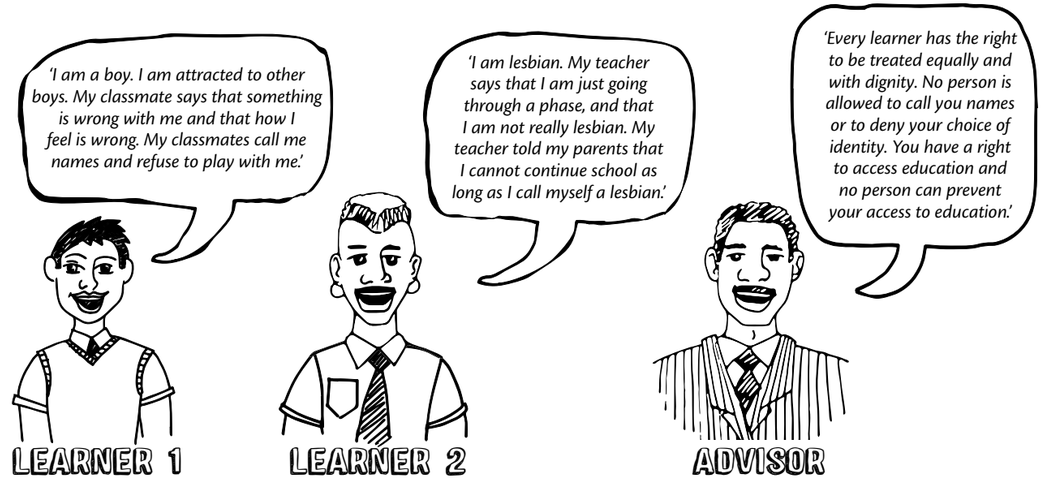
The Constitutional Court also recognised evidence that it is normal and healthy for adolescents to explore their sexuality, and that it is important for children not to feel shamed in the process of their sexual development.

THE RIGHT TO EQUALITY AND DIGNITY PROTECTS LEARNERS

In a school, a learner's rights to **equality and dignity** mean that they should never be treated differently or valued less because of their sexual orientation or gender identity. No person (whether he or she is a teacher, a principal, a parent or another learner) can treat a learner differently because of the manner in which they express their gender, or because of the persons they are attracted to. To do so would amount to an infringement of their rights to equality and dignity. Such conduct is prohibited by our Constitution.

Some examples of conduct that infringes the rights to equality and dignity include:

- Calling a person insulting names



because of how they express their gender identity or sexual orientation.

- Refusing to interact with someone because of their gender identity or sexual orientation.
- Refusing to admit a learner to a school because of their gender identity or sexual orientation.
- Forcing a learner to wear a dress or to wear pants, or to otherwise present themselves as a girl or a boy, even though they want to express themselves differently.

FREEDOM OF EXPRESSION

Everyone has the right to talk about and express their gender identity and their sexuality freely, and the right to choose when to do so. Section 16 of the Constitution protects this freedom, and this right should not be limited.

The Constitutional Court has emphasised the importance of free expression to childhood development. In *S v M (Centre for Child Law as Amicus Curiae)*, the Constitutional Court said the following:

> Individually and collectively **all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way**, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. [Authors' emphasis]

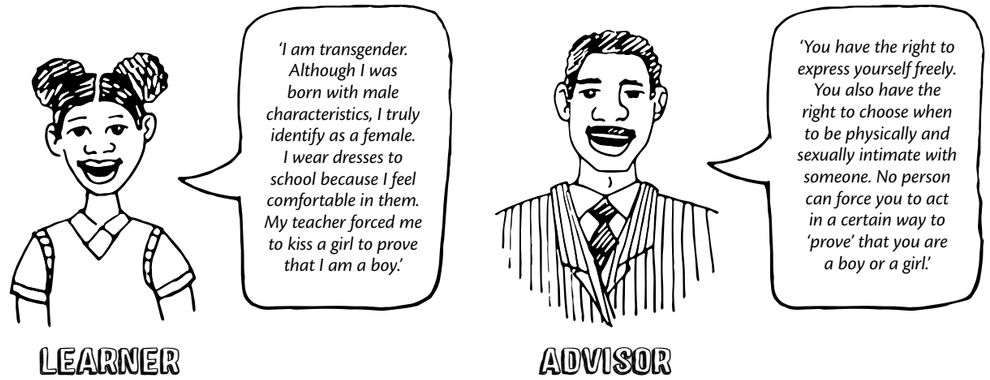
The Constitutional Court has also specifically held that school policies such as dress code can sometimes discriminate against learners by restricting their ability to express their identity freely, and that a school must reasonably accommodate the needs of all learners.

It is important to remember that freedom of expression does not protect hate speech. In terms of Section 16(c) of the Constitution, advocacy of hatred based on a person's gender, which constitutes incitement to cause harm, is unconstitutional. In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') states that no person may publish, propagate, advocate or communicate words against any person where there is a clear intention to be hurtful, harmful or to incite harm, or promote or propagate hatred on the basis of certain grounds. These grounds include sex, gender and sexual orientation.

PRIVACY AND BODILY INTEGRITY

In addition to the right to express oneself freely, a person also has the right to privacy protected by Section 14 of the Constitution. The right to privacy means that a person has the right to decide if, when and with whom they discuss and express their gender identity and sexuality. The Constitutional Court explained, in the National Coalition case, that expression of sexuality falls within the sphere of private intimacy and autonomy:

> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. **The way in which we give expression to our sexuality is at the core of this area of private intimacy.** (1998 ZACC 15 at para 32.) [Authors' emphasis]



It is also important to recognise that Section 12 of our Constitution protects a person's **right to psychological and bodily integrity**. A person's right to psychological and bodily integrity means that they have the right to control their own bodies, and the right not to be violated. This is important in ensuring that all persons are able to express themselves freely if they choose to, and to ensure their privacy if they choose to be private.

The Equality Act's prohibition on **harassment** also protects the right to privacy and psychological and bodily integrity. The Equality Act defines harassment as unwanted conduct which is persistent and serious and which demeans, humiliates or intimidates a person based on their gender or sexual orientation.

RESPECTING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY OF LEARNERS

In schools, educators, parents, teachers and other learners must respect the free expression and privacy of all learners. Some examples of conduct that would infringe the rights to privacy and bodily integrity include:

- Forcing a learner to identify as gay or lesbian, or as a man or a woman, against their will.
- Refusing to allow a transgender learner to use a toilet intended for the opposite sex.
- Refusing to allow a gay or transgender learner to wear a school dress.
- 'Inspecting' a learner to confirm their gender identity or sexual orientation.
- Forcing an LGBTI learner to take part in physical or sexual acts to prove his or her sexual orientation or gender, or to 'correct' their sexual orientation or gender.

INTERNATIONAL LAW

International law plays an important role in our constitutional democracy. In terms of our Constitution, the courts must take international law into consideration when interpreting the Bill of Rights.

The international community has entered into various human-rights treaties that protect the equality, dignity, privacy and bodily integrity of LGBTI learners. Examples of international law instruments that are important to the protection of the rights of LGBTI learners include:

- **Universal Declaration of Human Rights**: Recognises that all people are equally entitled to the rights and freedoms set out in the Declaration.
- **International Covenant on Civil and Political Rights**: Recognises that all people are equally entitled to (among other things) freedom of association, freedom of expression, and the right to liberty and security of the person.
- **Convention on the Rights of the Child**: Article 8 provides that State Parties must respect the right of the child to preserve his or her identity without unlawful interference.
- **Convention against Discrimination in Education**: Article 1(1) recognises that 'discrimination' includes any distinction, exclusion, limitation or preference based on (among other things) sex, and has the purpose or effect of nullifying or impairing equality of treatment in education.
- **African Charter on the Rights and Welfare of the Child**: Article 21(1) requires states to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, including those customs and practices discriminatory to the child on the grounds of sex or other status.

The South African state must take steps to advance its obligations in terms of international law, and ensure that the rights of all learners in schools – regardless of their gender identity, or sexual orientation – are protected.

SCHOOL POLICIES SHOULD CONFORM TO THE CONSTITUTION

The preamble to the South African Schools Act, 1996 (SASA) recognises that there is a need to redress past injustices in educational provision, and to combat all forms of unfair discrimination and intolerance.

Section 5(1) of the Schools Act makes it clear that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. In terms of Section 20(1)(a) of the Schools Act, the school governing body has a duty to promote the best interests of the school, and to ensure the provision of quality education for all learners at the school.

The school governing body of a school is responsible for determining the admission policy and code of conduct for a school. While the school governing body has this power, the policies and code of conduct must comply with the Constitution. The Department of Basic Education has published Guidelines for a Code of Conduct for Learners ('the Code of Conduct Guidelines'), which emphasise that the school Code of Conduct must be developed with all stakeholders in the school – including parents, educators, learners and non-educators at the school. The Code of Conduct Guidelines also emphasise the rights of learners to equality, dignity and privacy.

It is important for school governing bodies, educators, parents and learners to support the development of inclusive school policies that actively promote respect for LGBTI learners, and take into account gender and sexuality diversity. Learners should not be subjected to disciplinary process or punishment on the basis of their gender identity and sexual orientation. The Department of Basic Education has also published a guide on combating homophobic bullying in school, which provides important guidelines on the steps that all stakeholders can take in developing inclusive policies and a safe environment for all learners.

WHAT CAN SCHOOLS AND EDUCATORS DO TO ENSURE A MORE INCLUSIVE AND SAFE ENVIRONMENT FOR LGBTI LEARNERS?

There are many active steps that schools can take to work towards a more inclusive environment. Some examples include:

- Developing a gender-neutral dress code for learners, to ensure that LGBTI learners are not discriminated against
- Ensuring that there are school rules and policies to effectively combat bullying against LGBTI learners
- Encouraging the school community to embrace LGBTI learners, and to speak openly and respectfully about diversity
- Developing the school curriculum so as to promote understanding and respect of all learners.

LEARNERS CAN PROTECT THEIR RIGHTS

It is important to know our rights. It is also important to know who to contact and what steps to take if rights are violated.

If any person at school discriminates against you on the basis of your gender identity or sexual orientation, there are various ways to obtain help. You should always try to speak to counsellors or people that you trust. There are also public institutions and processes that you can follow.

We describe some of those processes here. There are many avenues for help, and the ones discussed here are just examples. There are also various LGBTI-rights non-profit organisations all over South Africa, which have been created to offer support.

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC)

The SAHRC was formed in order to promote respect for human rights and a culture of human rights. In order to fulfil its obligations, the SAHRC has the power to investigate cases where human rights have been violated, either by the state or by any other person. If there are instances where a learner has been discriminated against or otherwise had their rights violated on the basis of their sex, gender or sexual orientation, the SAHRC is empowered to investigate the matter.

You can report any incident of discrimination to the SAHRC.
The SAHRC telephone number for lodging a complaint is 011 877 3600. A complaint can also be lodged on their website: www.sahrc.org.za.

EQUALITY COURT

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') gives effect to the right to equality.

The Equality Act aims to promote equality and to prevent, prohibit and ultimately eliminate unfair discrimination, harassment and hate speech. It does so by providing content to the right to equality, and provides a mechanism for protection through the establishment of the Equality Court.

The Equality Act is an important tool, as it provides remedies for victims of unfair discrimination, hate speech and harassment.

Equality courts are supposed to be less formal, and their rules and procedures are more relaxed than in normal courts. You can approach an equality court (the magistrates' court or high court in your community) at any point in order to lodge a complaint. It is not a rule that you need a lawyer to do so. You also do not have to pay anything in order to approach an equality court for assistance.

The Equality Court has been empowered to grant various forms of relief, such as the payment of damages; directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment; an unconditional apology; or requiring the offending party to undergo an audit of specific policies or practices as determined by the court.

SOUTH AFRICAN COUNCIL OF EDUCATORS ('THE SACE')

The SACE is a body that is specifically empowered to take action against educators who breach certain ethics codes. A wide range of misconduct can be reported to the SACE, such as verbal abuse, harassment, and physical intimidation.

Any educator, learner, parent, community member or interested person may lodge a complaint with the SACE. Complaints can also be lodged anonymously. The complaint should be lodged in writing, and include as much detail as possible. Once the complaint is lodged, the SACE will open a file and allocate a case number. The person against whom the complaint has been made will be contacted and asked to respond within a specific time period (within five or ten days).

The SACE Ethics Committee will then make a decision on how to proceed. This may include actions such as investigating the matter further, taking disciplinary action against the person complained about, or referring the issue to the South African Police Services and/or the Education Labour Relations Council.

A letter of complaint may be forwarded to:
The Chief Executive Officer
South African Council for Educators (SACE)
Private Bag X 127
Centurion 0046.

The letter may also be hand-delivered to the Chief Executive Officer, South African Council for Educators (SACE), 240 Lenchen Avenue, Centurion 0046; or it may be emailed to ethics@sace.org.za.

SOUTH AFRICAN POLICE SERVICES ('SAPS')

Conduct such as serious verbal and physical abuse, harassment and inappropriate sexual advances constitute a criminal offence. Such an incident can be reported to the Child Protection Unit of the South African Police Services, and criminal charges can be laid.

CONCLUSION

The Constitution recognises that all learners are equal. Every learner should be free to choose their gender identity, sexual orientation, and the manner in which they express themselves. Unfair discrimination against learners based on the choices they make about their gender identity and sexual orientation is unconstitutional, and should not be allowed in our schools. The Constitution further recognises the right of LGBTI learners to dignity. It is important that we do not allow LGBTI learners to be treated with less respect than other learners. There is still a lot to be done to ensure equal treatment of LGBTI learners.

Nurina Ally is the Executive Director of the Equal Education Law Centre.

Tshego Phala is a Senior Associate in the Pro Bono Department at Webber Wentzel.

CASES

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6; 1998 ZACC 15.

Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC); 2005 ZACC 19.

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and constitutional Development and Another; 2014 (2) SA 168 (CC); 2013 ZACC 35.

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC); 2007 ZACC 18.

MEC for Education: KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC); 2007 ZACC 21.

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC); 2013 ZACC 25.

CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

South African Schools Act 84 of 1996.

Civil Union Act 17 of 2006.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

POLICY AND GUIDELINES

Department of Education 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners', 1998.

Department of Basic Education 'Challenging Homophobic Bullying In Schools', 2016.

INTERNATIONAL AND REGIONAL INSTRUMENTS

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

The Convention on the Rights of the Child (CRC), 1989.

The Universal Declaration of Human Rights (UDHR), 1948.

The International Covenant on Civil and Political Rights (ICCPR), 1966.

Convention Against Discrimination in Education, 1960.

CHAPTER 10

RELIGION AND CULTURE IN PUBLIC EDUCATION IN SOUTH AFRICA

Tim Fish Hodgson

THE CONSTITUTIONAL COURT ON CULTURAL IDENTITY

'Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community, and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.'

MEC for Education: KwaZulu-Natal and Others v Pillay

CONSTITUTIONAL COURT ON VARIATIONS IN UNDERSTANDING CULTURAL IDENTITY

'While cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song, and another through keeping a traditional home.'

MEC for Education: KwaZulu-Natal and Others v Pillay

INTRODUCTION

All people have culture. Our cultures are all around us, all of the time, and are a product of our knowledge, experience, beliefs, values, attitudes, practices and identities. Culture is in the food we eat, the clothes we wear, the music we listen to, the way we dance. It describes human relationships and activities on an individual and societal level.

In South Africa, as in many other places in the world, religion is an important part of culture to many people. Some people tie their personal identities very closely to faith in God or to religious practices. Other people, who place less emphasis on faith, still celebrate their cultures through performing religious ceremonies at important events in their lives, such as births, initiation ceremonies into adulthood, weddings and funerals.

This chapter will focus mostly on religion – which has always been of significant cultural importance in South African schools, and in society more generally – although it will also discuss cultural practices. In part as a result of South Africa's history of colonialism and apartheid, different forms of Christianity are the dominant religion in South Africa, with over 85% of South Africans identifying as Christian.

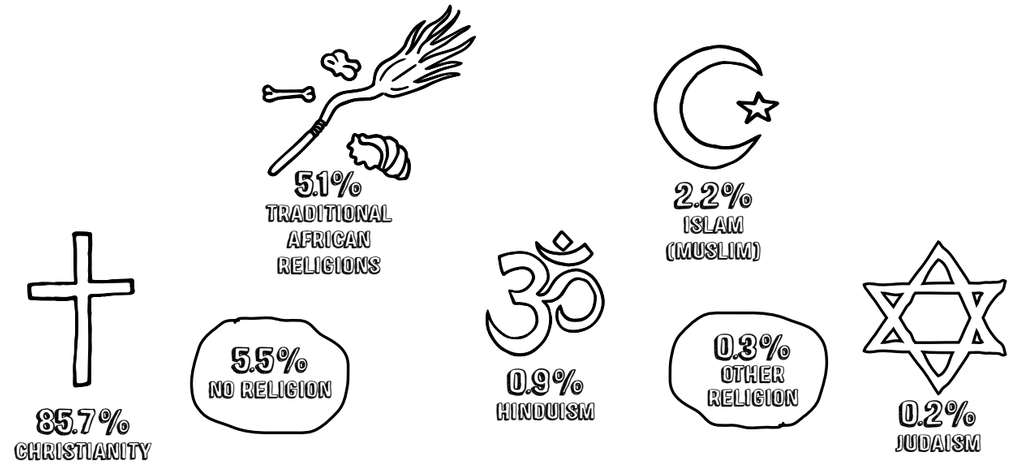
Table 10.1: Religious affiliation in South Africa (%).

RELIGION	SA average	WC	EC	NC	FS	KZN	NW	GP	MP	LP
Christian	85.7	88.4	85.2	98.0	98.0	78.7	94.3	85.2	93.5	77.8
None	5.5	1.6	8.2	0.7	0.4	3.2	2.6	7.7	1.8	14.5
Trad. African*	5.1	1.5	5.9	0.4	0.1	11.1	2.4	3.1	3.7	7.2
Muslim	2.2	7.4	0.4	0.7	0.4	2.6	0.5	2.7	0.8	0.3
Hindu	0.9	0.2	0.2	0	0	3.9	0.1	0.4	0.1	0
Other	0.3	0.5	0.1	0.2	0.1	0.4	0.1	0.4	0.1	0.2
Jewish	0.2	0.3	0	0	0.1	0.1	0	0.5	0	0

**Ancestral, tribal, animistic or other tradtional religions* *(Source: PEW research & Stats SA)*

Despite this, South Africa is a country of many religions. For example, there are large communities of Muslim, Jewish and Hindu people throughout South Africa, and millions of people subscribing to traditional African religions. It is also important to remember that though religious belief is important to many people, nearly three million people (5.5% of the population) do not subscribe to any religion. This includes a large number of people who do not believe in any God at all.

It is important to understand that the same cultures and religions are understood differently by different people and groups. Both culture and religion are dynamic, and change over time, depending on the social context and individual personality and practice.



THE CONSTITUTION, RELIGION AND CULTURE

On a basic level, the equality clause of the Constitution outlaws all discrimination based on religion, conscience, belief and culture. This means that there is room for a wide range of beliefs, which is in keeping with the Preamble of the Constitution's clear statement that 'South Africa belongs to all who live in it, united in our diversity'. The Constitution therefore does not set any one religion as an official 'state religion'. This is important, because it means that even though most South Africans identify as Christian, according to the Constitution South Africa is not a 'Christian country'.

CONSTITUTIONAL COURT ON EXTENT OF RIGHTS

'Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation.'

MEC for Education: KwaZulu-Natal and Others v Pillay

THE CONSTITUTIONAL COURT ON RELIGIOUS & CULTURAL RIGHTS

'The two rights may overlap, however, where the discrimination in question flows from an interference with a person's religious or cultural practices.

...

'Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and beliefs developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual beliefs. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural.'

MEC for Education: KwaZulu-Natal and Others v Pillay

THE RIGHT TO FREEDOM OF RELIGION, BELIEF AND OPINION

The Constitution also specifically protects the right to 'freedom of religion, belief and opinion' (Section 15). Its approach to religion is to acknowledge the importance of religions and beliefs to all people, and try to protect them. Although the state should promote all religions, it is required to do so without any favour for or prejudice against any particular religions or beliefs. It is particularly important for minority religions and cultures that have 'deviant' social norms and practices to be protected by the Constitution, provided that these norms and practices do not harm other people's rights.

Unlike other Constitutions, ours specifically permits 'religious observances' at state institutions such as hospitals, schools, and at official government events. In the specific context of schools, this raises many questions. What is a religious observance? What kinds of observances are allowed at schools? Do schools have to make sure that each and every religion's observances are followed at every school? All the Constitution tells us about this is that kinds of observance must be conducted:

- In accordance with the rules of 'appropriate public authorities'
- On an 'equitable basis'
- In a manner that ensures that attendance is 'free and voluntary'.

THE RIGHT TO CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES

Before we try to answer these and other questions about religion in schools, it is important to note that later in the Bill of Rights, the rights of religious and cultural communities are also protected (Section 31). These communities cannot be denied the right 'to enjoy their culture[s]' and 'practise their religion[s]', or to join and maintain religious and cultural groups and communities. Religious and cultural marriage – such as in terms of African Customary Law, Hindu Law, Jewish Law and Islamic Law – are also protected by the Constitution. This also means that courts will protect religious practices in marriage, such as lobola and dowry.

It will also become practically important that it does not matter for the purposes of constitutional protection whether a specific religious or cultural practice is voluntary or mandatory. Courts have clearly said that they will seldom doubt the genuineness, validity or importance of cultural or religious practice or belief. What matters is how much specific beliefs or practices matter to particular people and groups of people.

It is also true that as a specific example of a cultural practice, there is often some overlap between religion and culture and the rights protecting them. This is discussed further below.

Discrimination based on religion or culture is prohibited specifically by Section 9 of the Constitution.

THE RIGHT TO ESTABLISH PRIVATE 'RELIGIOUS' SCHOOLS

The Interim Constitution explicitly stated the right 'to establish, where practicable, educational institutions based on a common culture, language or religion'. Under the Interim Constitution, the Constitutional Court explained that this 'right' was one that entitled communities to establish their own religious schools, but did not require the state to do so.

The Final Constitution (referred to as 'the Constitution' throughout this handbook) also includes for 'everyone' a 'right to establish and maintain, at their own expense, independent educational institutions'. It is important that unlike the Interim Constitution, the Final Constitution makes no mention of religion in this right. It simply requires that independent schools do not discriminate based on race, are registered, and 'maintain standards that are not inferior to standards at comparable public educational institutions'.

The extent to which a private school can have a 'religious ethos' and participate in religious instruction, observances and education is therefore not spelled out by the Constitution. The Constitutional Court has since indicated that a Christian private school, by and large, may 'maintain' a 'specific Christian ethos'. Although this will be discussed briefly in this chapter, the main focus of the chapter is the appropriate place of religion in public schools.

RELIGION IN SCHOOLS AND OTHER RIGHTS IN THE BILL OF RIGHTS

Discrimination based on religion or culture is prohibited specifically by Section 9 of the Constitution. The equality clause provides protection to religious and cultural beliefs, but also requires respect for other rights in the Bill of Rights, such as human dignity and equality of different genders, races and people with varying capabilities and disabilities in the practice of religion and culture.

According to the Constitutional Court – as reflected in a case about corporal punishment in schools – although religious belief and practices are important and must be respected, where those beliefs may violate the rights of learners, they must be balanced against these rights. Sometimes the religious rights of parents and communities are considered of lesser importance than the rights of learners themselves.

CASE STUDY

CHRISTIAN EDUCATION SOUTH AFRICA V MINISTER OF EDUCATION

Christian Education South Africa, a voluntary association of 196 private Christian schools (representing around 14 500 learners around South Africa) challenged the Schools Act's ban on corporal punishment, arguing that it violated their constituency's constitutionally protected religious rights.

The Minister of Education argued that even at a private Christian school, and despite the fact that Christianity could be argued to support corporal punishment, allowing teachers to physically discipline children through corporal punishment violated learners' rights to freedom of security of the person, and to dignity.

The Constitutional Court concluded that the Schools Act's ban on corporal punishment, though limiting the right to freedom of religion of Christian parents, was reasonable and justifiable and complied with the Constitution, based on the reasons presented by the Minister.

Christian Education South Africa v Minister of Education

LEGISLATIVE AND POLICY FRAMEWORK

Apart from the extensive constitutional protections for religion, other legislative and policy developments have an influence on culture and religion in education.

SOUTH AFRICAN SCHOOLS ACT

The South African Schools Act protects 'freedom of conscience and religion at public schools' by providing that religious observances may be conducted at public schools. It indicates that this must be done in accordance with rules issued by a school governing body, on an equitable basis, and where attendance by 'learners and members of staff is free and voluntary'. It also reminds us that these observances are subject to the requirements of provincial laws and the Constitution.

The Schools Act also allows for the establishment of private schools. This is subject to the restated requirements of the Constitution and additional requirements, including those regarding age of admission of learners and registration of schools.

Finally, the Schools Act requires school governing bodies to draw up a code of conduct for their learners, after consultation with the learners, parents and educators.

Codes of conduct are often controversial, having bearing on (among other things) what children may wear, and their grooming, including beards and hairstyles. Understanding a school's code of conduct is crucial in order to make a claim that one's religion or culture requires certain forms of jewellery, clothing or hairstyle to be worn to school.

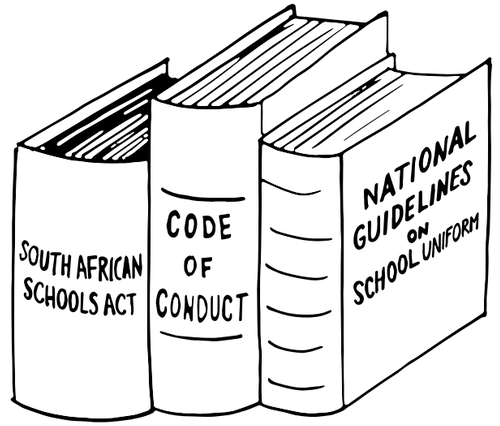
CODE OF CONDUCT GUIDELINES

As early as 1998, the national department of education published Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners. These guidelines indicate that they are subject to the Constitution, and 'must reflect' constitutional democracy, human rights and transparency.

In a section on 'principles and values', the guidelines explain that 'the freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression, as seen in clothing selection and hairstyles'. The guidelines also emphasise the importance of learners developing their 'academic, occupational, social, sport, spiritual, art and cultural potential'.

Schools should not forget the importance of the values, rights and freedoms detailed in the guidelines. Not only must these guidelines be followed in the drafting of a code of conduct, but even where this has not happened, a Court has determined that the provisions in the guidelines must still be used in interpreting and applying a code of conduct. The Court emphasised that guidelines should be interpreted generously and contextually, and not in a 'rigid manner'.

Importantly for the purposes of this chapter, like the Schools Act, these guidelines also give schools and governing bodies guidance on offences that may lead to suspension and expulsion. The



conditions outlined for suspension are broad – including, for example, 'immoral behaviour or profanity', 'disrespect', 'objectionable behaviour' and 'repeated violations of the school rules or Code of Conduct'.

Schools and school governing bodies may mistakenly interpret these to include uniform and hairstyle violations that are motivated by religious and cultural practices, if they do not read the guidelines as a whole – including the rights, values and freedoms they detail. The High Court has warned that such violations of existing codes of conduct are 'a far cry from "'serious misconduct"', which may warrant suspension. In doing so, it highlighted the fact that suspension is a potentially serious punishment that is 'a blot on [a] school career and may impact negatively on [a child's] personality, dignity and self-esteem. It may, indeed, affect [a child's] normal development into full maturity, and even have a seriously prejudicial effect on [the child's] future career'.

GUIDELINES ON SCHOOL UNIFORM

In 2006, the Department of Basic Education produced the National Guidelines on School Uniform, in order to give guidance to school governing bodies in developing their school uniform policies. The school uniform guidelines speak directly to the issue of religious and cultural diversity. They clearly and emphatically protect learners' rights to religious and cultural dress and hairstyles.

Finally, the Department of Education published a policy directly on the subject in 2003, the National Policy on Religion in Education. This policy is contextualised and detailed below in the section on Religion in Education.

NATIONAL GUIDELINES ON SCHOOL UNIFORM: RELIGIOUS AND CULTURAL DIVERSITY

'(1) A school uniform policy or dress code should take into account religious and cultural diversity within the community served by the school. Measures should be included to accommodate learners whose religious beliefs are compromised by a uniform requirement.

(2) If wearing a particular attire, such as yarmulkes and headscarves, is part of the religious practice of learners or an obligation, schools should not, in terms of the Constitution, prohibit the wearing of such items. Male learners requesting to keep a beard as part of a religious practice may be required by the school to produce a letter from their religious teacher or organisation substantiating the validity of the request. The same substantiation is applicable to those who wish to wear a particular attire.'

RELIGION IN EDUCATION

APARTHEID AND CHRISTIAN NATIONAL EDUCATION

The apartheid government adopted a policy on religion in education in South Africa called 'Christian National Education' (CNE). It was based on a particular understanding and form of Christianity that supported apartheid and racial discrimination. CNE was part of many aspects of the apartheid education system for all children, regardless of race, and deeply affected both the approaches of schools to religious education, and the entire school curriculum.

The ultimate purpose of CNE was to indoctrinate children with a specific brand of Christianity, and attack and put down other religions in the process. It emphasised authority and a conservative Christian understanding of morality and the world, and discouraged individualism and difference. Schools were also used as places where children were encouraged to internalise racist and sexist views consistent with this worldview.

RELIGION IN EDUCATION IN THE NEW SOUTH AFRICA

Against the constitutional background sketched above, and with this history in mind, South Africa began the long process of reconfiguring the curriculum and the entire education system after its first democratic elections in 1994. A lengthy process led ultimately to the adoption of the National Policy on Religion in Education, in 2003. In 2001, even before the Policy was finalised, 'Religion Education' was introduced into schools to teach learners about religions and religious diversity.

The Policy, which applies to all public schools in the country, distinguishes between three different ways in which religion could be relevant in schools: Religious Education, Religious Instruction, and Religious Observances.

The basic differences between these three concepts can be explained simply as follows:

- **Religious observances** include things such as prayer, singing, ceremonies, dress, dietary requirements, and perhaps also the placement of symbols on walls and doors
- **Religious education** is education about different religions in South Africa and the rest of the world, aimed at creating an understanding of diverse religions and tolerance for these religions, and promoting social justice and human rights
- The Policy explains that instead of neutral teaching about religion, **religious instruction** is teaching someone a particular religion, with the purpose of getting that person to agree with, believe in or follow that particular religion.

The Policy contemplates major roles for schools in both **religious observances** and **religious education**, but describes **religious instruction** as 'inappropriate' for the school environment and schooling programme at public schools. The Policy does also include reference to **religious ethos**: it makes clear that 'no particular religious ethos should be dominant over and suppress others' in public schools. So although regional, local and community concerns and religious ethos must be considered and understood by all schools, only private schools may adopt an exclusive religious ethos or character.

RELIGIOUS EDUCATION

Knowledge about different religions and religious perspectives is taught to all children in all schools in the compulsory subject Life Orientation. This portion of the Life Orientation curriculum also includes compulsory content on human rights, democracy, and the Constitution. The constitutional background paints an important context within which learners can try to understand the full diversity of religious practices and beliefs in South Africa.

RELIGIOUS INSTRUCTION

Religious instruction cannot be part of the national curriculum or be taught in public schools, but should rather be pursued by parents, families and community religious organisations and institutions outside of school.

The only exceptions are that schools are encouraged to allow their facilities to be used by religious organisations after school and/or in a manner that does not interrupt schooling. Voluntary gatherings and meetings of learner-run societies, associations and unions during break times and after school appear to be permitted by the Policy.

Some examples which may be contemplated by the Policy include: the use of the school for religious meetings or ceremonies after school hours; prayers for Muslim children on Fridays during school hours; and learner-run religious clubs and societies such as 'Christian Union' or 'Jehovah's Witness Club' during break times.

RELIGIOUS OBSERVANCES

Unlike religious instruction and religious education, the protection for religious observances in schools stems directly from the Constitution. The Policy seeks to give more clarity on what it means for observances to be 'free and voluntary', and ensure that they are conducted on an 'equitable basis'.

The Policy is clear that religious observances 'are not part of the official educational function of a public school', and teachers, learners and parents must always remember this.

The Policy deliberately does not try to deal with every possible religious observance and determine how schools will be able to comply. Instead, it sets out guidelines to be consulted if the school does choose to hold religious observances, and leaves the option open that the school may even decide to hold no religious observances at all.

Free and voluntary

The Policy contemplates observances that are truly free and voluntary. This is a particularly difficult thing to achieve with children, who are subject to peer pressure and can easily be made to feel as though they are not 'normal' if they are in a religious minority. What is clear is that there is a strict requirement that all religious observances 'must accommodate and reflect the multi-religious nature of the country in an appropriate manner'.

The Policy also gives some examples of forms of observances that may be considered to be 'appropriate':

- Rotation of opportunities for observance between different religions
- Selected readings from various texts emanating from different religions
- The use of 'universal prayers' which do not refer to any particular God or stem from any specific religion
- A period of silence in which children may pray quietly, meditate, or simply think.

Children are allowed to opt out of religious observances, but the Policy notes that this might have the danger of making those learners feel 'different'. Schools must consciously try to cancel out this effect.

FREE & VOLUNTARY

In the words of the Constitutional Court:

> 'Compulsory attendance at school prayers would infringe freedom of religion. In the context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion. To guard against this, and at the same time to permit school prayers, Section 14(2) makes clear that there should be no such coercion.'
>
> *S v Lawrence , S v Negal, S v Solberg*

In the words of the Religion in Education Policy:

> 'Other forms of equitable treatment may be developed which are consistent with this policy and applicable legislation. Where the segregation of pupils is contemplated, a school must consider and mitigate the impact of peer pressure on children, and its negative influence on the willingness of children to be identified as "different".'

EQUITABLE BASIS

In the words of the Policy:

> 'Since the state is not a religious organisation, theological body, or inter-faith forum, the state cannot allow unfair access to the use of its resources to propagate any particular religion or religions. The state must maintain parity of esteem with respect to religion, religious or secular beliefs in all of its public institutions, including its public schools.'

In the words of the Constitutional Court:

> 'The requirement of equity in the conception of freedom of religion as expressed in the interim Constitution is a rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society …
>
> Accordingly, it is not sufficient for us to be satisfied in a particular case that there is no direct coercion of religious belief. We will also have to be satisfied that there has been no inequitable or unfair preference of one religion over others.'
>
> *S v Lawrence , S v Negal ; S v Solberg*

In the words of the Court:

> 'The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age, who should be increasingly taking responsibility for their own actions and beliefs.'
>
> *MEC for Education: KwaZulu-Natal and Others v Pillay*

On an equitable basis

When applying the Policy, it is necessary for schools to pay close attention to the local, regional and national religious contexts in which the school exists. The Policy is conscious of the potential for religious observances to be used to promote – or even accidentally result in promoting – one religion. This risk is particularly large when the religion is dominant nationally (as is Christianity) or in a particular community.

The requirement that religious observances be conducted on an 'equitable basis' probably does not require the school to have equal amounts of observances from all world or South African religions each time it wants to follow a particular religious observance. It most probably also does not mean that each school must rotate between this wide set of possible religious observances in a manner that allows an equal number of observances per year or per term to each religion. This would be an extremely difficult standard for schools to meet. This standard requires that schools do not favour one particular religion. It also requires that a real and significant attempt is made to regularly include religious observances that are not those of the dominant religion in the school. Given the context of the Policy, these could include both other religions prevalent in South Africa and elsewhere in the world, and other religions observed by children belonging to minority religious communities at the school.

This may also include, for example, following a variety of different religious observances from different sects or branches of the same religion, such as reform Judaism and orthodox Judaism; Sufi, Sunni or Shia Islam; or Catholic, Protestant, Anglican and Charismatic denominations of Christianity. The policy also specifically requires the accommodation and canvassing of non-religious moral and ethical views. These could include different ideas from moral philosophies from all around the world, and different perspectives on morality, that stem from constitutional values such as human dignity and the achievement of equality.

In particular, schools should constantly pay attention to children who belong to religious minorities, and ensure that religious observances do not alienate them or make them the subject of bullying or teasing.

While Christianity continues to be the dominant religion in many contexts, there is a particular reason to make sure that children of minority religions do not feel alienated by Christian practices at school, given the history of Christian National Education.

In doing so, schools should also take the guidance of children of the non-dominant religion and their parents on how best their beliefs, observances and practices could be equitably accommodated by schools. The Constitutional Court has emphasised the importance of children's voices and opinions being heard in the Court as well as in their schools.

CURRENT CHALLENGES FACED BY SCHOOLS

RELIGIOUS OBSERVANCES AND SCHOOL UNIFORM

The Religion in Education Policy describes 'dress' as a religious observance and the National Guidelines on School Uniform protects learners' rights to religious and cultural dress and hairstyles.

A number of issues have arisen in the last few years about how religious and cultural beliefs requiring or encouraging certain observances may conflict with school uniform policies and codes of conduct.

JEWELLERY: *ISIPHANDLA*, BEADS AND NOSE STUDS

Many schools have strict rules about what jewellery, accessories and make-up may be worn at schools. Jewellery, like hair and clothes, has an important place in cultural and religious practices.

A news report indicated that a child had a goatskin bracelet called an *isiphandla* – given to him in a religious ritual, to protect him – confiscated by a teacher. The principal suggested that as a compromise, the child wear a long shirt that would cover up the isiphandla. The Gauteng Department of Education spoke up in support of the child and of the need for school policies to respect learners' cultures, showing that using the media is one effective strategy for producing change.

Another principal in similar circumstances acted more rashly, cutting off a necklace of red and white beads from a learner's neck and then instructing him to fetch a broom to sweep them up. In this boy's culture, the beads are worn to ward off evil and disease, or after the death of a relative. In this case, the boy was wearing these beads to mourn the death of his grandmother.

CASE STUDY

JEWELLERY

Sunali, a girl of South Indian descent, attended Durban Girls High School. Sunali wore a small gold nose stud to school, in compliance with a 'time-honoured family tradition' that is also an almost-5 000-year-old South Indian tradition. In Sunali's family the tradition involves a nose-piercing and stud insertion when a girl reaches physical maturity, accompanied by a prayer. When Sunali turned 16, this stud would be replaced with a diamond stud, by her grandmother. This, Sunali's mother said, was all to be done as part of a religious ritual to honour and bless Sunali, and not for fashion purposes. Sunali challenged the school's decision to disallow her from wearing the nose stud because it conflicted with its Code of Conduct, which prohibits most types of jewellery.

The Court criticised the school's Code of Conduct, noting that 'a properly drafted code which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes such as the present one'. The Court found both the code itself and the school's failure to provide an exemption to Sunali to violate Sunali's rights to freedom of religion, culture, freedom of expression and equality.

MEC for Education: KwaZulu-Natal and Others v Pillay

CASE STUDY

HAIRSTYLES

Lerato is a Rastafarian, and has dreadlocks because of her faith. She is a learner at Leseding Technical School in Thabong, in Welkom in the Free State. In 2013 she was in Grade 8, and had been repeatedly dragged out of class and humiliated by the principal for her dreadlocks. The principal even forced her to stay in the school staff room, causing her to miss all her classes. Her father contacted Equal Education Law Centre (EELC), a non-profit organisation working to protect learners' rights, who initiated urgent court proceedings in the Free State High Court. When EELC contacted the Free State Department of Education, the department expressed the view that Lerato's Rastafarianism was not a seriously held belief. The school said that Lerato could only attend school if she cut off her dreadlocks, because they violated the school's rules on hairstyles.

The judge in this case found in favour of Lerato, warning that 'religious intolerance can ruin the whole country' and that 'I would appeal to the respondents and the powers that be to educate and make our people aware of the importance and advantages of accepting our religious diversity.' He found that Lerato had a right to basic education, which included a right to be in class. He also found that the school had discriminated against Lerato based on her religion, and violated her rights to freedom of religion, belief, expression and culture.

Radebe and Others v Principal of Leseding Technical School and Others

HAIRSTYLES: BEARDS AND DREADLOCKS

Schools commonly attempt to regulate the hairstyles of learners through the use of their uniform policies, which should follow the Department of Basic Education Guidelines and cannot violate learners' religious rights. A common problem is that faced by Rastafarian learners. Rastafarians are required to grow their hair and wear it in dreadlocks, in accordance with their religion.

This problem – which was raised as early as 2000 in schools in the Western Cape – continues, with media reports indicating that a school in Khayelitsha was preventing Grade 8 Rastafarian learner Azania Stofile from attending the school wearing dreadlocks, on the grounds of its uniform policy. A teacher at his school, Bulumko Secondary, displayed a lack of understanding and respect for the Rastafarian religion, claiming that 'If he is not smoking ganja (dagga), he is going to start selling ganja in the school'.

In 2011, Joe Slovo Engineering High School in Khayelitsha suspended 15-year-old Grade 8 Rastafarian learner Odwa Sityata from school because his dreadlocks violated the school rules on hairstyles, which required boys' hair to be short and unbraided. Odwa and his mother had both explained to the school that according to his religion, he was required to grow his hair and dreadlock it.

After a disciplinary hearing, the School Governing Body suspended Odwa for seven days. The SGB also advised him to cut his hair during the suspension, implying that he would not be allowed to return to school if he did not do so. The Western Cape Department of Education had known about Odwa's situation, but had done nothing to intervene. After Equal Education's intervention, the school allowed the learner to return to school.

In a similar set of circumstances concerning a 15-year old Rastafarian girl, a judgment in the Western Cape High Court in 2002 noted that School Governing Bodies should apply their minds to their Codes of Conduct and Uniform Rules – keeping the Constitution in mind – before deciding to prohibit dreadlocks. A failure to do so is by itself grounds for unconstitutionality.

There are also reported cases of Muslim boys being asked to shave beards that they have grown as signs of faith, for example, to show that they had learned to recite the whole Koran off by heart.

CLOTHING: HEADSCARVES, NIQABS AND FEZZES

Another common problem throughout the world is the customary dress of Muslim women, who believe that they must cover their hair with a variety of different forms of what are commonly described as 'headscarves', including niqabs, hijabs and burkas. Some Muslim and Jewish men also wear fezzes or yarmulkes respectively on their heads, as important symbols of their faith.

In 2013, 16-year-old Sakeenah Dramat and her 13-year-old brother Bilaal were kicked out of Kraaifontein High School. Sakeenah had worn a headscarf to school, and Bilaal wore a fez. Their parents were called into the school to fetch the children, because it was 'against the school's code of conduct for the children to wear the Islamic headgear'. When Sakeenah was asked to remove her headscarf, she told the school to phone her parents.

Their parents noted that they could not allow their children to take off their headgear, because it was part of their Islamic faith. The provincial department of education supported Bilaal and Sakeenah, noting that the DBE's Guidelines on School Uniforms allowed them to wear clothes that are part of their religious customs and obligations. Their parents complained to the South African Human Rights Commission, who investigated the matter.

In 2014, Rauhah began attending Grade 8 at Paul Erasmus High School in Senekal in the Free State. She wore a headscarf and full hijab to school, in line with her Muslim faith. Several learners were told that they were not allowed to wear a hijab to school.

After an unsuccessful meeting with the school, her father approached the Darul Ihsan Islamic Services Centre, who wrote a letter to the school explaining that girls were required to cover their bodies from 'head to toe' in accordance with the Islamic faith. The school contacted the SGB, who refused to give the parents permission for their children to wear hijabs, because they would be violating the school's dress code. Though some learners caved in to the school's pressure, Rauhah continued to wear her hijab to school.

In 2014, a private German school would not permit a Muslim girl to wear a headscarf to school, indicating that 'our feeling is, it should be a neutral ground. It shouldn't display one culture against the other one'. As a form of protest, in solidarity with the Muslim girls, other children also started wearing headscarves to school. After discussions with learners and parents, the school changed its rules to allow headscarves and comply with the Constitution.

RELIGIOUS SYMBOLS: CROSSES, STARS OF DAVID AND SIGNS

Religious symbols are important to many people of many different religions. Some of them come in the form of clothing and jewellery; others in the form of symbolic jewellery, such as crosses worn on necklaces or bracelets by Christians, or the Star of David worn by Jewish people.

Symbols can be put on posters or attached to walls, doors and doorposts. The importance of religious symbolism to religious expression should not be underestimated. It is currently relatively common for schools to have visibly placed religious symbols.

Although there have been no court cases about this in South Africa, in other places in the world where this has come to court, judges have decided that the placing of religious symbols in classrooms and halls – especially if they are of one particular religion – violates the rights of other learners, for two reasons.

First, the placement of religious symbols conveys a message that the school promotes or endorses that particular religion. Second, the placement of symbols of one religion – particularly if it is a dominant religion – makes learners of minority religious views feel 'different', 'other' and stigmatised.

RELIGION, CULTURE, HAIRSTYLES AND DISCIPLINE

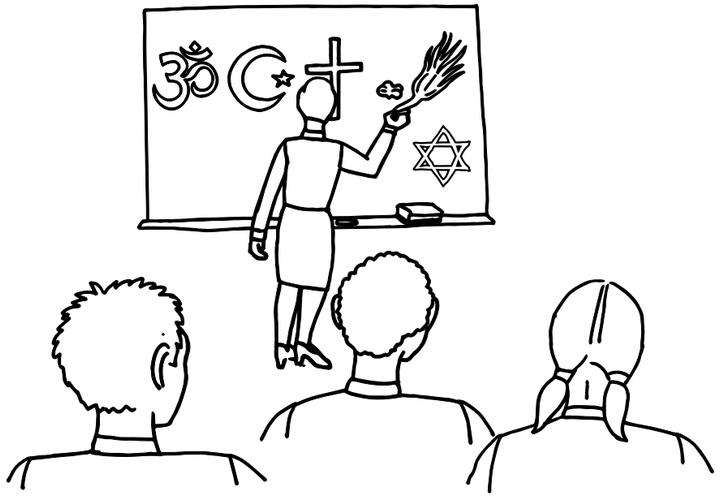
It has been confirmed by the Supreme Court of Appeal that a prohibition on growing dreadlocks may even be a violation of the cultural rights of isiXhosa people, who choose to do so in order to obey their ancestors. In this case, the Supreme Court of Appeal highlighted the importance of this cultural right, despite the fact that the Department of Correctional Services had argued that those wearing the dreadlocks were prison wardens, and that their choice to wear dreadlocks could have resulted in a reduction of discipline and failure to rehabilitate inmates. The Court concluded that 'Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound.' The case is relevant to the education context, where 'discipline' is often also used as a reason to enforce dress codes that prevent learners from wearing hairstyles that form part of their cultural practices.

Department of Correctional Services v Popcru and Others

CASE STUDY

RELIGIOUS SYMBOLS

In the 'Crucifix Case' in Germany, there was a law that required the posting of a cross or crucifix on the wall of each public-school classroom. The German Constitutional Court decided that this law was unconstitutional, because the display of a cross in a classroom would send a message to children about the school's identification with the Christian faith. The Court also decided that this amounted to pressure or coercion on children to follow the Christian faith.



RELIGIOUS EDUCATION AND INSTRUCTION

A concerned group of parents from schools around the country formed a non-profit organisation called 'Organisasie vir Godsdienste-Onderrig en Demokrasie' (OGOD).

Raising concerns about the explicit and overwhelmingly Christian ethos and practices at their children's schools, the parents of OGOD approached the High Court in 2015, asking the Court to rule that these school's practices were unlawful violations of the Department of Basic Education's Policy on Religion in Education and the Constitution.

Although the circumstances at the schools varied, OGOD complained about inappropriately provided religious instruction, a misunderstanding of the purpose of religious education, inequality and involuntary religious observances, and the unlawful adoption of an exclusive religious ethos at some of the schools.

Two of the schools required learners to take compulsory classes in Christian Bible study. These classes stray from the Policy's requirement – that religious education be focused on teaching learners about diverse religions – into the sphere of religious instruction, which the policy explicitly outlaws. They also assist in confirming the appearance that schools favour one religion, especially when this is seen in light of the background of the Christian ethos of the schools, and the regularity of Christian religious observances. These included:

- The hanging of exclusively Christian religious symbols, such as crosses, inside and outside classes
- Exclusively Christian prayers to start the day in assembly and registration classes led by teachers
- Exclusively Christian religious singing with closing prayers
- Exclusively Christian scripture readings.

The Council for the Advancement of the South African Constitution intervened in this case to assist OGOD in arguing that practices that try to make public schools exclusively Christian violate children's rights to religious freedom. The Council argued that the National Policy on Religion in Education is in line with the requirements of the Constitution.

The National Policy on Religion in Education says that even private schools 'are required to achieve the minimum outcomes for Religion Education', or education about religion, which would require adherence to its principles of voluntariness and equitability in some manner.

RELIGIOUS INSTRUCTION

Tanja Wittmann attended a private German school in Cape Town. At this school she was forced to attend compulsory 'religious instruction' classes. These classes contained 'purely Christian material', in keeping with the explicitly Christian ethos of the school.

Tanja was refused exemption from these classes and Christian prayers. The school noted that though attendance was compulsory, it did not intend to force Christianity on anyone. When Tanja's parents refused to comply, the school expelled her. Unsatisfied, Tanja's parents went to the media and approached the High Court. The judge in this case distinguished between religious education and religious observance, and noted importantly that the Constitution has nothing to say about religious education and religious instruction.

The Court found that at private schools, even a 'confessional' form of religious instruction aimed at indoctrinating children with specific religious beliefs would be constitutionally permissible. This is because, according to the judge, the Wittmanns had chosen to enrol Tanja in the school with the full knowledge of its religious character and 'freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules'.

Because the Constitutional Court has yet to make a decision about the extent of the permissibility of religious instruction in private schools, the position is still not settled. Presently, some religious private schools require compulsory religious instruction and attendance of religious ceremonies, while others allow children who do not wish to participate to be exempted.

As Tanja Wittmann's case shows, fears expressed by the Constitutional Court about 'coercion', 'peer pressure' and stigmatisation of learners of minority religions requesting exemptions from religious observances in public schools might apply equally to religious instruction in the private school setting.

IN THE WORDS OF THE COURT: RELIGIOUS INSTRUCTION

'[A] religious observance is an act of a religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance. Religious education is not. Whereas the interim Constitution and Constitution both provide for religious observances, both are silent about religious instruction in State and State-aided institutions.'

Wittmann v Deutscher Schulverein, Pretoria and Others

ISSUES FOR DISCUSSION ARISING OUT OF CASES

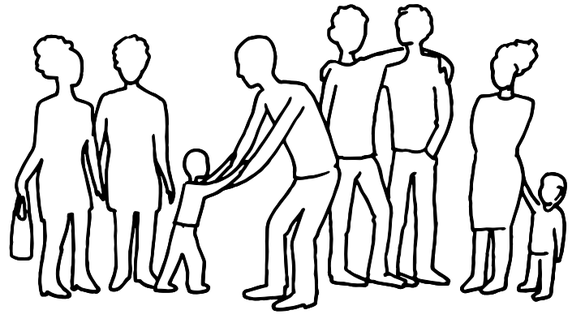
The cases discussed above raise many important questions and discussions about the appropriate place of religion in schools in South Africa's diverse constitutional democracy. Three issues will be emphasised further below to assist parents, teachers, learners, principals and School Governing Body members in the day-to-day affairs of schools and schooling.

AVOIDING THE ENDORSEMENT OF ONE RELIGION OVER ANOTHER: RELIGIOUS ETHOS AND CHARACTER

Courts in South Africa and around the world have explained clearly that it is not the place of a government to establish an official state religion. This so-called 'separation of church and state' does not mean that religion does not have an important role to play in our society, including in schools.

The challenge for schools is finding a place for all religions, without favouring any one religion. In this process, national context and direct community context should always be considered. For instance, public schools in a majority-Muslim community must be extremely careful not to promote or endorse Islam.

Generally, because the significant majority of South Africans identify as Christian, this threat is almost always relevant with regard to schools' promotion of Christianity. When public schools declare a Christian religious ethos or religious character publicly, they undoubtedly risk creating the reasonable impression that the state endorses Christianity over other religions. This can be very alienating for learners of other religions.



THE ROLES OF THE NATIONAL, PROVINCIAL AND LOCAL GOVERNMENTS AND SGBS: 'APPROPRIATE PUBLIC AUTHORITIES'

The chapters in this handbook dealing with education rights and governance structures in education deal broadly with the roles of different entities in the educational environment.

In the context of religion in education there is a small complication, because when it comes to religious observances, the Constitution specifically gives authority to 'appropriate public authorities' to make rules for the governing of these observances.

In the OGOD case, discussed above, it is hotly contested by the parties what the 'appropriate public authority' is that can make these rules on religious observances.

The schools argue that the national government is not an appropriate public authority to make rules about religious observances in schools, and therefore the National Religion Policy is unconstitutional. They argue that only SGBs can be appropriate public authorities. It would be surprising if the courts accepted this argument.

What is more likely is that the Court will rule that the national government has the power to make a policy on religious observances and create general norms and standards, which the provincial departments of education may be able to further specify through their own policies. Consistent with other cases, the role of SGBs would be to exercise discretion and make rules within these broad standards and the provisions of the Constitution.

This would mean that although SGBs can make their own uniform policies, codes of conduct and policies on religion, these policies would have to comply with the standards set by the Constitution and the Department of Basic Education, in policies such as the National Policy on Religion in Education.

Courts have made rulings that must be followed by SGBs in the formulation of their policies. The National Policy on Religion in Education must also be followed, unless a court rules it unconstitutional.

CONSULTATION WITH CHILDREN AND PARENTS

In all cases where problems arise with regard to religion or policies on religion in schools, schools, SGBs and departments of education must try to consult meaningfully with and take seriously the views of children and their parents. This is especially so for children and parents who are not part of the majority religious group in the school, community and region.

When making decisions about participation in religious education, observances or instruction in either public or private schools, the following guidance of the Constitutional Court in *Pillay* is helpful: 'The more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution.'

CONCLUSION: WHAT ABOUT THE MAJORITY?

In the context of religion in schools, the Gauteng MEC for Education recently said he was 'opening schools up to preachers', because '85% of South Africans are Christian' and 'as I last understood the Constitution, it was the majority that won'.

This is the same argument regularly made by schools and SGBs to deny learners the right to express their culture and religion in their clothing, jewellery and hair. It is also the argument made by the schools in the OGOD case discussed above.

Our government is constitutionally obliged to promote constitutional morality and constitutional values, and when state officials promote religion or religious activity they must do so even-handedly: if MECs and other leaders want preachers to enter schools, they should invite Hindu, Muslim, Christian, Jewish, Jehovah's Witness and Traditionalist preachers, and agnostics and atheists too.

Religious education in public schools that focuses on teaching about religions, in all their shapes and sizes – in the context of human rights, social justice and the importance of diversity – is the best place to start. Though religious observances that are equitable and voluntary also have a place in schools, religious instruction and the declaration of an explicit religious ethos are – rightly – strictly prohibited in public schools.

All of this must be undertaken in law, in policy and in classrooms around the country in the context of South Africa's Constitution, which acknowledges and celebrates South Africa's full diversity of religious and cultural practices, while measuring them continuously and consistently against the constitutional rights of others.

Tim Fish Hodgson is a Legal Researcher at SECTION27, a former Law Clerk for Justice Zakeria Yacoob, and a Master's degree candidate at the University of Oxford.

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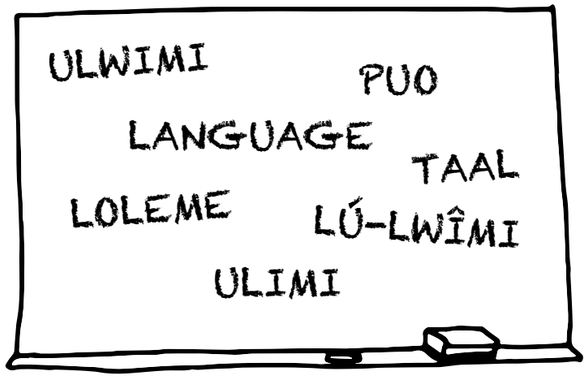
CHAPTER 11

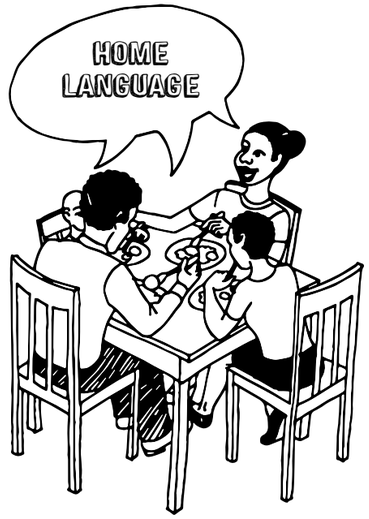
LANGUAGE IN SCHOOLS

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 strengthen 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, learners will receive education in (for example) 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; such 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 to systematise the deep discrimination against the majority of our population. A key aspect of this 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 the language of instruction in senior primary and secondary schools. The Bantu Education Department imposed on schools an instruction that English and Afrikaans would be the language of instruction at school, on an equal basis. Understandably, the learners felt that Afrikaans was being forced on them, and that their home languages were being undermined.

The resistance to this, and the denial of access to education in the language of a learner's choice, 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 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

Arising from this context, Section 29(2) now 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
> 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, which, as per Section 6(1) of the Constitution, 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, language in education – and particularly, the language policies adopted by school governing bodies – have the potential to bring about issues on the grounds of race, culture and ethnic and social origin.

NATIONAL EDUCATION POLICY ACT

The National Education Policy Act (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 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 practiced 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 on 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
- 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 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 emphasise 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 parents) 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 department 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, the head of the provincial education department must still consider how it can provide additional support to learners whose home language differs from their language of instruction at school.

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 like any other democratically elected government would be required to do.

The school governing body is also required, in terms of the norms and standards, 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 in the norms and standards and in the Language in Education Policy on diversity – which in turn forms a good foundation for respect and dignity – marks a break from the historical 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 have been historically marginalised; it is also aimed at promoting the culture and heritage that attaches to them.

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.

This 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 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. It is not clear whether or when it will be made final.

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, and the rights of individual languages.

EARLY CASES ON LANGUAGE IN EDUCATION

The cases dealing with language in education clearly illustrate the intersection between race, language and culture, and unfair discrimination on any or all of these grounds. These principles arise in the context of the powers of school governing bodies regarding the content of the language policies they adopt, and to what extent the provincial education departments may override these policies.

In the case of *Matukane and Others v Laerskool Potgietersrus ('Matukane')*, 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.

The case of *Laerskool Middelburg v Departmentshoof, Mpumalanga Department van Onderwys ('Laerskool Middelburg')* confirmed that the powers of a school governing body to adopt a language policy are not without qualification. In this case, the provincial education department instructed an Afrikaans-medium school to admit 20 learners seeking English-medium instruction, and the school governing body asserted that the education department did not have such a power. 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 Court continued that in every case, the best interests of the children would be the most important consideration in deciding the best outcome.

The procedures to be followed by a provincial education department in overriding a school governing body's powers were set out in the case of *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary and Another ('Mikro')*. 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 policy, the provincial education department may not ordinarily intervene
- If it does not comply with these – for example, 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 ('ERMELO')

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 allocations, 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 medium of instruction in education, particularly at the 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 a 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 the 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.

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 position. 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.

This will of course depend on the facts of each case, and 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 account of 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 that 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 30km 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 were unreliable. If the buses broke down, learners would sometimes miss school for days on end. Similarly, where the transport companies ceased providing their services because of late payment by the department of education, the learners who could not get to school would feel the worst impact.

They could also 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 therefore felt that they could not integrate properly into the school community.

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 court. 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 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 had been 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. The cases on this issue discussed above, however, suggest that as long as the department follows the correct procedure, they 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, but 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 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. However, if there are enough learners to make up an isiXhosa-medium class in an isiZulu-medium school, then the provincial education department must make provision for this. This is essentially a numbers game, which requires the provincial education departments to provide education in a particular language once that threshold of sufficient learners has been met.

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 suitably trained to teach the learners using English-medium sign language, in any of the schools in the province. 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.

Similarly, there have been problems with the procurement and delivery of textbooks to schools across South Africa, including the delivery of textbooks in the correct language to schools. Limited funding, weak procurement systems and poor data management to assess and meet the requirements of each school affect this. 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 publishers to ensure that textbooks are available in all of the official languages in each learning area, so that learners all have access to their required learning materials, regardless of their chosen language of instruction.

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 and works as in-house counsel at SECTION27.

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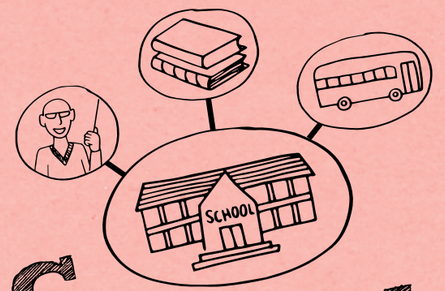


CHAPTER 12

BASIC EDUCATION PROVISIONING

Faranaaz Veriava

TERMINOLOGY

CONDITIONAL GRANTS refer to allocations from the national treasury for specified national programmes. Examples of conditional grants in basic education include infrastructure grants and school feeding schemes.

EDUCATIONAL INPUTS refer to the resources used to educate learners. For example, these would include appropriate school infrastructure; various goods, such as stationery and textbooks; and personnel, such as teachers and other staff necessary in a schooling context.

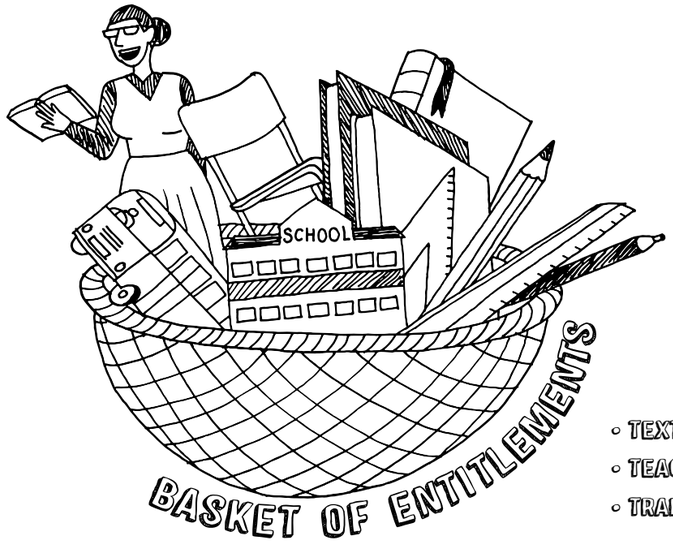
EDUCATIONAL OUTCOMES are the direct effects on learners in relation to their knowledge acquisition, skills, beliefs and attitudes. The most frequent measurements of outputs are examination results and test scores.

PERKINS BRAILLE MACHINE is essentially a Braille typewriter; its keys correspond to the different dots that form Braille.

UNIVERSAL DESIGN is the design of products, environments, programmes and services to be usable by all people, to address the diversity of learners and teachers with functional limitations.

INTRODUCTION

Education provisioning refers to provisioning for the various educational inputs that are necessary to provide learners with a quality education. As civil society advocates for a quality education, we sometimes imagine these inputs as a 'basket of entitlements' that are necessary or essential for a learner to enjoy her or his right to a basic education. The corollary of this right is that there is an obligation on government to provide this 'basket of entitlements'.



- TEXT BOOKS
- TEACHERS
- TRANSPORT
- BUILDINGS
- FURNITURE
- STATIONERY

In South Africa today, there remain many schools that must function without the full 'basket of entitlements' necessary for a basic education. This is particularly the case in the vast majority of historically disadvantaged schools. Where schools do not have these essential entitlements, learning and teaching is affected, and learners cannot enjoy their right to a basic education.

Since about 2008, therefore, civil society organisations such as the Centre for Child Law (CCL), the Legal Resources Centre (LRC), SECTION27 and Equal Education have led many campaigns for a better quality of education in historically disadvantaged public schools. Many of these campaigns have included litigation for improved education provisioning. The cases before the courts have addressed issues of poor school infrastructure, teacher provisioning, provisioning of desks and chairs, the delivery of textbooks to the classroom, and scholar transport.

The purpose of this chapter is to provide an overview of all the chapters that follow, and which fall under the umbrella of education provisioning. The education provisioning chapters are not necessarily an exhaustive list of all entitlements that are required for a quality basic education; rather, these chapters reflect some of the entitlements that have been at the centre of civil society campaigns for improved education provisioning. As far as possible, the overview and the chapters that follow will also discuss basic education provisioning for learners with disabilities.

This overview chapter begins with a contextual discussion of the legacy of apartheid education. It provides a snapshot survey of educational outcomes in South Africa, as evidenced from national and cross-national studies. The chapter then sketches out legislative law and policy framework for basic education provisioning that will be fleshed out in much more detail in the chapters that follow. Finally, the chapter discusses the core jurisprudential developments in respect of basic education provisioning.

PHILOSOPHY OF APARTHEID EDUCATION FOR BLACK CHILDREN

HF Verwoerd, then Minister of Native Affairs, and later to become Prime Minister of South Africa, said on the eve of the passing of the Bantu Education Act of 1953:

> Racial relations cannot improve if the wrong type of education is given to Natives. They cannot improve if the result of Native education is the creation of frustrated people who, as a result of the education they received, have expectations in life which circumstances in South Africa do not allow to be fulfilled immediately.

Under apartheid there were a least 14 different education administrations. In 1994, state education expenditure per capita annually was as follows: R5 403 for white children; R4 687 for Indian children; R3 691 for coloured children; and an average of R 1 715 for African children.

BUILDING AN INCLUSIVE EDUCATION AND TRAINING SYSTEM

Special-needs education is a sector in which the ravages of apartheid remain most evident. Here, the segregation of learners on the basis of race was extended to incorporate segregation on the basis of disability. Apartheid special schools were thus organised according to two segregating criteria, race and disability. In accordance with apartheid policy, schools that accommodated white learners with disabilities were extremely well-resourced, while the few schools for black learners with disabilities were systematically under-resourced.

Education White Paper 6 on 'Special Needs Education: Building an Inclusive Education and Training System'

CONTEXTUAL DISCUSSION

THE LEGACY OF APARTHEID EDUCATION

Apartheid education existed as one of the main cornerstones of the 'grand apartheid' scheme, which – together with other policies, such as the Group Areas Act of 1950 – aimed to exclude blacks from white areas, while simultaneously relying on and exploiting cheap black labour. Apartheid education was essentially entrenched through:

- The unequal funding of basic education along racial lines
- The teaching of a curriculum, as spelled out in the so-called Christian National Education Policy of 1948, that promoted racial superiority.

There was therefore a clear imperative to transform apartheid education at the dawn of democracy in 1994. Consequently, the new South African Constitution included a Bill of Rights with an education clause. There was also a shift from Christian National and Bantu Education to Outcomes-Based Education (OBE), and a new legal framework for schooling – the main law and policy being the South African Schools Act of 1996 (the Schools Act), and the National Education Policy Act of 1996.

The key features of the legal framework include: the desegregation of schools, nine years of compulsory schooling, the democratisation of the governance of public schools through the establishment of school governing bodies (SGBs) that include parents and learners in school governance, and a new system of funding for public schools.

Yet despite these very significant developments, inequality in education persists. Historically advantaged schools – former white or 'Model C' public schools – have the advantage of decades of capital investment and of being well-resourced, with access to qualified teachers. Historically disadvantaged former African schools are characterised by high pupil-teacher ratios, unqualified and under-qualified teachers, and a lack of books, libraries, laboratories and other resources.

This inequality in provisioning is further aggravated by the post-apartheid funding model, which while having some redress mechanisms nevertheless perpetuates inequality. According to this model, wealthier schools charge school fees to make up for deficits in state funding, while schools serving poor communities either charge low fees or (since 2006) are fee-free, following a reform in the legal framework.

Noteworthy, too, is that while former Model C schools these days tend to be more racially mixed, and while former Indian schools today appear to serve both Indian and African learners, this integration occurs along class lines. Poor, predominantly African learners remain relegated to the historically disadvantaged schools in African townships and in rural areas. This is what some commentators have referred to as 'incomes-based education', because of access to a better quality of education being dependent on a child's family income.

Education researchers have therefore referred to the South Africa schooling system as a 'dual education' system. This means that there are two different systems of schooling in public schools: the first being the well-resourced schools, which are the wealthy independent and former Model C schools, and to a lesser extent the former Indian schools; and the second system catering for poor, predominantly African learners, and being the majority of public schools existing along a continuum of under-resourcing and dysfunctionality. According to education researchers, this would constitute anything between 70 and 80% of South African learners.

The South African Constitutional Court has on several occasions commented on this apartheid legacy.

In *Governing Body of the Juma Musjid Primary School & Another v Ahmed Asruff Essay NO and Others ('Juma Musjid')*, for example, the court noted:

> The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

A FAILING SYSTEM OF BASIC EDUCATION

For a long time there has been a chorus from South Africa's foremost education researchers describing the system of basic education as being in a 'state of crisis'. Until recently, however, government has denied that there is a crisis in basic education. In January 2016 this changed, when Angie Motshekga, the Minister of Basic Education, stated that 'former African schools' exist as 'a Cinderella system deprived of resources and characterised by pockets of disasters ... this is akin to a national crisis'.

However, that there is a national crisis has long been evident in the poor educational outputs from the historically disadvantaged schools when compared to those of historically advantaged schools, and when compared to the academic performance of learners in other countries. This is illustrated in the table below – a summary of South Africa's performance in cross-national studies – and in the discussion of the matric examination that follows.

Table 12.1: A sample of the research which illustrates the degree of under-performance in historically disadvantaged schools in South Africa.

CROSS-NATIONAL STUDY	LEARNER PERFORMANCE
Trends in International Mathematics and Science Study (TIMSS) is administered to Grade 8 learners across 42 participating countries.	In **2002**, in South Africa, both Grade 8 and Grade 9 learners were tested because earlier TIMMS indicated that the test was too difficult for Grade 8 learners. • The scores of the former Model C schools were close to the international average. • The scores for historically disadvantaged schools were the lowest of the participating countries. • In 2011 scores improved, but South Africa's performance was still the lowest of all participating countries in the middle-income range.
The Southern and East Africa Consortium for Monitoring Educational Quality (SACMEQ III) Project in 2007 covered reading and mathematics. The tests are administered to Grade 6 learners and teachers.	In **2007**, South African learners ranked 10th for reading and 8th for maths (out of 13 participating countries), behind poorer countries such as Tanzania, Kenya and Swaziland. Maths scores were lower than reading scores. The results found that 27% of South African Grade 6 learners were illiterate. • Between SACMEQ II in 2000 and SACMEQ III seven years later, scores have shown little improvement. • For teachers, SACMEQ III revealed that only 32% of South African teachers had the required levels of content knowledge to teach in the subjects they were meant to teach.
The Progress in International Reading Literacy Study (PIRLS). PIRLS is administered to learners in Grades 4 and 5, and is aimed at testing reading literacy across 45 participating countries.	In the **2006** PIRLS study, South Africa achieved the lowest score of all the participating countries. • Only 13% of Grade 4s and 22% of Grade 5s reached the Low International Benchmark of 400 points. • According to education researcher Nic Spaull, this meant that 87% of Grade 4 and 78% of Grade 5 learners were deemed to be at serious risk of not learning to read.

THE TOXIC MIX

- The double burden of **poverty**. Many learners live in poverty, and simultaneously attend apartheid-style schools crippled by neglect and under-funding.
- The persistent **under-resourcing** of schools in respect of the various entitlements necessary for learning. Education researchers note various factors that appear to have the greatest impact in this regard. These include the low levels of teacher content knowledge, lack of access to textbooks, the language of learning, poor infrastructure, and the absence of early childhood education.
- **Poor management** at the level of school leadership and at the macro-level, meaning at the level of the national and provincial departments.
- In relation to **learners with disabilities**, the issues are more or variant. This will often depend on the nature of the disability that must be accommodated. So, for example, specialised teachers may be required, such as teachers who are trained in Braille or sign language; or specialised non-teacher personnel, such as physiotherapists or occupational therapists.

The matric or National Senior Certificate (NSC) exam marks the end of the schooling phase of a learner's education. Between 2010 and 2013, the matric pass rate was increasing steadily (68% in 2010; 70% in 2011; 74% in 2012 and 78% in 2013). Each year, the Department of Basic Education (DBE) cited these numbers as evidence of an improving system.

In 2014 the matric pass rate dropped to 76%, and in 2015 to 71%. The DBE attributed this to an adjustment phase due to the introduction of a new curriculum.

However, for many reasons education researchers question the use of the matric exam as an appropriate gauge of the functionality of a schooling system, or of a learner's academic achievement. Researchers state that the matric exam encourages mediocrity, by setting the bar too low. Learners are 'encouraged' to do easier exams that will make passing more likely. For example, learners are encouraged to do maths literacy rather than maths.

Education researchers note further that the matric pass rate masks the number of learners who have fallen out of the system. Only half of the learners who start Grade 1 actually make it to Grade 12, with most learners dropping out between Grades 10 and 12.

Finally, education researchers note that the pass rate must be assessed against the number of learners who actually qualify for access to a bachelor's degree or university entrance, with very few qualifying for such entrance. Put differently, therefore – according to Nic Spaull, an economist focusing on education – 'Of 100 students that started school in 2003, only 48 wrote matric in 2014, 36 passed, and 14 qualified to go to university.' Taking these factors into account, according to Spaull, a more appropriate measure would thus indicate a pass rate (for example) of 36% in 2014.

A SILVER BULLET TO FIX BASIC EDUCATION?

While there appears to be consensus among education researchers that there is a crisis in basic education, and while they agree further that there is a dual basic education system, they are less certain of how to remedy the crisis. In fact, education researchers say that there is no single 'silver bullet' that can fix the education system. This suggests that focusing on only a single issue (such as infrastructure, or curriculum revision) to the exclusion of other issues will not solve the education crisis.

Education researchers note that there are many reasons for the crisis. Graeme Bloch, an education researcher, has described these many reasons as a 'toxic mix'.

What is clear is that to fix the crisis, or to remedy the toxic mix, a multi-pronged strategy is necessary. We need better laws, policies and programmes, adequate budgeting, and improved management.

LAW AND POLICY

THE CONSTITUTION

Section 29(1)(a) of the Constitution states that: 'Everyone has the right to a basic education, including adult basic education.' The scope and content of this right is discussed in the chapter on 'The Constitution and the Right to Basic Education'.

The next section of this overview discusses some of the case law setting out government's obligations, primarily in respect of basic education provisioning.

INTERNATIONAL LAW

There are many international and regional instruments that entrench the right to basic education. The most important, for the purposes of the education provisioning overview, is probably the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR). The right to education is entrenched in Articles 13 and 14 of this covenant. The Committee on Economic, Social and Cultural Rights, created in terms of the ICESCR, has issued a number of General Comments that discuss the meaning of the rights in the covenant.

The 'Four-A' scheme set out in General Comment 13 (see table 12.2 below) is a guide to interpreting and giving content to the right to basic education. It states that while the exact standard secured by the right to education may vary according to conditions within a particular state, education must exhibit certain features. This is potentially helpful in assisting parents, learners, or organisations working in education rights when assessing whether a particular deprivation of an entitlement, or an action or inaction on the part of a departmental official or school, may be a violation of the right to basic education.

Table 12.2: The 'Four-A' scheme as set out in General Comment 13 of the Committee on Economic, Social and Cultural Rights.

Availability	This requires the government to create functioning educational institutions, in sufficient quantity, within the jurisdiction of the state party. For example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on. Some will also require facilities such as a library, computer rooms and a laboratory.
Accessibility	This requires that the government must ensure that educational institutions are accessible to everyone, without discrimination. Accessibility has three overlapping dimensions: • Non-discrimination: education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds • Physical accessibility: education must be within safe physical reach, either by attendance at some reasonably convenient geographic location (such as a neighbourhood school, or through the provision of transport) or via modern technology (by having access to a distance-learning programme). Schools must comply with the requirements of Universal Design to be accessible to learners with disabilities • Economic accessibility: education must be affordable to all.
Acceptability	This requires that the government must ensure that the form and substance of education, including curricula and teaching methods, have to be acceptable (in other words, they must be relevant, culturally appropriate, and of good quality) to learners, and in appropriate cases, parents.
Adaptability	This requires that the government develops policies and programmes that it can adapt to the needs of changing societies and communities, and responds to the needs of students within their diverse social and cultural settings, including those learners who have disabilities.

CASE STUDY

EQUAL EDUCATION'S CAMPAIGN FOR NORMS AND STANDARDS

In March 2012, Equal Education launched an infrastructural case requiring the upgrade of two schools in the Eastern Cape, and a court order compelling the Minister of Basic Education to finalise the norms and standards for basic infrastructure, almost four years after a draft was first introduced into the public domain.

The Department of Basic Education (DBE) agreed to address the infrastructural needs of the two schools, but opposed the finalisation of norms; instead, it published non-binding infrastructural guidelines.

Under increasing pressure from Equal Education's relentless campaign for norms and standards – including marches, sleeping outside Parliament, and hearings in different provinces – and in the context of potential litigation under the strong right to basic education, in November 2012 (a few days before the matter was to be heard) an out-of-court settlement was reached between Equal Education and the Department. The Minister agreed to publish draft regulations for public comment by 15 January 2013, and to finalise the norms by 15 May 2013. In January 2013 a new set of draft regulations emerged. Civil society was very concerned with the content of this draft, which led to a public outcry; and the norms were not finalised by the 15 May deadline.

In July 2013, with Equal Education renewing threats of litigation, the Minister agreed to a new set of norms. The finalised Regulations emerged at the end of November 2013.

THE LEGAL FRAMEWORK FOR EDUCATION PROVISIONING

Before discussing the legal framework regarding specific line items in respect of basic education provisioning, some of the more general provisions are worth noting.

Section 3 of the Schools Act makes schooling compulsory for learners from the age of seven to fifteen, or grades one to nine, whichever comes first. Section 3 further requires that a Member of the Executive Council (MEC) must ensure that there are enough places for all learners within this compulsory phase. In other words, government must ensure that all learners who fall within the compulsory phase of school have access to a school. This section could also be interpreted to imply that government must ensure that there is education of a sufficient standard to accommodate all learners within this phase of schooling.

In 2007, the Schools Act was amended, in what can be viewed as a concerted effort to provide a framework for establishing minimum standards to improve the quality of basic education. Section 5A requires that the Minister of Basic Education provide norms and standards for:

- school infrastructure
- capacity of a school in respect of the number of learners a school can admit
- the provision of learning and teaching support materials. This would include textbooks and other learning materials, such as workbooks.

Section 58C(3) then requires that provincial ministers of basic education report annually to the national minister on measures taken by each of the provinces to comply with the various norms. These sections are aimed at ensuring provinces plan and budget appropriately in respect of these specific areas of provisioning. As such, these reforms serve to establish a mechanism of accountability for the provinces in respect of basic education delivery. A potential role for education rights advocacy is to ensure that:

- These norms and standards are in fact developed
- Provinces are held accountable, at the very least, to complying with the benchmarks established in these norms and standards for basic education provision.

While norms and standards were developed in respect of school infrastructure – as evidenced in the case study – to date, norms and standards are yet to be determined in respect of the other areas noted in Section 5(A).

Returning to a discussion of the specific line items in provisioning for basic education, this requires piecing together aspects of the Schools Act and its subsidiary legislation.

Provisioning may be divided into three main categories: (i) infrastructural provisioning, which includes the building of schools, classrooms and the provisioning of water, sanitation and services; (ii) personnel expenditure, which includes educator salaries; and (iii) non-personnel recurrent expenditure, which includes capital equipment and consumables used inside schools for schools to function properly, such as textbooks, stationery and computers.

This overview will provide a broad outline of some of the law and policy under each of these specific line items. A more detailed discussion will be found in the specific education-provisioning chapters that follow.

Once state funds are allocated to schools for either personnel or non-personnel expenditure, shortages in school budgets are made up through the charging of school fees or fundraising. School fees and other privately-raised funds enable schools to supplement resources, for example by the employment of additional teachers, building new classrooms, and the general resourcing of the school.

No-fee schools, on the other hand, receive some funding from the government, once the Minister of Basic Education has set a minimum level of funding per learner. This is called the no-fee threshold, and is supposed to be the minimum amount of funding necessary to provide an adequate education to learners.

In 2015 the no-fee threshold was R1 116. In 2016 it was R1 177 and in 2017 it is R1 242.

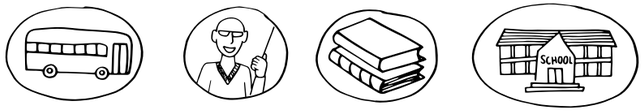
However, for the last few years, in some provinces – such as Limpopo Province – schools have received amounts below this no-fee threshold. This means that at many schools there is no money for items such as chalk, photocopying, school security, and other basic items necessary to ensure the functioning of a school.

By way of explanation of the framework, the relevant laws and policies in respect of the different line items are each discussed in turn below.

> ...at many schools there is no money for items such as chalk, photocopying, school security, and other basic items necessary to ensure the functioning of a school.

TARGET DATES IN THE INFRASTRUCTURE REGULATIONS:

- The eradication of mud and asbestos schools, and the provision of services to schools without any water, power or sanitation, must be prioritised within three years of the passing of the Infrastructure Regulations ***(November 2016)***
- The norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security must be phased in over a seven-year period ***(November 2020)***
- The norms and standards relating to libraries and laboratories must be provided within ten years ***(November 2023)***
- All other norms and standards are to be phased in before the end of ***November 2030***. An example of this is compliance with the principles of Universal Design to make schooling accessible to learners with special needs. Thus, for instance, schools must have ramps, clear floor passages and walkways for wheelchairs, parking for people with disabilities, and visual aids for communication between educators and learners who are deaf or hearing impaired. (The time frames for the implementation for these provisions appear to be unduly long.)



(i) Infrastructure

In 2008, the Department of Education published 'The Draft National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment' (the 'National Policy'), and 'The Draft National Minimum Norms and Standards for School Infrastructure'. These two documents together were intended to provide the blueprint to guide future infrastructural development in public schools in South Africa.

The National Policy document was finalised in 2010. This policy document acknowledges a clear link between poor infrastructural conditions and poor learner outcomes, and aimed to develop new criteria for infrastructural planning. As noted, however, the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure ('Infrastructure Regulations') were not finalised until the end of November 2013.

These Regulations establish benchmarks in respect of provisioning for things like classrooms, electricity, water, sanitation, libraries, laboratories, electronic connectivity and perimeter security. They also set incremental target dates for meeting specified goals. Provincial Education Departments were also required to develop school infrastructure plans within a year of the publication of the Regulations, and to report annually to the Minister of Basic Education on their progress in implementing the Regulations.

(ii) Non-personnel provisioning

State provisioning for non-personnel expenditure for schools is guided by the principles set out in the Norms and Standards for School Funding. Every year, each school will receive an allocation from government for non-personnel expenditure. The Norms and Standards for School Funding prescribe as a policy target that the personnel-to-non-personnel spending ratio should be in the order of 80:20.

In practice, much more is spent on personnel funding than is recommended by the Norms and Standards for School Funding. This is illustrated in the box below. The impact that this has on education provisioning is elaborated on in more detail in the discussion on post provisioning that follows.

DEVIATIONS FROM THE GUIDELINE:

In 2012/2013, personnel-to-non-personnel expenditure by province was as follows:

Eastern Cape	90:10
Free State	89:11
Gauteng	81:19
KwaZulu-Natal	84:16
Limpopo	93:07
Mpumalanga	87:13
Northern Cape	87:13
North West	86:14
Western Cape	83:17

State allocation for non-personnel expenditure is established according to the quintile ranking of a school on the poverty index. Schools are ranked from the poorest to the least poor, with quintile 1 being the poorest schools and quintile 5 being the wealthiest schools.

Of the funds available for non-personnel expenditure, 80% is allocated to 60% of the poorest schools. In other words, the bulk of the monies for non-personnel expenditure is directed to the poorest schools, which generally are also the no-fee schools.

The reasoning is that the wealthier schools in quintiles 4 and 5 can raise money through school fees and fundraising activities. While this is seen as a progressive poverty-targeting measure, it constitutes a relatively small part of state spending on education.

In respect of textbook provisioning, the DBE has published but not finalised its 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material (LTSM)'. The draft policy broadly defines LTSM to include stationery and supplies, learning materials, teaching aids, and science, technology, mathematics and biology apparatus.

The draft policy makes reference to national LTSM norms and standards to 'honour' government's obligations to give effect to the right to basic education. This appears to suggest that the draft policy is a precursor to Norms and Standards

for LTSM. As such, the draft policy seems to have been formulated based on Section 5(A) of the Schools Act.

The policy aspires to ensure that every child has a textbook in every subject per grade. The draft policy therefore draws a distinction between 'core LTSM' that is essential to teaching the entire curriculum of a subject for a grade, and 'supplementary LTSM', which is used to 'enhance a specific part of the curriculum'.

Core LTSM includes a textbook, a core reader or novel depending on the grade, a workbook (an activity book designed to cover the curriculum), and teacher guides. Supplementary LTSM is defined as including learning materials such as atlases, dictionaries, subject-specific apparatus, and electronic and technical equipment.

The draft policy seeks to achieve a more centralised procurement mechanism, and improved systems for the delivery of textbooks to classrooms and the retrieval of textbooks from learners every year. The absence of such systems was noted and the systems were repeatedly identified as necessary by the various investigative processes that followed the Limpopo textbook crisis in 2012, and eventually culminated in a judgment in the Supreme Court of Appeal. This judgment is discussed in the next section of this chapter.

(iii) Personnel provisioning

Education is regarded as a 'personnel-intensive sector', as the bulk of provincial spending is allocated to this line item.

Section 5 of the Employment of Educators Act 76 of 1998 (EEA) provides that the Head of Department in a province determines the educator establishment in that province. This is the process by which a province determines the number and allocation of educator posts for that province. In 2002, the Department of Education adopted the 'Post-Provisioning Norms'. This allocates educator posts according to a formula that weights certain specified factors, such as class size, the range of subjects offered, and the poverty of a particular community. The higher the weighting of a school, the more likely it is that the school will benefit in terms of the allocation of an educator post. These Norms also instruct provinces to set aside between two and five percent of posts for allocation in favour of 'needy schools', as defined by a formula.

Commentators have argued that the Post-Provisioning Norms are insufficiently geared towards historical redress, since other weighted factors continue to favour the more advantaged schools. That is, because educator salaries have been determined according to qualifications and experience, the funds directed in respect of

this line item are said to continue to favour historically advantaged schools, since historically these schools have had better-qualified educators. Also – since personnel costs constitute the lion's share of the education budget – despite pro-poor targeting for non-personnel expenditure, funding for schools remains skewed in favour of historically advantaged schools.

Section 20(4) of the Schools Act then provides that SGBs may establish posts for additional educators, and may appoint additional educators. School fees and other fundraising initiatives generate the financial resources for this. Schools that cater for poor communities are therefore unlikely to benefit from this provision.

(iv) Scholar transport

An area of education provisioning that does not fall within the line items discussed above, but which is an area of increasingly vibrant education-rights activism, is that of scholar transport. In 2015, the Department of Transport promulgated the 'National Learner Transport Policy'. This policy was developed in collaboration with the DBE, and aims to develop standardised criteria across the provinces for 'needy learners' who walk long distances to schools. The policy is discussed in detail in the chapter on 'Scholar Transport'.

(v) Education provisioning for inclusive education

Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System ('White Paper 6'), published by the DBE in 2001, outlines the South African government's strategy in respect of the education of learners with disabilities. White Paper 6 envisions the need for an adequately-funded three-tiered system of inclusive education; but since the paper's publication fifteen years ago, that system remains elusive. This is discussed in detail in the chapter on learners with disabilities. Some of the concerns in respect of adequate infrastructural provisioning for learners with disabilities have already been mentioned.

It is noteworthy that the White Paper proposes a conditional grant for non-personnel expenses. To date, however, no such conditional grant has been provided for inclusive education.

In 2014, government published the 'Policy on Screening, Identification, Assessment and Support (SIAS)'. The purpose of SIAS is to provide for the standardisation of procedures and processes to identify and assess all learners requiring additional support. This Policy makes reference to norms and standards for personnel provisioning for inclusive education. Section 19(4) states:

> Post provisioning norms and standards will make provision for all categories of staff required in an inclusive education system, including itinerant learning support, therapeutic and psycho-social support professionals, as well as teacher and class assistants, therapy assistants, technicians, interpreters and facilitators.

As with the conditional grant, the publication of these norms is yet to occur. The experience of organisations working in both special and full-service schools is that these schools remain severely understaffed, with insufficient teachers and specialised non-teaching staff. There is therefore a great need for stronger mobilisation and advocacy for both the implementation of White Paper 6 and an adequate law and policy framework for learners with disabilities.

RELEVANT CASE LAW

Over the past few years there have been a significant number of cases addressing education provisioning. Most of these cases will be discussed in the chapters that follow. The discussion here is restricted to a cursory overview of specific cases in the Constitutional Court, the Supreme Court of Appeal, and the High Courts of South Africa that have provided guidance as to:

- the 'basket of entitlements' that make up the rights to basic education;
- the obligations of government in the fulfilment of the right to basic education in respect of education provisioning.

THE *JUMA MUSJID* CASE

In *Governing Body of the Juma Musjid Primary School & Another v Ahmed Asruff Essay NO and Others (Juma Musjid)*, a case in which a private property owner successfully sought to evict a public school conducted on its property, the court went beyond the strictures of that case – and indeed, to some length – to comment on the extent of government's obligations to protect the right to basic education. In the famous paragraph describing these obligations, the court said:

> It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under Section 29(1)(a). Unlike some of the other socio-economic rights, this right is **immediately realisable**. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in Section 29(1)(a) may be limited only in terms of a law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in Section 21(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'. [Author's emphasis.]

So the Constitutional Court made it clear that the right to basic education as an unqualified right means that an individual has a direct claim in respect of the right, and also that government is under an immediate duty to provide a basic education. This is in contrast to the qualified socio-economic rights, such as health, housing, food, water and social security. The court's 'incrementalist' approach to interpreting these rights has been set out in the chapter on the 'The Constitution and the Right to Basic Education'.

While the Constitutional Court acknowledges the absence of internal qualifiers to the right to basic education, it states that the right remains subject to the limitation clause in terms of Section 36. The implications of the meaning of 'immediately realisable' and the limitations clause are also discussed in more detail in the chapter on 'The Constitution and the Right to Basic Education'.

THE *BEFA* CASE

In December 2015, the South African Supreme Court of Appeal (SCA) in the case of *Minister of Basic Education and Others v Basic Education for All and Others* (the *BEFA* case) gave judgement in an appeal relating to the incomplete delivery of textbooks to learners at certain schools in the Limpopo Province. The BEFA judgment was the culmination of a sustained campaign of litigation brought by public-interest organisation SECTION27 for improved textbook provisioning. The first textbook case was initiated in 2012, and resulted in three separate court orders in that year. The fourth case was successfully instituted by the organisation in 2014, and was then appealed by government.

The SCA confirmed that the right to basic education was 'immediately realisable'. The judgment held further that the guarantee that every learner had the right to a basic education included the entitlement that every learner at public schools must be provided with every textbook prescribed for his or her grade before commencement of the academic year. The order further explicitly noted that the corollary to this right was government's duty to provide such textbooks.

The *BEFA* judgment also rejected a budgetary constraints justification from government in respect of full textbook provisioning. The SCA noted that government had made a 'bald assertion' as to budgetary constraints, in that it had failed to provide any evidence that it would be unable to procure the funds for textbook provisioning. The judgment also noted that government's planning for the implementation of its textbook policy had been 'inadequate'.

THE *MADZODZO* CASE

In the case of *Madzodzo and Others v Minister of Basic Education & Others ('Madzodzo')*, the Legal Resources Centre (LRC), acting on behalf of the Centre for Child Law (CCL) and parents from a group of schools in the Eastern Cape, brought an application to compel the government to deliver desks and chairs to schools where there were severe furniture shortages. The court found that government's failure to provide 'adequate age- and grade-appropriate' desks and chairs to pupils at schools in the Eastern Cape constituted a violation of the right to a basic education.

The judgment elaborated on the content and meaning of the right. It noted that the state's obligation to provide a basic education was not confined to making a place in a school available to a learner, but also included a 'range of educational resources', including the provision of furniture.

The court also rejected a justification from government that the furniture had not been provided because of budgetary constraints. It found the government had failed to budget proactively for furniture shortages based on relevant information that was available at the time the budget was decided.

The LRC in the Eastern Cape has run several cases to address poor teacher provisioning in schools in that province, in a context in which some schools have severe teacher shortages, while in other schools there is an excess of teachers. These cases are discussed in detail in the chapter on post provisioning. In short, the court has consistently found that there is

a duty on government to advertise vacant teacher posts, to then appoint teachers to these posts, and finally to pay teacher salaries. In its first post provisioning case, of the *Centre for Child Law & Others v Minister of Basic Education & Others* in 2012, the court implied that both teacher posts and other administrative non-teacher posts were essential to the smooth functioning of a school. The court noted:

> [The Schools Act] requires both teacher and non-teacher establishments to be known by governing bodies before their budgets can be approved, and to allow them to determine how many additional posts are needed at their schools. The only interpretation of the legislation that is consistent with the obligation on the respondents to respect, protect, promote and fulfil the fundamental right to basic education is that the MEC is empowered and obliged to determine the establishment for both teaching staff and non-teaching staff at public schools in the province.

THE *TRIPARTITE STEERING COMMITTEE* CASE

In the case of *Tripartite Steering Committee and Another v Minister of Basic Education and Others ('Tripartite Steering Committee')*, the Eastern Cape High Court had to determine whether the right to basic education included a direct entitlement right to be provided with transport to and from school at government expense, for those learners who live a distance from school and who cannot afford the cost of transport. The court concluded that it did.

THE *WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY* CASE

So far, there has only been one case dealing with the right to basic education for learners with disabilities. The case of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another ('Western Cape Forum for Intellectual Disability')* was brought by a coalition of non-governmental organisations that provides for profoundly and severely intellectually disabled children who would not otherwise have access to an education.

The organisations alleged that government provisioning for profoundly and severely intellectually disabled children was less than that allocated to other children, including children with mild to moderate disabilities. An argument made by government was that children with this category of severe disability would not benefit from an education. Government also made a resources-allocation argument, contending that given the many competing demands in South Africa, it had to make difficult policy choices and was unable to afford further expenditure on education; and that its failure to provide for this particular category of children served a 'rational connection to a legitimate government purpose'. The court strongly rejected government's arguments, and said:

> A government purpose which imposes differential treatment on the affected children cannot in my view be said to be rational. It must be remembered that the applicants did not ask that the needs of the affected children be met by the provision of extra funds. What they ask of the respondents is to spread the available funds fairly between all children. I am accordingly of the view that the appellant has established that the rights of the affected children to receive a basic education are being infringed.

THE COURTS ON EDUCATION PROVISIONING

The following principles have been determined from jurisprudence in respect of education provisioning:

- The right to basic education is an **immediately realisable right**. This means that every learner has a direct claim to be provided with a particular entitlement necessary for his or her education. This in turn requires that government do everything possible to ensure that such an entitlement is provided to each and every learner.
- The courts have adopted a **content-based approach to interpreting the right to basic education**. This means that, by recognising textbooks and furniture as essential items for a basic education, the courts are beginning to define the 'basket of entitlements' necessary for a quality education.
- Government cannot make 'bald assertions' about budgetary constraints without putting forward evidence of budgetary constraints. There is a duty on government to **budget appropriately for the right to basic education**, based on available information. This approach to a budgetary constraints argument is consistent with the developing principle in the wider socio-economic-rights jurisprudence that there is an implicit duty on government to budget effectively. In the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd) and Another*, the Constitutional Court held:

  > This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. *In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.* [Author's emphasis.]

- Learners with disabilities cannot be denied their right to a basic education. This means that **learners with disabilities must be budgeted for**, including in respect of the additional necessary accommodations necessary to enable learners with disabilities to fully enjoy the right to basic education.

CONCLUSION

This chapter has provided an overview of the South African government's obligations in respect of the right to basic education, and how government has sought to give effect to these obligations through law and policy. In doing this, it has alluded to some of the vacuums in basic education provisioning that can be addressed through mobilisation, advocacy and even litigation.

The chapter has further noted that there is no single 'silver bullet' to improve the quality of education. What is required is a multipronged strategy to fixing the crisis in education. This is evident in the various campaigns of civil society for improved education provisioning that have contributed to holding government accountable to meeting its obligations in respect of basic education.

People need to pool their collective skills and knowledge to improve the resourcing of education. Below is a brief listing of potential examples of future education-provisioning campaigns.

Campaigns for the development of norms and standards for a quality basic education:

- Section 5(A) requires that the Minister of Basic Education provide norms and standards for Learner Teacher Support Materials (LTSM). While such norms have been alluded to over the years, this has never been developed
- Similarly, norms and standards for personnel provisioning for inclusive education have been alluded to, but are yet to be passed.

Holding government accountable:

- Following the finalisation of the School Infrastructure Regulations, Equal Education has turned its attention to a campaign to ensure that provinces publish their implementation plans to meet the deadlines imposed by the Regulations
- Following the *BEFA* judgment that requires government to provide every learner at public schools with every prescribed textbook for his or her grade before commencement of the academic year, SECTION27 and the organisation Better Education for All have been closely monitoring textbook delivery in Limpopo Province to ensure that all textbooks are delivered to all learners in all subjects. Similar monitoring initiatives should also occur in other provinces where there have been reports of textbook shortages.

Expanding the basket of entitlements that are essential to a basic education:

Schools for the visually impaired rely on Perkins Braille Machines ('braillers') to enable learners to write and take notes. Blind learners also write their examinations using braillers.

SECTION27 is currently assisting a school for the visually impaired that has 165 learners, of which 34 are completely blind and require braillers all the time to be able to do their school work.

The school also teaches Braille to all of its partially sighted learners, because of the possibility that their vision will worsen or that they will lose their vision completely. All of these learners require their own braillers for Braille lessons. The partially sighted learners also have problems with their eyes getting tired or sore after working with large print, and so they require braillers outside of their Braille lessons as well.

In addition, each of the 23 teachers at the school requires a brailler to be able to teach properly. At the moment, the school has only three braillers in working order. The problem is aggravated by the lack of braille textbooks, which means that it is even more important for learners to take notes in class.

The Department of Education undertook to provide 25 braillers, but said that they did not have money for any more.

Not only is 25 not enough (even for the blind learners); the Department has also not delivered these as promised.

Faranaaz Veriava is a senior legal researcher and legal counsel based at SECTION27.

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CHAPTER 13

INFRASTRUCTURE AND EQUIPMENT

Lisa Draga

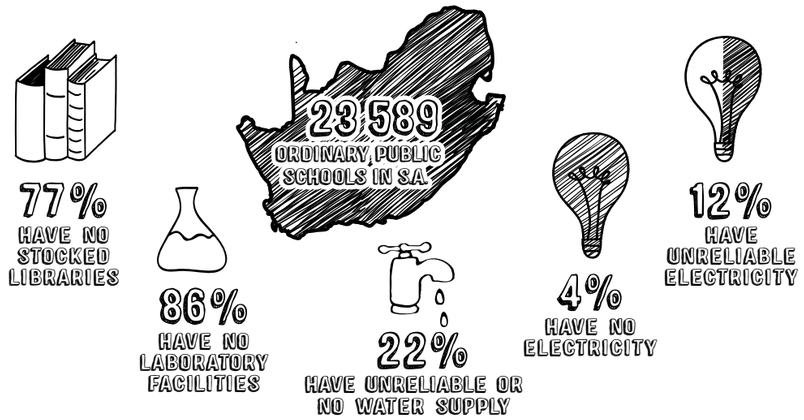

Figure 13.1: Conditions in ordinary schools in South Africa.

INTRODUCTION

Crumbling classrooms, horrendous bathrooms, cracked fences, and non-existent libraries and laboratories remain a reality for thousands of school-going children across South Africa.

At the same time, a privileged few are able to study in comfortable, well-resourced and safe learning environments.

The Department of Basic Education's (DBE) own statistics, released in 2015, highlight these painful disparities. They show that of the 23 589 public ordinary schools in the country, 77% do not have stocked libraries, 86% have no laboratory facilities, and 5 225 schools have either an unreliable water supply or none at all. A total of 913 schools are expected to function without electricity, and a further 2 854 must make do with an unreliable supply.

Further interrogation of these numbers reveals a pattern – the worst school infrastructure conditions are recorded largely in the former Bantustan areas. For instance, statistics show that about 94% of Limpopo schools do not have a library or laboratory facilities, a far higher percentage than the national average. It is therefore invariably black South African learners who are most cheated of an acceptable learning environment.

Inequities in physical resourcing are the most concrete manifestations of the glaring disparities in our education system, and they entrench and perpetuate the legacy of apartheid education. Poor learners, most of whom are black, are condemned to attend classes in school environments that disempower rather than empower them to learn and succeed.

The link between school infrastructure conditions and their effect on learning outcomes has been well documented by a number of reputable studies. For instance, a 1979 review conducted by Carol Weinstein concluded that there was a link between improved educational outcomes and – among other infrastructural factors – the age and condition of school facilities, as well as with lighting, ambient temperature, and quality of air.

The DBE's national policy on school infrastructure, titled the 'National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment' (NPEP), emphasises the negative effects of a poor schooling environment on learners. These include irregular attendance and higher drop-out rates. Importantly, NPEP also recognises the detrimental effects of inadequate school infrastructure on teachers, citing attrition, high turnover and teacher absenteeism– no doubt due to working in demoralising, unhygienic and often unsafe environments.

Although fixing only our schools will by no means fix our broken education system, this is but one of many factors that must be addressed urgently in order to provide an adequate basic education for all South African children.

BACKGROUND

Every day, thousands of South African children attend schools that have appalling infrastructure. Many learn in hazardous and life-threatening conditions.

It is only since 2011, however, that the drive to address the school infrastructure crisis in South Africa has begun to gain traction. This has been through a combination of the rise of an education-based activist movement, and the more frequent use of the courts by public-interest litigators.

The first significant case concerning school infrastructure was brought in February 2011 by the Legal Resources Centre (LRC), representing seven Eastern Cape mud schools. The matter was settled by an agreement with the State, which secured R8.2 billion to address the mud-school problem as a whole in the Eastern Cape. The case has become known as the 'mud-schools case'.

The skewed racial disparities in the quality of school infrastructure in South Africa also encouraged Equal Education (EE) – a democratic social-justice movement dedicated to achieving equal and quality education for all, whose core membership base consists of learners – to take up the cause for adequate school infrastructure for all.

EE's initial campaign was aimed at ensuring that the Minister of Basic Education publish a national policy on school libraries. This later evolved into a campaign centred on ensuring that the Minister publish the 'Regulations Relating to the Minimum Uniform Norms and Standards for School Infrastructure' (as she was empowered to do by the South African Schools Act).

These regulations were seen as significant, as they would set a legal standard for the minimum physical resources all schools should have. The norms and standards would also serve as a tool for holding government accountable. Once introduced, this law would empower affected communities to insist that the unacceptable and dreadful infrastructure conditions at their schools be remedied.

To further its cause, EE members engaged in sustained activism. EE eventually filed two court applications and entered into two separate settlement agreements with the Minister before the norms and standards were finally made law.

In January 2014, just two months after the norms and standards were published, a six-year old boy named Michael Komape died when he fell into a pit toilet at his school in Limpopo, because the seat of the toilet was so corroded. The campaign for norms and standards was renamed the Michael Komape Campaign, to ensure proper and timeous implementation of the norms and standards in honour of Michael.

While this campaign continues to unfold, the non-governmental legal organisation SECTION27 has

WHAT ARE THE MINIMUM UNIFORM NORMS AND STANDARDS FOR SCHOOL INFRASTRUCTURE?

This is a law made by the Minister. It says what makes a school a school. The Minister must make sure that all schools have basic infrastructure such as water, electricity, libraries and laboratories. This law contains deadlines for when these things must be achieved.

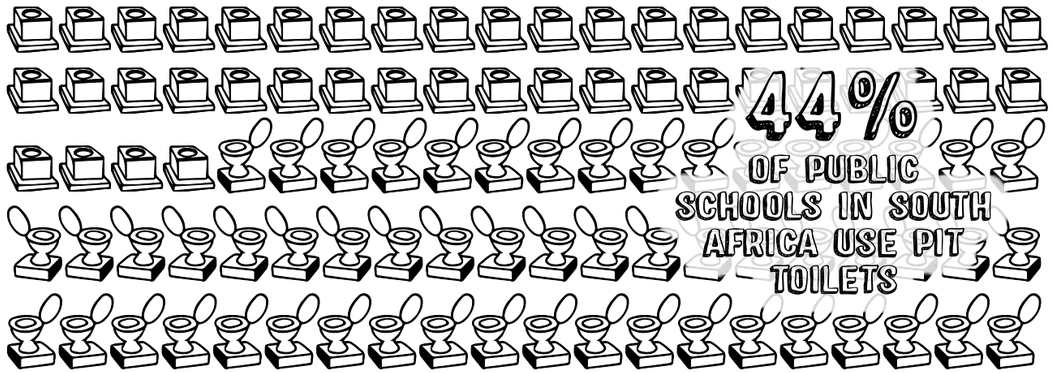

Figure 13.2: Percentage of schools in South Africa using pit toilets.

brought a damages claim on behalf of the Komape family. The claim is against the Minister, the Limpopo MEC for Basic Education, the school governing body, and the principal of the school.

The horrific, tragic and senseless death of Michael Komape encapsulates the serious dangers posed by poor and hazardous school infrastructure. It evokes outrage and fear – especially when viewed against the DBE's statistics, which show that 44% (almost half) of our nation's schools still use pit latrines.

On 29 November 2014, a year after the publication of the norms and standards, the Basic Education MECs were required by law to hand over to the Minister their action plans on how they intend to achieve the norms in their provinces. These plans are an important source of information, and should contain (among other information) details of the infrastructure backlogs at the district level, and a costing exercise pegged to the short-, medium- and long-term deadlines set in the norms and standards.

Once the MECs' plans are released, civil society and the public can scrutinise them carefully and make recommendations for improved school infrastructure delivery. Communities can also assess whether their school has been correctly catered for in their provincial plan. This opens up a space for dialogue between communities and the state, and allows the state to remain well-informed on whether implementation is on track, whether schools' needs – in terms of the norms – are being met, and whether human and financial resource provisioning is being done in an effective manner.

Given the significant role of these plans in the implementation process, it is disheartening that the Minister delayed substantially before making them available to the public.

In November 2014 the Minister's spokesperson said that the Minister had received all the provincial plans prior to the due date; but all the plans, with the exception of those from Limpopo, were only released more than six months after the Minister had received them. The Minister made the plans public only after EE engaged in continuous activism including letters, pickets around the country, sleep-ins, and a 2 000-strong march of learners and teachers to the Eastern Cape Department of Education. It would take a further four months before the remaining plan was released, and this only after EE held a picket outside the Limpopo Department of Education and later met with the Limpopo MEC.

At the time of publication it had been more than a year since the MECs' annual norms and standards implementation reports to the Minister fell due in terms of the regulations (on 29 November 2015). The Minister is yet to release these reports, or even indicate whether she has received them at all.

This does not bode well for accountable, transparent, effect and timeous implementation of the norms and standards.

Also of concern is that there exist certain loopholes in the norms and standards, including the use of vague language, that make it easier for the DBE to shirk its legal duties with impunity.

LAW AND POLICY

INTERNATIONAL

'General Comment 13 on the Right to Education', issued by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), states that education must be available, accessible, acceptable and adaptable. Elaborating on the availability aspect, the Committee states that:

> [functioning schools] are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically-competitive salaries, teaching materials and so on; while some will also require facilities such as a library, computer facilities and information technology.

The Committee therefore acknowledges that the right to receive an education entails the right to receive an education in a physical environment that is conducive to learning.

NATIONAL

Section 29(1) of the Constitution confers the right to a basic education on all. However, what this right entails precisely is hotly contested.

The Constitutional Court, in *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others*, drew attention to the problem of apartheid-inherited school infrastructure facilities that continue to plague our education system:

> The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities, and the discrepancy in the level of basic education for the majority of learners.

The historical injustice of the inequities in school facilities is also mentioned in NPEP, a policy introduced by the Minister through the National Education Policy Act.

The first of NPEP's policy statements refers to the publication of national norms and standards for school infrastructure, to address these inequities. As discussed, these norms and standards were introduced in November 2013.

WHAT DO THE NORMS AND STANDARDS SAY?

There are FOUR deadlines for norms and standards:

- **Schools built entirely from materials such as asbestos, metal and wood, and schools with no access to any form of power or water supply or sanitation**
  3-year deadline: 29 November 2016
- **Electricity, water, sanitation, classrooms, perimeter security, electronic connectivity**
  7-year deadline: 29 November 2020
- **Libraries & Laboratories**
  10-year deadline: 29 November 2023
- **'All other norms' e.g. sports and recreation facilities, universal access**
  17-year deadline: 31 December 2030

This case was launched in August 2015 and concerns six-year old Michael Komape, who died on 20 January 2014, at Mahlodumela Primary school, Limpopo, after falling through an unstable and broken makeshift 'seat', into the pit of a toilet. The unstable 'seat' structure could not hold his weight, and he suffocated to death.

The norms and standards are groundbreaking because they finally provide some legal clarity and give some content to the Section 29 right to a basic education.

According to the norms and standards, all schools that do not have any water, electricity and sanitation must be provided with these by 29 November 2016.

The problem of schools built entirely from inappropriate materials such as mud, metal, wood and asbestos must be addressed by this same date.

The norms also set 7-, 10- and 17-year target dates.

By 29 November 2020, all schools must be brought into compliance with the norms regarding perimeter fencing, classrooms, electronic connectivity, sanitation, water and electricity.

Libraries and laboratories are required by 29 November 2023.

All other norms and standards, including adherence to the principles of Universal Design to accommodate learners with disabilities, must be met by 31 December 2030.

By this final deadline, all special-needs schools must also 'be fully accessible'. Ensuring accessibility would entail the provisioning of infrastructure such as ramps, clear floor passages, and walkways for wheelchairs; as well as parking for persons with disabilities.

However, it is unjustifiable to expect learners with disabilities to wait this long to receive these provisions. The various difficulties facing learners with disabilities are discussed in Chapter 5 of this handbook.

The DBE did not make its earliest deadline of 29 November 2016.

Missing from the statutory and policy framework concerning school infrastructure is the issue of desks and chairs.

In February 2014, a judgment was delivered on this subject in the Eastern Cape High Court, Mthatha. The judgment had its genesis in earlier litigation, which began in October 2012.

The initial litigation was brought on behalf of a children's-rights-focused non-governmental organisation, the Centre for Child Law (CCL), and certain parents at three Eastern Cape schools. It was aimed at obtaining an order that the Minister, the Eastern Cape MEC and the Head of the Department of the Eastern Cape Department of Education had violated the affected learners' rights to education, equality and dignity, due to their failure to provide adequate age- and grade-appropriate furniture at the learners' schools.

The litigation also sought more systematic relief that would require the appointment of independent auditors to determine the furniture needs of all schools in the province. The matter ended in a settlement agreement, embodied in an order of court, which required, among other things, that the audit of all Eastern Cape schools be concluded by 28 February 2014, and that the results be handed over to the parents' lawyers.

Almost a year after the conclusion of the settlement agreement, the CCL – now with parents from four more schools – returned to court on the basis of non-compliance with the settlement. This time they sought the appointment of an independent body to verify the results of a DBE-conducted audit, as well as a plan specifying when each school listed on the audit report would receive their required furniture.

They also asked the court to order that the required furniture be delivered to all schools 90 days after the completion of the independent audit.

The matter was settled in part. The state resisted being held to a specific delivery date, arguing that all that could be expected of the state was a reasonable plan to provide furniture within the shortest possible time.

In its judgment, *Madzodzo and Others v Minister of Basic Education and Others*, the Court stated that 'insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education'.

Ultimately, the judge agreed with the 90-day delivery date, largely ascribing his reasoning to the state's failure to make a firm commitment on when it intended to deliver the furniture. The state's failure to meet the 90-day deadline prompted another round of litigation.

In January 2016, the Eastern Cape High Court, Mthatha granted an extensive order in favour of CCL. The order obliged the Minister and MEC to establish a Furniture Task Team to be led by a minister-appointed national co-ordinator.

The task team would be responsible for preparing a consolidated list of furniture needs at all Eastern Cape public schools. This list would then be put through a verification process, and the results were to be communicated to the Court by 31 August 2016. The court order requires that all schools have their furniture needs met by 1 April 2017. The Minister must also file quarterly reports to the Court on budgeting and implementation processes undertaken to ensure compliance with the order.

The CCL and the LRC are to meet with the national co-ordinator at least once every 90 days. At the time of writing, the consolidated list of furniture needs had been published, and the verification process was under way.

As mentioned earlier, a significant court case concerning school infrastructure is currently before our courts. This case was launched in August 2015 and concerns six-year old Michael Komape, who died on 20 January 2014, at Mahlodumela Primary school, Limpopo, after falling through an unstable and broken makeshift 'seat', into the pit of a toilet. The unstable 'seat' structure could not hold his weight, and he suffocated to death.

Michael's family have now sued the Minister and the DBE, claiming among other things that the Minister, the department and the leadership of the school had a duty to protect him and other learners at his school from unhealthy and unsafe school conditions – a duty it failed to fulfil.

The Minister and her department deny that the toilet could not hold Michael's weight and was unsafe. They have also denied that Michael's death was in any way caused by any unconstitutional, unlawful or negligent behaviour on their part. The Minster further denies that the state of school infrastructure has infringed on the rights of learners, like Michael, who attend dilapidated schools in Limpopo or elsewhere.

Lawyers for the Komape family argue that the Minister and the DBE knew or should have known about the terrible and dangerous state of the school's sanitation infrastructure, and did nothing to address this. The Minister and the DBE have therefore failed to comply with the norms and standards for school infrastructure.

As already discussed in this chapter, the norms and standards prescribe the very basic infrastructure standards that any given public school in South Africa must eventually comply with. The norms and standards set out the minimum requirements for a clean and safe toilet at a school.

This pending matter is significant because it highlights the grave consequences of the failure of the Minister and the DBE to address the infrastructure crisis, despite a long history of civil society engaging extensively with the education department about dismal infrastructure at schools.

CASE STUDIES

Thoko and Ovayo are Grade 8 learners at Sobukwe High in rural Limpopo. Their school has no electricity, and its water tanks sometimes run dry. This means that when they are very thirsty, they must leave the school grounds to fetch water from a distant source. Sometimes when they return from fetching water the school break has already ended and they miss some of their lessons for the day. There are no toilets at the school; which is very embarrassing, because learners and teachers have to make use of the open fields surrounding the school to relieve themselves.

Thoko and Ovayo's right to a basic education is being violated. Also, all the teachers' and learners' right to dignity is being violated, because their school has not been provided with toilets.

The norms and standards for school infrastructure say that schools such as Sobukwe High must be provided with toilets and electricity by 29 November 2016.

Sobukwe High must also receive reliable water supply by 29 November 2020.

PRACTICAL STEPS YOU CAN TAKE IF YOUR SCHOOL HAS BAD INFRASTRUCTURE

KNOW YOUR NORMS

Familiarise yourself with the norms and standards. Know what your school is entitled to receive, and by when.

KNOW YOUR PROVINCE'S INFRASTRUCTURE PLAN

Each provincial MEC of education must annually provide the Minister of Basic Education with an infrastructure plan stating how they will achieve the norms and standards. The MECs must then report to the Minister every year, on the progress their province has made. Each plan has a project list containing the names of schools that the province intends to assist. Check if your school's name is on the list, and if the infrastructure that the list says your school must receive is correct.

The MEC's provincial infrastructure plans, project lists and progress reports can be obtained on the DBE's website.

If the information on the project list is incorrect, you can approach the civil society organisations set out on page 388 of this book for help.

Lisa Draga is an attorney at the Equal Education Law Centre, and a former Law Clerk for Justice Zakeria Yacoob. She holds an LLB Summa Cum Laude from UWC, and an LLM, Alternative Dispute Resolution from the University of Missouri, Columbia.

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CHAPTER 14

POST PROVISIONING

Sarah Sephton

KEYWORDS

- **Centre for Child Law** The Centre was established in 1998, and is based in the Faculty of Law at the University of Pretoria. The Centre contributes towards the establishment and promotion of the best interests of children in South Africa, through litigation, advocacy, research and education.
- **Educator** The Department of Basic Education defines an educator as 'any person who teaches, educates or trains other persons at an education institution or assists in rendering education services, or who renders education auxiliary or support services provided by or in an education department'. For the purposes of this handbook, we will use the word 'teacher' to stand in for 'educator'.
- **Legal Resources Centre** The LRC is a non-profit law clinic based in South Africa, with offices in Durban, Grahamstown, Cape Town and Johannesburg. The LRC promotes and protects human rights, and offers legal assistance and advice to vulnerable and indigent people.
- **No-fee schools** Public schools that are declared no-fee schools do not charge school fees. The names of the 'no-fee schools' will be published in a Provincial Gazette, and the criteria to determine the 'no-fee schools' will be based on the economic level of the community around the school.
- **Post provisioning** A process that determines the number of teachers allocated to each public school. It ensures that an adequate teacher-to-learner ratio exists in classrooms. This process is expressly required by the relevant legislation governing education.
- **School Governing Body** The South African Schools Act gave parents, teachers and high school students the right to form school governing bodies (SGBs) and to make policies regarding issues such as language, religious instruction, school fees, and a code of conduct for learners. SGBs consist of the principal, elected members (who can be parents of learners in the school, teachers at the school, staff members who are not teachers, and learners at the school) and co-opted members (non-voting members).
- **Learner-to-educator ratio** The learner-to-educator ratio (LER) is the average number of learners per teacher at a specific level of education, or for a specific type of school, in a given school year. Educators include other staff at schools, including principals. In this handbook, we refer to educators as teachers.

OVERVIEW

South Africa is facing an education crisis, and one of the factors contributing to this crisis is the shortage of teachers in many schools. This problem is particularly severe in the Eastern Cape. For the most part, teacher shortages are caused by an incorrect allocation of teachers to schools. As a result, some schools end up with far more teachers than they need, while other schools have too few.

Post provisioning is the name given to the process of assigning teachers to schools across South Africa. It is a mechanism that aims to ensure that each school is allocated the correct number of teachers.

The Member of the Executive Council (MEC) for Education in a province will determine the number and allocation of teacher posts, referred to as the 'teacher-post establishment' or 'post basket'. Once the whole teacher-post establishment is determined for the province, posts are then allocated to schools.

This process is governed by the Employment of Educators Act 76 of 1998, and the policy that comes from it.

In order to determine the correct number of teachers for a particular school, the following factors should be considered:

- The number of learners at the school
- The number of learners with special educational needs at the school
- The number of grades each school caters for
- The subjects offered by a particular school.

Posts are allocated to schools by the Head of the Department of Education. In practice, this is done by an official at the Provincial Department of Education, using a computerised model. The Head of the Department's office will issue each school with an allocation of posts each year. There are then various mechanisms in place that make sure that a teacher is appointed to each of these posts.

If these mechanisms function well, there will not be an issue with teacher shortages in some schools and too many teachers in others. The mechanism should ensure a more equal distribution of teachers to schools. In turn, this will increase the quality of education at these schools.

This chapter will examine the steps that are to be taken – by both the Department of Education and the schools – during the post provisioning process. It outlines the common problems that occur, how these should be addressed, and how to secure the payment of teachers by the Department of Education.

The chapter will also explore ways to compel the Department of Education to fulfil its obligations in terms of the post-provisioning model without resorting to court action. It will conclude with a brief discussion on court cases that have already taken place that deal directly with problems in post provisioning in South Africa.

Lastly, this chapter will discuss why it is important that the post provisioning process works well in terms of addressing inequalities in the education system.

LAW AND POLICY

The Post-Provisioning Process is set out in three pieces of legislation:

- The Employment of Educators Act 76 of 1998 (EEA)
- The South African Schools Act 84 of 1996 (Referred to in this handbook as 'The Schools Act')
- The Labour Relations Act 66 of 1995 (LRA)

It is also necessary to consider the various policies implemented by the Department of Education that come directly from this legislation.

The Post-Provisioning Model (PPM) envisages a process to be followed annually, in which an MEC calculates the number of teaching posts required by the provinces, and the Heads of Department (HODs) calculate the number of teaching posts required by each public school in the province and then allocate teachers to vacant posts. The aim of the PPM is to make sure that all schools are staffed adequately and run optimally.

While the outline of the process is contained in the legislation mentioned above, provinces may depart slightly from the standard model.

CALCULATING POST ESTABLISHMENTS

The process begins with the calculation of the number of posts required by the province.

Section 5(1)(b) of the EEA states that 'the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council'. In other words, before an individual school's post establishment is determined, the MEC must establish the overall provincial post establishment. This is the overall number of posts available for teachers in a particular province that the province can then distribute to schools for the following academic year.

It is only after the MEC for a province has created the provincial post establishment that the HOD of the province can allocate post establishments to individual schools. Individual post establishments provide each school with an indication of the number of teachers allocated to that school, and the post level of the allocated teachers and management staff; for example: one Principal, one Deputy Principal, four Heads of Department and 20 level 1 teachers.

A school's post establishment is supposed to align with the specific needs of each school. The formula for determining the number of teachers needed for each school considers the following:

1. Maximum ideal class size applicable to a specific learning area or phase
2. Number of periods for each teacher
3. Need to promote a learning area
4. The size of the school
5. Number of grades
6. Number of languages of instruction
7. Disabilities of learners
8. Access to curriculum/what subjects are offered
9. Poverty (the department is supposed to place additional teachers at poor schools)
10. Level of funding (from just the DOE).

Although the formula for a school's post establishment is comprehensive, in some instances it can lead to a skewed learner-to-teacher ratio, with some teachers teaching classes with low numbers of learners, while others teach classes of more than 40 learners. The Department of Education has a desired learner-to-teacher ratio of 40:1 in ordinary primary schools, and 35:1 in ordinary secondary schools. This ratio is not in place at all schools across the country, and many schools still suffer from a great shortage of teachers.

Some schools are able to achieve a lower learner-to-teacher ratio if they offer more subjects and if they are able to properly diagnose and identify learners with special needs. This often favours the wealthier schools, who have the resources to identify learners with special needs and who are able to offer more subjects through the use of teachers appointed by the school governing body. Poorer schools are forced to offer a limited number of 'core' subjects due to the low learner numbers and shortage of teachers funded by the provincial education department.

The MEC and HOD are not the only actors in the post-establishment process. They must engage with the recognised unions representing various staff in the education sector. The law states that the provincial post establishment should be decided in consultation with these bodies before the post establishments are created.

The main unions in South Africa are:

- The South African Democratic Teachers Union (SADTU) – largest membership
- The National Professional Teachers' Organisation of South Africa (Naptosa) – second-largest membership
- The South African Teachers Union (in Afrikaans: Suid-Afrikaanse Onderwysersunie) (SAOU).

The HOD requires accurate data from each school in order to determine each school's post establishment. Because factors at schools change, school post establishments are not fixed. These factors include: a change in the number of learners enrolled at a particular school, a change of curriculum, a change to the grading and classification of a school (for example, from no-fee to fee-paying), and financial constraints.

Many of the poorer schools are immediately disadvantaged as they are not able to or do not submit accurate data to the provincial education department – often because of practical hurdles, such as not having phones, faxes or email facilities – and there appears to be little incentive for district offices to ensure that this data is obtained and submitted in the appropriate form. This leaves many schools under-resourced, on an ongoing basis, and discriminates against learners at these schools.

DISTRIBUTION OF POST ESTABLISHMENTS

Once an individual school's post establishment has been created by the HOD, the school is informed, and needs to work with the department to ensure that its posts are filled.

The department must ensure that schools receive their school post establishments by 30 September of the year before the school calendar year to which they apply. Schools use their post allocation to plan for the year ahead, and to decide on their budget. Based on the budget and allocation of teachers, in fee-paying schools the SGB might decide to increase school fees to increase the funds available to hire additional teachers – known as 'school governing-body teachers' – and plan their subject and class allocation for each teacher.

The timeous release of the post allocation is critical to the preparation of the school's budget. The release of a school's post establishment to the school can be done in different ways, including printing and posting the school-establishment letters directly to the school, printing and distributing a letter via the district office, or emailing the school or district office. They are commonly collected by the schools from the district offices.

VACANCIES AND ADVERTISING FOR POSTS

Once the SGB knows their post establishment for the year, they set about filling any vacant posts.

The SGB submits profiles of their vacant substantive (teaching and management) posts to the department. These vacancies are advertised in post bulletins. Post bulletins allow teachers to become aware of the vacancies in public schools. A teacher becomes a potential candidate when he or she submits an application to the department. The application is then forwarded to the relevant SGB for consideration.

Many provinces have a priority placement facility for teachers who received bursaries to study from the department. They are known as Funza Lushaka bursary-holders.

ALLOCATION OF TEACHERS

The allocation of teachers is not altogether straightforward.

Once applications have been sent to a school, it can begin the process of short-listing and interviewing potential candidates. This is done by the SGB. Although the SGB has significant power and discretion with regard to the appointment of teachers, the final power to appoint or transfer a teacher lies with the provincial head of the education department.

These powers and functions are laid out in both the EEA and Section 20 of the Schools Act. This process generally takes a long time, as the applications for each vacancy are first submitted to the department. The department must sort the applications and distribute them to each school. The school has two months within which it must complete the interview and recommendation process.

According to Section 6(3)(a) of the EEA, after SGBs make recommendations for the posts based on their interviews, final appointments of teachers are made by the department. However, there are limitations regarding which teachers the SGBs may recommend for a post. The SGB can only recommend candidates that the HOD has identified as being:

- Suitably qualified for the post concerned
- From a group of teachers identified as being in excess of what is required within a province.

Similarly, the SGB must ensure that its recommendations for appointment take into account Section 6(3)(b) of the EEA, which provides that all appointments and recommendations must be in line with the principles of equity, representation and redress.

The SGB must submit three names to the department for each post. If they submit fewer than three names per post, this must be done through consultation with the HOD.

In order for the recommendations from the SGB to be considered by the department they must conform to conditions set out in Section 6(3)(b)(i)-(v) of the EEA.

These include:

1. The democratic values and principles referred to in section7(1) (equality, equity and the other democratic values and principles in the Constitution of South Africa)
2. Any procedure collectively agreed on or determined by the Minister for the appointment, promotion or transfer
3. Any requirement collectively agreed on or determined by the Minister for the appointment, promotion or transfer
4. A procedure whereby it is established that the candidate is registered or qualifies for registration as a teacher with the South African Council of Educators (SACE)
5. Procedures that would ensure that the recommendation was not obtained through undue influence on the members of the governing body.

If all of these requirements are met, the department may issue a letter of appointment to the recommended teacher. However, if these requirements are not met then the recommendations by the SGB will not be considered.

If this happens, the department (which must also consider the requirements for the appointment of a teacher) may temporarily appoint any suitable candidate on the list, or re-advertise the post. The SGB can appeal this temporary appointment (the process of which will not be dealt with here).

Lastly, if the SGB fails to make a recommendation within two months after it was requested to do so, the EEA provides that the HOD is authorised to make an appointment without a recommendation.

PROBLEMS AND POSSIBLE SOLUTIONS IN POST PROVISIONING

THE DEPARTMENT FAILS TO ADVERTISE VACANT POSTS

When the provincial department fails to fulfil its obligation to advertise posts, there are a number of steps that can be taken by schools to ensure the obligation is fulfilled.

Firstly, if the school's SGB is part of an education-related union, such as the Federation of Governing Bodies of South African Schools (FEDSAS) or SADTU, the school should take up the matter with its union. The union can help to put pressure on the department to advertise vacant posts.

If the school is not associated with a union, or if this approach fails, the school could communicate directly with the department. This might involve writing to the department to highlight the posts allocated to the school in the post establishment, and pointing out that such positions have not been advertised by the department. This step should always be taken prior to litigation, to give the department a chance to fulfil its duty.

Only if the department is unresponsive or makes it clear that it does not intend to fulfil its obligation should schools resort to litigation (going to court). Litigation has been successful in the past.

THE DEPARTMENT ADVERTISES VACANT POSTS BUT FAILS TO MAKE APPOINTMENTS

It may be that the department does advertise the vacant posts, and the SGB of the school may then perform its role of recommending appointments; but then the department fails to make the appointments. In some instances, the department does not make the appointments because it no longer has the budget available to do so.

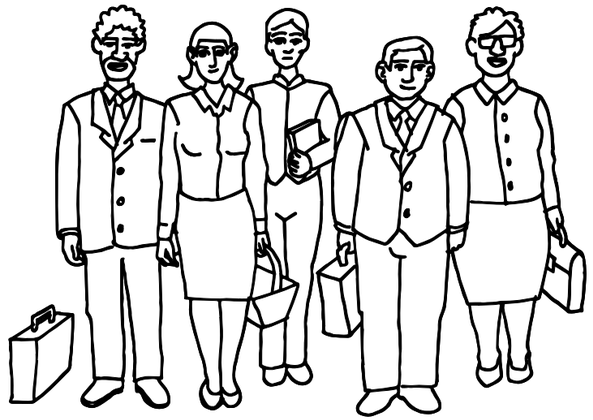
When the department fails to make an appointment, similar steps should be taken as in the situation in which the department fails to advertise at all (described above).

Schools should not simply fill these posts themselves, unless they have the funds to pay the appointed person.

There are many instances in which a school appoints a teacher, and tells that teacher that in due course the department will issue a letter of appointment and pay that teacher.

If a teacher is appointed in this manner, the department may not be obliged to appoint or pay him or her.

It is very important for a school to keep records carefully, in order to reclaim funds or in case litigation may follow. These include records of all communication between the school and the department, the dates of appointment of the teachers, and records of amounts paid by the school to the teachers. Under no circumstances should a school appoint a teacher who is not suitably qualified or for whom they do not have a substantive vacancy.



THE DEPARTMENT APPOINTS BUT DOES NOT PAY TEACHERS

Even when posts have been advertised appropriately by the department, recommendations have been made by the school, and appointments have been made by the department, the department may fail to pay the appointed teachers.

Once again, similar steps to those in the two scenarios above should be taken in order to put pressure on the department to fulfil its obligation. The school should attempt to resolve the issue by taking the matter to the union and approaching the department before proceeding with litigation.

It is very difficult to succeed in forcing the department to pay appointed teachers if no letter of appointment has been issued. This means it is important to ensure that such a letter is issued.

If the department fails to issue a letter of appointment, then the teacher in question must not begin working at the school. It is the responsibility of the teacher in question, as well as of the principal of the school, to ensure that this does not happen.

If there is no letter of appointment, the school and the teacher should proceed on the assumption that the teacher does not have a contract of employment, and should not rely on verbal guarantees by the department that a letter of appointment will be issued. If a teacher begins work without a letter of appointment and the department fails to pay that teacher, there will be no contract to rely on in order to force the department to pay.

CASE STUDIES

There have been a number of important cases concerning the issue of post provisioning in the Eastern Cape. These cases will be discussed below.

CENTRE FOR CHILD LAW

In 2012, a number of schools in the Eastern Cape approached the LRC for assistance with their teacher shortages. The LRC began by writing to the Department of Basic Education to request that the problem be addressed, and that the posts be filled.

The department was unresponsive. The LRC launched an application on behalf of a group of named schools and the Centre for Child Law (CCL), which acted in the interests of all schools in the Eastern Cape.

This decision in this case can be found in the law reports. Its official description is *Centre for Child Law & Others v Minister of Basic Education & Others*.

The relief sought was that the department should fill vacant teaching posts with temporary appointments in the short term; and in the longer term, with permanent appointments. The LRC also asked the department to fill all non-teacher posts, such as cleaners, administrators and office staff.

The matter was settled out of court on all issues (except for that of non-teacher posts, which will not be dealt with in this handbook). The settlement agreement was made an order of court. However, the department largely failed to comply with the court order, except in respect of the appointment and payment of temporary teachers in 2012.

Because the matter had been pursued in the public interest, most of the schools represented were nameless, and it was very difficult to assess the impact on those schools of the department's failure to adhere to the terms of the court order. The LRC decided that the best approach going forward was to enforce the order with regard to approximately 10 schools with which the LRC had a relationship, and where the implementation of the order could be monitored properly.

The impact on these schools due to the department's failure to comply with the court order was that the schools had to appoint teachers out of their own budgets. So the order was enforced by approaching the courts and asking them to force the department to appoint the teachers who had been teaching at the schools, and pay their salaries from the beginning of that year (1 January 2013).

The Grahamstown High Court was approached, and an order was granted by consent. This means that the department agreed to the court order. The teachers were furnished with letters of appointment.

However, the department failed to pay the teachers in accordance with the order. In response, the LRC applied to court for an order that the failure to pay a teacher in terms of a letter of appointment was a debt owed by the state to the teacher in question, in terms of the State Liability Act. In response to the failure to pay, state assets could be attached in repayment of the debt. This technique was successful in forcing the department to pay the schools.

LINKSIDE I

In the aftermath of the Centre for Child Law case, there remained a serious problem with post provisioning in the Eastern Cape.

Once again, the LRC launched proceedings in the Grahamstown High Court, this time on behalf of Linkside High School and approximately 35 other schools. The name of the case is *Linkside and Others v Minister of Basic Education* (known as *Linkside I*).

Once again, the LRC wanted vacant posts to be filled on a temporary basis in the short term, and permanently in the long term. The LRC also wanted the department to reimburse the schools for all payments made by schools (R28 million), in the three preceding years, to teachers who should have been appointed and paid by the government.

Because of the lack of compliance in the Centre for Child Law case, the order in *Linkside I* was formulated to include 'deeming clauses'. This meant that if the department failed to appoint recommended teachers to the posts after a specified period of time, the appointments would be 'deemed to have been made'. The order was granted, and the appointments were made in terms of the deeming clauses.

However, the department failed to reimburse the schools in compliance with the order. Due to the manner in which the LRC had structured the court order, this debt could be recovered through the State Liability Act. The Minister and the MEC's assets at both national and provincial level were 'attached' by the Sheriff to pay off the debt. This technique was successful in forcing the department to reimburse the schools. The final important element of this case was that the LRC applied for certification of an opt-in class action, which was granted by the court. This will be explained below.

LINKSIDE II

Knowing that many more schools were affected by the failures of the post provisioning process, following *Linkside I* the LRC went ahead with a class-action court case in order to address teacher shortages throughout the Eastern Cape.

A class action is an action brought on behalf of a large group of people or entities who are in a similar situation. In this case, a class action was brought on behalf of schools in the Eastern Cape who had substantive vacant posts that had not been filled from 2012 to 2014.

This was an 'opt-in' class action, which can be contrasted with an 'opt-out' class action.

In an opt-in class action, only the parties who expressly indicate that they want to be a part of the class action are included, whereas those who do not express an interest in joining the action are excluded.

The LRC decided on an opt-in class action, because this allowed the schools that wanted representation to approach the LRC with details of their problems. This avoided the problem that was faced in the Centre for Child Law – where the case was brought in the public interest, but the LRC did not know the exact details of the schools they represented, and so the order was difficult to enforce.

The opt-in approach allowed the LRC to have all the necessary details of the schools they represented, and to know exactly which teachers needed to be appointed where, and (where proper records had been kept) how much was owed to each school.

About 80 schools in the Eastern Cape chose to opt in to the class action. The order in *Linkside II* was constructed similarly to that in *Linkside I* – with deeming clauses, and that state assets could be attached to enforce reimbursement to schools. This was crucial for effective enforcement of the order.

The outcome of the case was that all the named teachers were appointed to the vacant posts, and about R82 million was paid out to the schools. The only outstanding clause of the court order, with which the department failed to comply, was the publishing of an open-teacher-post bulletin advertising the vacant positions at schools.

The LRC then went back to court to institute 'contempt of court' proceedings. The bulletin was finally published on 1 April 2016. This was the first open-teacher-post bulletin published in the Eastern Cape since 2012. Most of the provinces publish teacher-post bulletins on a regular basis.

One interesting aspect of *Linkside II*, and a novel approach in South African law, was to ask the court to order that the department appoint a 'claims administrator'.

The court ordered that a registered chartered accountant act as a claims administrator to receive the R82 million from the department and distribute the amounts payable to individual schools. The claims administrator had to verify each school's claim and then pay them the appropriate amount. This meant that no claim was paid unless the school had the paperwork to confirm that they had the vacancy on their post establishment, that the teacher had been appointed and had been paid by them (proof of payment was critical).

On the whole, *Linkside II* was a resounding success; but it did not benefit poorer schools that were not able to join the class action, or did not have the paperwork to support their claims.

CASE STUDY

MTHATHA IN THE EASTERN CAPE

Lawyers from the Legal Resources Centre recently visited schools in the Mthatha area. The visit revealed that many schools had requested the Eastern Cape Department of Basic Education to assess the learners, but had received little or no feedback from them.

In some instances the schools had been notified that assessments would be conducted, but on the day of assessment there was such an overwhelming number of learners who had to be assessed that the officials from the department refused to assess anyone.

During the visit by the LRC, principals and teachers also complained that they do not have the capacity to accommodate children who are struggling, as they are already coping with overcrowded classrooms. Some teachers reported staying behind in the afternoons to assist special-needs learners in their own time, while others expressed the need for a class assistant to accommodate the special-needs learners.

Schools reported that in many instances, learners with special needs end up leaving the school system prematurely because their parents realise that they will not be able to finish their education without much-needed assistance. Many of these learners often display disciplinary problems in class, as they are unable to cope with the work. Schools reported that drug abuse was especially high among the special-needs learners.

The failure of the department to have learners assessed by educational psychologists and medical professionals to determine their education needs clearly infringes on learners' constitutional right to basic education.

Schools are not afforded a weighting that can be used to adapt the school's post provisioning in order to ensure that they are provided with extra teachers to assist special-needs learners

(This section on the rights of learners with special education needs was compiled with the assistance of Cecile van Schalkwyk, Candidate Attorney, Legal Resources Centre)

RIGHTS OF LEARNERS WITH SPECIAL EDUCATION NEEDS

The systematic dysfunction of the current South African education system has a disproportionately unequal impact on learners with special education needs.

The number of public schools that make specific provision for learners with special needs is inadequate, and children with special education needs are often accommodated within the mainstream education system. This places a burden on teachers, who are expected to teach in already overcrowded classrooms while accommodating learners who require specialist attention.

In order to address this problem, the Department of Basic Education (DBE) has published a distribution model for the allocation of educator posts to schools. The model provides for learners with disabilities or educational challenges to be allocated a weighting that reflects their relative need in terms of post provisioning.

Before a weighting can be given to a learner, the learner must be assessed in terms of the National Strategy on Screening, Identification, Assessment and Support, which forms part of the implementation of Education White Paper 6 – Special Needs Education.

The post provisioning of the school must then be adapted, to ensure that there are more teachers available to accommodate the learners with special needs. However, the DBE is failing to assess learners who have been identified as requiring special-needs education. Without the proper assessment, schools are unable to adapt their post provisioning to reflect the educator needs of their learners.

Chapter 5 deals in detail with the issues of learners with disabilities.

THE IMPORTANCE OF POST PROVISIONING

Post provisioning, particularly in the Eastern Cape, does not always function as it should.

The Eastern Cape is a province made up of a number of former 'homelands' and historically its schools are overcrowded and poorly resourced. This has a resulted in a dominant rural populace, with poor service provision and a dependency on migrant labour.

Post provisioning works best in the Western Cape and Gauteng. Both have strong administrations, and are home to South Africa's wealthier cities. Their populations are predominantly urban and peri-urban, and able to access better services than their rural counterparts.

The additional difficulty faced in the Eastern Cape is that rapid urbanisation has resulted in many rural schools losing learners who move with their families to the cities. These schools are often left with a skewed learner-to-teacher ratio (too few learners and too many teachers).

There are also many small schools in the province where more than one grade is taught at the same time, in the same class, by one teacher. They are usually inadequately resourced.

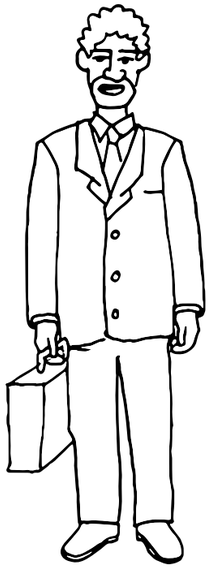
The Eastern Cape has had a problem in getting teachers to move from the schools where they are teaching to schools where they may be needed. The teachers resist being moved to other schools, and they are usually aided by teacher unions.

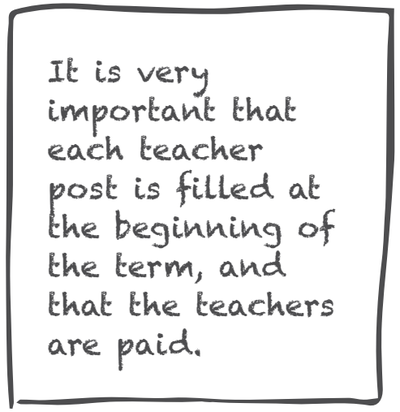
The failure to deal decisively with 'teachers in addition' – in other words, excess teachers, also known as 'double parking' – places a huge burden on the budget of the department. These teachers are paid, but are not where they are needed. This means that additional teachers must be appointed and paid where there are vacancies. This is usually the reason that posts are not advertised, as the budget is already overburdened by teachers in addition.

Also, parents and learners vote with their feet, and move to better-performing schools. These schools often become overcrowded, because the teachers do not move with the learners. Some of the most overcrowded schools achieve excellent results, but these are difficult to maintain with too few teachers and too few classrooms.

Stark inequalities are also seen between better-resourced schools that cater to wealthier income groups, and the no-fee schools catering to poorer income groups.

Many schools that have been allocated posts are not able to fill these posts, because the department fails to publish





regular bulletins. They have a large number of vacant positions. To deal with a shortage of teachers they increase their class size, employ additional teachers, ask parents to step in and look after a class, or ask teachers to volunteer to teach these classes. Wealthier schools address this problem by increasing school fees, and paying teachers (who should have been appointed by the department) themselves. In some instances, schools spend their budget on filling teacher positions and are then unable to afford other essential services, such as security; and maintaining the school may no longer be a priority, resulting in a deterioration of the building and grounds.

However, no-fee schools are the worst affected. They cannot afford to hire extra teachers on their own budgets. Many of these schools will ask for a registration fee or a 'donation' from parents in order to pay a teacher a small stipend (a small amount of money to be used for transport and food, but not equal to a salary earned by other teachers). Some simply fail to employ the required number of teachers, and learners have to share teachers across different grades, or are taught by teachers who are not trained to teach a particular subject. Many schools have had to reduce the number of subjects they offer.

In other instances, teachers feel compelled to work for no pay, or accept a salary that only covers the cost of transport to and from school, hoping that the Department of Education will pay them at a later stage.

The failure to fill vacancies also has a negative impact on the teachers, who may be qualified but are not appointed by the department. Working for a small stipend instead of a proper salary has a negative impact on the morale of teachers, who are often unable to pay their own bills and feed their families. The proper appointment and payment of teachers is vitally important.

It is very important that each teacher post is filled at the beginning of the term, and that the teachers are paid. For this to happen, regular open-post bulletins must be published. The movement of teachers due to retirement, death and between schools can be catered for in this way. Proper planning by both schools and the department should ensure that the appropriate number of teachers is placed at each school, and that these posts are filled.

This is a goal supported by the Department of Education and teacher unions; but problems in implementing steps to achieve this goal are common, especially in the Eastern Cape.

Sarah Sephton was appointed as the Director of the Legal Resources Centre's Grahamstown office in 2003. In 2015, she undertook her pupillage and was admitted to the bar. During her time at the LRC, Sephton litigated extensively on the constitutional right to education, successfully securing valuable resources for many schools in the Eastern Cape.

This publication is based on legal papers drafted by the Legal Resources Centre for the purpose of litigation on post provisioning. Only one of these cases has been reported in the Law Reports. The author was the attorney of record in this litigation.

CASES

Centre for Child Law & Others v Minister of Basic Education & Others 2013 (3) SA 183 (ECG); 2012 ZAECGHC 60.*

Linkside and Others v Minister of Basic Education and Others 2015 ZAECGHC 36.

CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

The Employment of Educators Act 76 of 1998.

The South African Schools Act 84 of 1996.

The Labour Relations Act 66 of 1995.

* See also subsequent unreported litigation dealing with the enforcement of this order and the payment of teachers.

CHAPTER 15

TEXTBOOKS

Nikki Stein

KEYWORDS

Textbooks fall into the broader category of learner teacher support materials (LTSM). The National Department of Basic Education distinguishes between these different types of LTSM as follows:

- **Textbooks:** the textbooks provided to learners for each of their learning areas contain the content of their curriculum, and exercises and practice material to assist learners in grasping that content. The purpose of the textbook is therefore to supplement what the teacher covers during class time. Learners can then work from their textbooks to process that material, by completing the activities in separate exercise books.
- **Workbooks:** unlike textbooks, workbooks contain only exercises and activities, which are designed to test learners' knowledge of the curriculum. The exercises in the workbooks are designed to mirror what learners cover during class time, and learners complete the activities in the workbooks themselves. The workbooks can therefore only be effective if learners use them together with their prescribed textbooks, so that they have the content of the curriculum contained in their textbooks and the accompanying exercises to assist in processing, consolidating and absorbing that curriculum. Learners in Grades R to 9 receive workbooks for certain learning areas. New workbooks are provided to learners in each academic year, and are theirs to keep.
- **Additional LTSM for mathematics and physical science:** in addition to textbooks and workbooks provided to learners, the Department of Education provides additional learning materials for physical science and mathematics. These are sometimes referred to as the 'Siyavula books'. The Siyavula books are not intended to replace textbooks and workbooks, but rather to supplement the LTSM learners receive in these particularly challenging learning areas.

LTSM also includes stationery, which is necessary for the teaching and learning process. The provision of stationery, however, is beyond the scope of this chapter.

The LTSM provided to learners is closely related to the school curriculum, and the textbooks and workbooks they receive must ensure that by the end of the academic year, they understand the content of the curriculum and are able to apply it.

The lifespan of a textbook is five years. This means that learners must return their textbooks to their schools at the end of each academic year, and the textbooks will then be provided to the incoming class in the following academic year. The Department of Education does not provide new textbooks for each learner every year.

However, if there are not enough textbooks for each learner to have his or her own book for each learning area, the Department of Education must deliver as many textbooks as are required. For example, if books are lost or damaged, or if there is an increase in learner enrolment at a particular school, the Department of Education must deliver the number of textbooks necessary to ensure that every learner has his or her own textbook for every learning area.

The Department of Education refers to these textbooks as 'top-up' textbooks, meaning that although many learners already have their prescribed LTSM, the department must deliver additional books to match the number of learners at the school.

INTRODUCTION

The inclusion in our Constitution of the right to basic education is critical in allowing our children to unlock their full potential, and is therefore an important vehicle for the achievement of equality in our society. But what exactly is a basic education? What does the right include?

In short, there is no one catch-all aspect of basic education that renders all other components meaningless. Rather, realisation of the right to education requires a basketful of different elements. In this chapter, we discuss the importance of one of these key elements: textbooks.

Nic Spaull, an economic researcher working on education and social policy, has described the importance of textbooks as follows:

> Textbooks are a fundamental resource to both teachers and learners. Teachers can use textbooks for lesson-planning purposes, as a source of exercises and examples, and also as a measure of curriculum coverage. Learners can use textbooks to 'read ahead' if they have sufficiently mastered the current topic, preventing gifted learners from being held back. Textbooks can, to a certain extent, also mitigate the effect of a bad teacher since they facilitate independent learning.

He continues:

> Given that the reading-performance gains to reading textbooks are only evident when learners either have their own textbooks or share with not more than one other, policy should focus on ensuring that no learner need share with more than one learner. Given the well-defined and relatively low cost of this policy option, it would seem that providing reading textbooks where they are in short supply – particularly in poor schools – is the low-hanging fruit of the South African primary education system.

The Supreme Court of Appeal has held that every learner is entitled to his or her own textbook for every learning area. The focus of this chapter is on the circumstances leading up to this finding, and on its implications.

LAW AND POLICY

The right to textbooks is part of the broader right to basic education, as guaranteed by Section 29(1)(a) of the Constitution. This broad provision does not specify exactly what the right to basic education entails, but our courts have clarified (in the judgments we discuss below) that textbooks are a core component of the right. In other words, a failure by the state to ensure that every learner has all of his or her prescribed textbooks is in breach of the right.

SOUTH AFRICAN SCHOOLS ACT

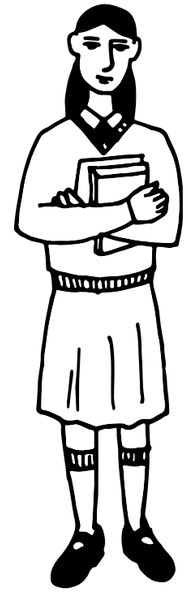
The South African Schools Act 84 of 1996 sets out general obligations in the delivery of the right to education. These obligations are divided between:

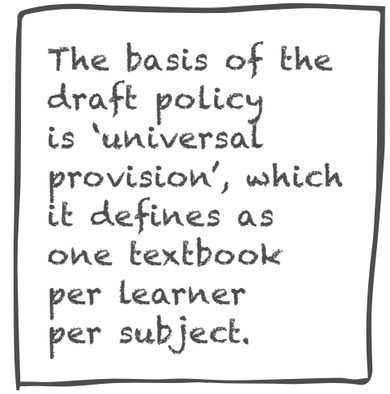
- The national Department of Basic Education, which sets policies
- The provincial education departments, which are responsible for the implementation of these policies
- The school principal, who is the representative of the provincial education department in each school
- The school governing body, which is akin to a mini-government in each school, and is responsible for promoting and protecting the best interests of the community in which the school is situated.

We discuss the relationship between these different actors elsewhere in this book.

For the purposes of textbooks, the following provisions of the Schools Act are relevant:

- Section 5A requires the National Minister of Basic Education to prescribe norms and standards for the provision of learning and teaching support material. This includes the provision of stationery and supplies; learning material; teaching material and equipment; apparatus for science, technology, life science and mathematics; electronic equipment; and school furniture and other school equipment
- The Member of the Executive Council responsible for education in each province is responsible for the delivery of basic education in each province according to these norms and standards, among others. This includes the provision of sufficient funding to each school to cover its day-to-day expenses, including some of the materials referred to in Section 5A of the Schools Act. It also includes the obligation to procure and deliver textbooks for all learners attending public school in the province, unless that power has been conferred on the school governing body as discussed below
- As its name suggests, the school governing body (SGB) is responsible for the governance of the school. The school governing body's powers generally extend to the adoption of codes of conduct, an admission policy and a language policy for the school. Section 21 of the Schools Act allows the head of the Provincial Education Department (PED) to confer additional powers on the school governing body, including the power to purchase textbooks, educational materials and equipment for the school. If the school governing body has the necessary capacity, therefore, the provincial education department will provide the necessary funds to arrange the procurement and delivery of textbooks, rather than performing the function itself.





DRAFT LTSM POLICY

In 2014, the national Department of Basic Education published a draft policy on the provision and management of LTSM. Its purpose is to guide the provision and management of all LTSM, including textbooks.

The draft policy makes a distinction between core learning materials and supplementary learning materials, defining each as follows:

- **Core LTSM** refers to the category of LTSM that is central to teaching the entire curriculum of a subject for a grade. Generally, this would comprise a textbook/learner book, workbook and teacher guide. For the Foundation and Intermediate Phases, this includes graded readers. In the Intermediate Phase, this includes a core reader for the teaching of literature. In the Senior Phase, this includes a core reader and a novel for the teaching of literature. For Further Education and Training, this includes set works. These are to be procured centrally by each provincial education department.
- **Supplementary LTSM** refers to LTSM in addition to the core LTSM, and is generally used to enhance a specific part of the curriculum. Examples include a geography atlas; dictionaries; science, technology, mathematics, and biology apparatus; electronic/technical equipment; etc. These will be procured by individual schools.

The basis of the draft policy is 'universal provision', which it defines as one textbook per learner per subject. It therefore aims to achieve complete access to diverse and good-quality LTSM. It does so through two avenues: supply of new textbooks by the provincial education department, and retention of textbooks from year to year by individual schools.

To achieve the best-quality materials at the lowest cost, the draft policy supports decentralised development and centralised procurement. In other words, LTSM will be developed from a broad range of sources, to ensure a high quality of materials. However, procurement will take place centrally at a provincial level – rather than through individual schools – because this would be more cost-effective.

At the time of writing this chapter, the policy had not yet been finalised.

RELEVANT CASE LAW

In 2012, the Department of Education introduced the CAPS curriculum. CAPS stands for Curriculum and Assessment Policy Statements. It replaced the previous Revised National Curriculum Statements (RNCS).

Because the curriculum changed, the Department of Education (DOE) was required to provide new textbooks, which covered the new curriculum. In addition, the CAPS curriculum aimed at increasing learners' use of textbooks, so that they would be able to rely less on teachers in circumstances of poor content knowledge, poor communication, and poor school conditions, including overcrowding.

To avoid having to provide new textbooks to every learner in the country at the same time, the department introduced the CAPS curriculum over a period of three years; it was introduced to:

- learners in Grades R, 1, 2, 3 and 10 in 2012
- learners in Grades 4, 5, 6 and 11 in 2013
- learners in Grades 7, 8, 9 and 12 in 2014.

In 2012, however, learners in Limpopo were not provided with any CAPS textbooks. It emerged that, for various reasons, neither the national nor the provincial departments of education had ever ordered CAPS textbooks from publishers.

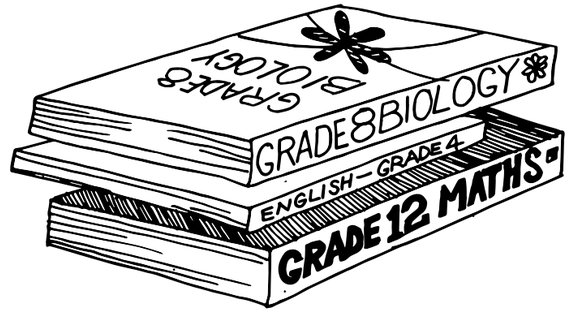
Following several broken promises by the Department of Education to procure textbooks urgently, SECTION27 – together with the principal of a secondary school in Giyani, and the mother of learners at a primary school in Thohoyandou – approached the North Gauteng High Court to compel the Department to deliver textbooks. They also sought the development and implementation of a catch-up plan for Grade 10 learners, which would involve extra teaching time to make up for the lost teaching time for the period during which learners did not have access to their prescribed textbooks.

The matter came before Judge Jody Kollapen in the High Court. In granting the relief sought by the applicants, Judge Kollapen held that:

> [T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education, and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.

Judge Kollapen concluded on this basis that the Department of Education's failure to provide textbooks was a violation of learners' right to basic education. He ordered the Department to deliver all textbooks by no later than 15 June 2012, and to develop and implement a catch-up plan for Grade 10 learners.

Although the Department of Education delivered some textbooks to learners in Grades 1, 2, 3 and 10, it persisted in its failure to ensure that every learner had his or her own textbook for every learning area. The reports of textbook shortages that SECTION27 continued to receive were inconsistent with reports from the



Department of Education that it had achieved 99% delivery by 28 June 2012.

To reconcile these differences, the parties appointed a verification team, led by Professor Mary Metcalfe, to assess the state of textbook delivery as at 28 June 2012. The verification team found that out of a sample of 10% of the schools in Limpopo, 22.1% had not received all of their textbooks by 11 July 2012.

Despite demands for a thorough audit of textbook delivery across all schools in Limpopo, and urgent delivery of all outstanding textbooks, there was little to no improvement in textbook delivery following the verification report.

The applicants who had brought the first textbooks case therefore approached the North Gauteng High Court again, seeking an order compelling complete delivery of all outstanding textbooks for 2012. They also sought an order compelling complete textbook delivery for 2013 (in which year the CAPS curriculum would be introduced to Grades 4, 5, 6 and 11) by 15 December 2012.

The Court confirmed that every learner is entitled to his or her own textbook for every learning area. While the extent of the Department of Education's non-delivery of textbooks was not clear, what was clear was that it had failed to provide each learner with all of his or her prescribed textbooks.

This judgment was therefore an important step in defining the right to textbooks as a right that accrues to each individual learner. This was an important stepping-stone for what followed.

BASIC EDUCATION FOR ALL & OTHERS V MINISTER OF BASIC EDUCATION & OTHERS (HIGH COURT)

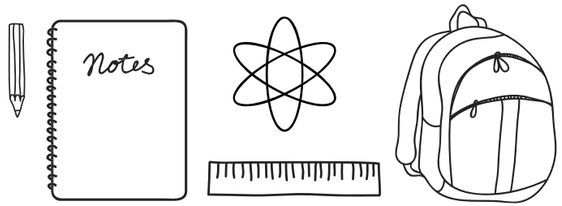
By 2014, the problems with textbook procurement and delivery had still not been resolved. Although textbook delivery had improved, there were still widespread reports of significant shortages across Limpopo. Although the schools concerned had reported their shortages to the Department of Education, no remedial action had been taken.

Basic Education for All (BEFA – a community-based organisation that had formed in response to the 2012 textbooks crisis), together with 18 schools that had not received all of their textbooks, therefore approached the North Gauteng High Court once more to compel textbook delivery.

There were textbook shortages across all grades – all of which, at that stage, had already started the CAPS curriculum. What this means is that the shortages arose from a failure to deliver all of the required textbooks in 2012, 2013 and 2014.

The Department of Education raised two primary defences: first, that they had insufficient funds to purchase all of the required textbooks; and second, that the principals of schools in Limpopo had failed to follow the prescribed mechanisms for reporting shortages. Even though the Department knew about the shortages, therefore, they argued that the principals' failure to report the shortages in line with the rigid processes prescribed excused the Department from acting on these reports.

The Court held that the question of whether there was a violation of rights 'does not really seem to me to be controversial any more'. The starting point of the judgment was therefore that 'the Constitution requires that every learner have every textbook that he or she requires before the teacher begins with that part of the curriculum to which the textbook relates. That usually, if not



always, means that all the textbooks must be available to all the learners on the first day of the academic year'.

On the importance of textbooks in the realisation of the right to education, the Court held that '[b]ooks are the essential tools, even weapons, of free people'. The Court continued:

> It is argued by the [Department of Education] that the teacher can fulfil the functions of a textbook. This is of course true up to a point. But again, the resources are complementary. What a teacher tells her class is ephemeral, and subject to the perceptions, preconceptions and worldview [sic] of the individual teacher. An inattentive pupil may miss entirely what the teacher is saying, with no way of retrieving the information being imparted. Notes prepared by teachers will vary in quality from one individual to another. The absence of textbooks places an additional workload on the teacher. And there is evidence before me that in some schools in Limpopo, there are no copying facilities.

Turning to the individual right of every learner to all of his or her textbooks, the Court held as follows:

> The delivery of textbooks to certain learners but not others cannot constitute fulfilment of the right. Section 29(1)(a) confers the right of a basic education to everyone. If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It doesn't matter at this level of the enquiry that all the other learners have been given their books.

The effect of this judgment is that as long as there is even one learner without all of his or her prescribed textbooks, the state is in breach of its constitutional obligations.

The Department of Education appealed to the Supreme Court of Appeal. Their argument on appeal was that even if they did not provide a learner with each of his or her prescribed textbooks for each academic year, this would not be in breach of the right to basic education. In other words, they argued that if the court imposed on them a legal obligation to provide every learner with his or her own textbooks, this would create a standard of perfection that would be impossible for them to meet.

MINISTER OF BASIC EDUCATION AND OTHERS V BASIC EDUCATION FOR ALL AND OTHERS (SUPREME COURT OF APPEAL)

The Supreme Court of Appeal rejected the argument made by the Department of Basic Education that they could not be expected to deliver a complete set of prescribed textbooks to every learner before the start of the academic year. The Department argued that it was doing its best to ensure complete textbook delivery, and that circumstances beyond its control had rendered this impossible.

The Court did not accept this, and stated as follows:

> The truth is that the DBE's management plan was inadequate and its logistical ability woeful. One would have expected proper planning before the implementation of the new curriculum. This does not appear to have occurred. The DBE also had a three-year implementation period during which it could have conducted proper budgetary planning, perfected its database, and ensured accuracy in procurement and efficiency in delivery. It achieved exactly the opposite, and blamed all and sundry.

The Court confirmed that the failure to provide textbooks was a violation of the right to education, particularly in the case of vulnerable children living in rural areas, but also set out in detail why it constitutes unfair discrimination:

> Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools, or copy from a blackboard, which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty-stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home, and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.

These decisions have made it clear that every learner is entitled to a textbook for every learning area. To the extent that the state does not meet this obligation, it is in breach of the right to basic education, as well as the right against unfair discrimination.

LEGAL AND PHILOSOPHICAL DEBATES

ELECTRONIC RESOURCES AND THE RIGHT TO EDUCATION

Some provincial education departments have started to introduce electronic resources – such as laptops and tablets – into schools. For example, in 2015 the MEC for Education in Gauteng, Panyaza Lesufi, piloted the use of tablets in seven township schools in Gauteng.

In his 2016 state of the province address, MEC Lesufi confirmed his commitment to ensuring increased access to electronic resources in Gauteng.

While it is important to keep up with technological advances, electronic resources cannot be seen as a replacement for more traditional LTSM, particularly given the following considerations:

- Many schools do not have reliable and uninterrupted access to electricity, particularly in the rural areas
- Even fewer schools have reliable access to the internet
- There is a misconception that electronic resources can replace hard-copy textbooks and workbooks for learners and teachers with visual impairments. However, these cannot effectively replace Braille materials. Learners must be provided with Braille materials over and above any electronic resources
- Adequate teacher training, so that teachers can use these resources effectively, must accompany the use of technology.

While the use of technology is a positive move, it cannot on its own improve the quality of basic education. These additional considerations must be addressed as well.

PROVISION OF TEXTBOOKS TO LEARNERS WITH VISUAL IMPAIRMENTS

There is currently no uniform strategy for providing Braille textbooks to learners (and teachers) with visual impairments. This means that blind and partially sighted learners do not have access to any of their prescribed texts unless exceptional circumstances exist.

The Supreme Court of Appeal confirmed in its November 2015 judgment that every learner is entitled to his or her own textbook for every learning area. A failure by the Department of Education to provide textbooks in line with this standard is therefore a violation of the right to education.

Section 9 of the Constitution further prohibits unfair discrimination on the grounds of disability, and requires the state to take positive steps to promote the achievement of equality through steps designed to advance persons, or groups of persons, disadvantaged by unfair discrimination. This includes people with disabilities.

It follows that the Department of Education is under a clear obligation to provide textbooks to learners with visual impairments in an accessible format (namely, Braille or large print). There are certain practical considerations to be taken into account in this regard:

- It takes longer to produce Braille textbooks than it does to produce printed textbooks. One of the reasons for this is that many textbooks are not available in electronic formats; they must be transcribed letter-for-letter into Braille. This is obviously very time-consuming and resource-intensive. However, it is not an adequate excuse to deny Braille textbooks to learners with visual impairments. The problem must be addressed through adequate planning and resource allocation
- Braille textbooks are also more expensive to produce than ordinary textbooks. However, this too is not an adequate justification for not providing them, for two reasons. Firstly, the nature of the right to basic education (discussed elsewhere in this book) is such that it is not subject to available resources. Secondly, the fact that Braille textbooks are expensive cannot justify unfairly discriminating against learners with visual impairments by denying them this core component of their right to education.

Learners with visual impairments are also often more reliant on their reading materials; for example, when they cannot easily see the blackboard. In addition, given the lack of braillers – equivalent to pen and paper at school for a blind child – learners are far more reliant on their textbooks and the notes prepared for them.

There can be no doubt that there is an obligation on the Department of Education to provide these essential materials to learners with visual impairments, and that their continued failure to do so is in breach of the right to basic education, as well as unfairly discriminating against this vulnerable group.

MONITORING THE IMPLEMENTATION OF THE TEXTBOOK CASE

BEFA and SECTION27 continued with advocacy work after the success of the textbook case in the Supreme Court of Appeal. This was to ensure that communities in Limpopo were aware of their right to quality basic education and that each and every learner is entitled to a textbook in each of his/her subjects. SECTION27 and BEFA are also monitoring whether there are continuing textbooks shortages at schools in Limpopo Provinces. This involves:

- Engaging tribal authorities
- Engaging the Limpopo Department of Education (LDOE)
- Engaging school children
- Using community and mainstream media
- Engaging high-profile individuals
- Using pamphlets and posters
- Having roadshows in high-traffic areas
- Door-to-door campaigns and taxi rank mobilisation
- Engaging public sector healthcare users
- Engaging religious groupings

The organisations visited all five districts in Limpopo in early 2016: Capricorn, Vhembe, Waterberg, Sekhukhune and Mopani. The table below details the shortages reported. All shortages were passed on to the LDOE. BEFA and SECTION27 will continue to work with people of Limpopo Province to report textbook shortages.

District	Textbooks shortages reported
Mopani	4 961
Capricorn	4 333
Vhembe	5 551
Waterberg	6 454
Sekhukhune	17 538
TOTAL	**38, 837**

HOW TO REPORT TEXTBOOK SHORTAGES

If you have textbook shortages at your school, **SMS 'textbooks' to 44984** to report them.

SYSTEMS FOR REPORTING TEXTBOOK SHORTAGES

While many of the provincial education departments have systems in place for reporting textbook shortages, these systems are often inadequate. They prescribe rigid procedures that are difficult to follow.

For example, many provinces rely on reports sent via fax or e-mail. Access to these resources is extremely limited, particularly in the rural areas. In addition, the system allows only teachers or school principals to report shortages. This means learners must rely on the staff at their schools to secure this essential learning tool. Because teachers and principals do not always report the shortages in time or at all, this system does not always ensure that the needs of these learners are met.

Systems to report shortages must be flexible, and must take into account the schools' actual access to resources. In addition, there must be a way for learners to report textbook shortages directly.

THE LINK BETWEEN SCHOOL INFRASTRUCTURE AND LTSM

It is clear that there is not one single component of the right to education that, without all of the other components being provided, will ensure that learners receive a quality basic education. Each and every part of basic education discussed in this book is critical to ensuring that learners' rights to basic education are realised.

There is a close relationship between school infrastructure and access to textbooks. School infrastructure affects textbook procurement, delivery and storage. Consider the following examples:

A number of rural schools are located in areas that are difficult to access by road. Where the roads are not tarred, or they are in poor condition, they become even more difficult to use during heavy rains. Trucks delivering textbooks may not be able to get to all of these schools. This also means that officials from the district and circuit offices of the Department of Education cannot easily access schools to communicate with them and address any problems that may arise.

Where schools have not been provided with appropriate infrastructure, they often use makeshift structures for classrooms and storage to protect them from the elements, such as rain, sun and wind. But these don't always provide appropriate storage space. At the end of 2012, while there was an improvement in textbook delivery for the 2013 school year, many schools did not have appropriate spaces to store the textbooks during the rainy holiday season. A large number of books were destroyed after floods in Limpopo, because of the inadequate infrastructure at these schools.

The education departments' existing methods for reporting textbook shortages rely on good communication infrastructure. Schools are required to fax or e-mail forms indicating their shortages, or to phone a hotline to record their book shortages. The reality, however, is that the communication infrastructure at schools may render this impossible. During her verification process, Professor Metcalfe found that in 2009/10, 2.7% of schools in Limpopo had an e-mail address, 23.6% had a fax machine and 28.4% had a landline. In other words, only a very small number of schools would be able to report their textbook shortages through the prescribed methods.

This illustrates the close relationship between all of the elements of basic education. Until all of these elements are provided, the state will not have met its obligations under Section 29 of the Constitution.

Nikki Stein is a member of the Johannesburg Bar and works as in-house counsel at SECTION27.

CASES

Basic Education For All & Others v Minister of Basic Education & Others 2014 (4) SA 274 (GP); 2014 ZAGPPHC 251.

Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA); 2015 ZASCA 198.

SECTION27 and Others v Minister of Basic Education and Another 2013 (2) SA 40 (GNP); [2012] ZAGPPHC 114.

SECTION27 and Others v Minister of Basic Education and Another, Case No 24565/12, 4 October 2012.

CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

South African Schools Act 84 of 1996.

POLICY AND GUIDELINES

Department of Basic Education 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material', 2014.

SOURCE MATERIAL AND FURTHER READING

TF Hodgson & S Khumalo 'Left In The Dark: Failure to provide access to quality education to blind and partially sighted learners in South Africa', 2015.

South African Human Rights Commission 'Report: Delivery of Primary Learning Materials to Schools' (2014).

N Spaull 'Equity & Efficiency in South African Primary Schools: A Preliminary Analysis of SACMEQ III South Africa' (2012).

M Metcalfe *et al* 'Report: Verification of Text Books Deliveries in Limpopo' (2012).

The Presidency of the Republic of South Africa 'Report of the Presidential Task Team Established to Investigate the Non-Delivery and/or Delays in the Delivery of Learner Teacher Support Material (LTSM) in Limpopo Schools' (2012).

CHAPTER 16

SCHOLAR TRANSPORT

Solminic Joseph and Julian Carpenter

OVERVIEW

Every day, millions of learners hoping to better themselves through education wake up early to get to school. But for learners who have long distances to travel, the journey can be much more difficult.

Scholar transport is a necessary and integral part of the right to basic education, but learners who cannot get transport suffer – particularly those in rural South Africa. In *Juma Musjid* the Constitutional Court described the right to basic education as follows:

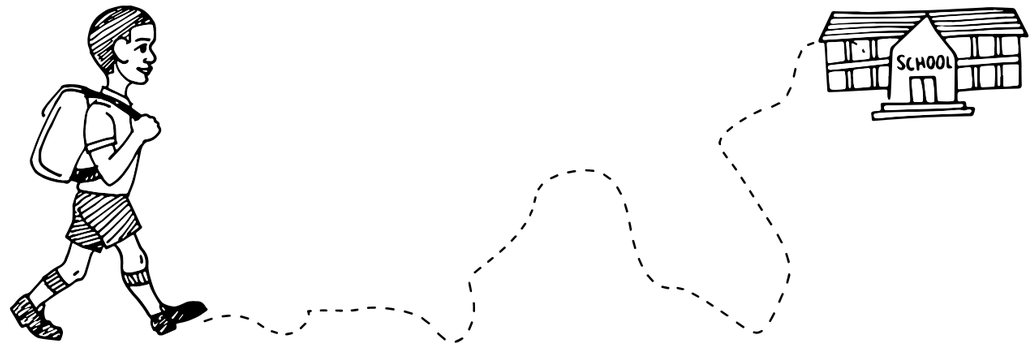
> [The right to a] basic education is an important socioeconomic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning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

Looking at the backdrop to the scholar transport problem, one can appreciate its scale.

According to the 2013 National Household Travel Survey, published by Statistics South Africa, of the 17.4 million learners who attended educational institutions, about 11 million walked all the way.

In KwaZulu-Natal (KZN) alone, where more learners walk to school than in any other province, over two million primary and secondary school learners walked all the way to school. Of these learners, more than 210 000 walk for more than an hour in one direction, and 659 000 walk for between 30 minutes and an hour each way.

Learners face serious challenges on their journeys to and from school, all of which can hurt academic performance. They are often faced with long, tiring treks to class, dangerous weather which damages textbooks, and violence which hurts them physically or emotionally.



DISTANCE

Through Equal Education's (EE) work in KZN, we have met learners who commute over 13 kilometres one way to school – a round-trip of 26 kilometres. This requires them to wake up just after 3am to start preparing. For many learners in rural areas, their mornings also include chores such as fetching water and herding cattle to grazing fields.

When walking to school, learners sometimes have to cross dangerous, mountainous terrain, in which they encounter snakes and sharp rocks. Learners must endure torrential downpours and cross rushing rivers to get to class.

The tragic consequence of this became clear to Equal Education when a learner at Hlubi High School in KZN recounted how she saw a primary school learner drown after being swept away by the river. Her emotions raw, she explained how she was gripped by fear and unable to help the young learner, as she could not swim. She recounted how she imagines the learner in her silent moments, and how this experience affects her still.

In statements to EE, learners explained that they had limited or no shelter to protect themselves on their commute, and that they feared being struck by lightning every time they walked in the rain.

SAFETY

The safety of learners is also threatened by criminals.

A young female learner told EE of her ordeal one afternoon on the way home.

> When we were about an hour and a half away from the school we were walking in an open area when the man grabbed me. The man raped me … The man was waiting for us close to the river. He grabbed the girl that was walking with me and beat her. She ran away. After he beat my friend, he grabbed me and choked me and then raped me. He didn't rape the other girl. She ran away… [Now] I struggle to concentrate in class. Every time when school is about to end, I am worried and scared, because I have to walk home.

Another female learner explained how she and some friends were offered a lift by a man in a bakkie while walking home. They accepted the lift because they were tired. The driver dropped her friends off but kept her in the truck. He sped off with her, and she became very scared. She struggled and managed to jump out of the speeding vehicle, waking later in hospital, having suffered a broken arm and other injuries.

Violence against children is a blight on the conscience of South Africa, and an indictment of our society. Children occupy a special place in society. They are the future of a nation, and their protection is key to its future prosperity. But every year, thousands of learners fall victim to neglect or various forms of violence, including rape and murder.

The South African Constitution recognises the special place of children through specific rights and protections. The Constitution goes so far as to state that in all matters concerning children, their best interest is of paramount importance.

Children who walk long distances to school face very real and ever-present dangers. These dangers can strip them of their identity, their dignity, and possibly their lives.

But they are avoidable dangers. Safe and reliable scholar transport would allow learners to be protected from crime, and give them much-needed peace of mind.

The need for scholar transport cannot be overstated when the safety and security of learners is our chief concern.

ACADEMIC PERFORMANCE

A lack of scholar transport has a very direct and profoundly negative impact on the academic performance of learners. A learner explained to EE:

> I try my utmost not to arrive late, but the journey to school is taxing and I arrive late most days of the week. Often, I am late three times in a row. When I arrive late at school, I am already very tired and I struggle to concentrate in class. I even struggle to keep my eyes open in class at times because I am so tired. We are provided with lunch at school and this provides us with energy for the journey home.
> Learner, Esikhumbuzweni High School

Another learner explained that:

> [T]here are extra classes in the morning, at 7am. Living so far, I am always late for extra class. I have received corporal punishment for being so late at school … I arrive home around 5pm from school. I then have to do my chores, which includes washing, cooking, and fetching water. I also need to wash my school uniform. It is difficult to do my homework in the evenings. My chores take time and I am tired and sleepy. I failed Maths and Accounting, because I do not understand the work.
> Learner, Nhalakahle Senior Secondary School.

The inability to concentrate in class is a clear and direct result of having to walk unreasonably long distances to school. It places rural learners at a great disadvantage compared to their urban counterparts, and places immense pressure on the educational programme of the school. Teachers must often repeat lessons when learners can't concentrate or are absent due to inclement weather.

Bad weather has other consequences besides high absenteeism and late arrival. It causes learners to be wet in class and unable to concentrate. Learners also invariably get sick more often. One of the biggest and most serious problems that bad weather causes is damage to textbooks. Books are often ruined and become unusable. Learners have resorted to putting plastic bags in their backpacks and putting the books under their clothes.

Not having safe and reliable transport to school has a detrimental effect on learners' access to education, and many are being denied access to schooling altogether. Many learners who don't have transport do not finish school.

The state recognises this problem, and has tried to address it by policy intervention.

NATIONAL SCHOLAR TRANSPORT POLICY

On 23 October 2015 the Department of Transport (the DOT) promulgated the National Learner Transport Policy (the National Policy).

[It] was developed in collaboration with the Department of Basic Education (DBE) and other stakeholders, and aims to address the challenges of accessibility and the safety of learners. This (National) Policy recognises the need to have a uniform approach to the matter of transportation of learners, and the fulfilment of the constitutional mandate of the Department to provide a safe and efficient transport system.

The creation of this National Policy was necessary to set minimum norms and standards for the creation of transport for learners and the facilitation of access to schools for many thousands of learners around South Africa, particularly in rural areas.

IN THE MINISTER OF TRANSPORT'S WORDS

The National Policy seeks to 'ensure that **even learners in disadvantaged communities and deep in rural areas of the country will have access to schools** and become part of the active economy in the near future.' *(Foreword to the Policy by the Minister of Transport, Ms Dipuo Peters)* [Authors' emphasis]

APPLICATION FOR SCHOLAR TRANSPORT ASSISTANCE

Schools can apply for scholar transport. The National Policy lays out the guidelines in Section 3.3.1.

After consultation with the School Governing Body (SGB), principals must identify beneficiaries of subsidised learner transport services, in line with the following criteria:

- Beneficiaries must be needy learners from grade R to 12 'as prescribed'
- Learner transport will be subsidised to the nearest appropriate school only, and not to a school of parental choice (parental choice means when parents prefer to enrol their child at a school other than the nearest suitable school)
- Priority must be given to learners with disabilities, taking into considering the nature of the disability
- Priority must be given to primary school learners who walk long distances to schools
- Existing learner transport services must be taken into account when identifying beneficiaries, as no learner transport services will be provided in areas where public transport is available. This is in order to avoid duplication of services and resources.

At first glance, the criteria seem to be adequate. However, there are deficiencies in the National Policy.

The criteria state that beneficiaries must be 'needy' learners from grade R to 12 'as prescribed', but it does not define who a 'needy' learner is.

A favourable aspect of the criteria is that primary school and learners with disabilities 'who walk long distances' are to be prioritised, as they are the most vulnerable and in the most desperate need. Existing learner transport services must be taken into account, and no learner transport services will be provided where 'public transport is available'. Many families struggle to afford public transport; and as a result, learners make long and unsafe journeys to school on foot.

A lot of the responsibility rests with the principal and the SGB to ensure that an application is made on behalf of all learners who require transport. This can be a good or a bad thing. It may be good because principals and SGBs may know the needs of their school better than a department official.

But it may instead be bad, because principals may be overwhelmed and the SGB inadequately trained.

Principals have also told EE that they have stopped applying, because they get no acknowledgement from the department of receipt of their applications, and no action is ever taken.

National and provincial transport policies do not expressly provide learners or parents the ability to approach district offices or other department officials to discuss scholar transport needs.

However, the constitutional and education legislation that we work under should allow parents and learners to do this. When transport is lacking and parents attempt to raise the issue with the authorities, investigations rarely take place, and it is normally only under the threat of litigation that progress is made.

TRANSPORT FOR LEARNERS WITH DISABILITIES

The National Policy requires that all vehicles used for school transport must comply with the principles of 'universal design'. This means they must be accessible to all learners who need to use them including learners with disabilities. It is important that this is properly considered when provinces, principals and SGBs make plans to implement the National Policy.

Different sets of guidelines drafted by the Department of Basic Education for Special Schools (2007) and Full Service Schools (2010) set out specific criteria for transport policies in these schools.

The significant challenges faced by learners with disabilities in getting to school are detailed in SECTION27's 2016 'Too Many Children Left Behind: Exclusion in the South African Inclusive Education System' report. Learners with disabilities are particularly affected by the long distances they have to travel.

The report details problems caused by distances travelled to and from school, inappropriate and inaccessible vehicles, safety and the impact on children with disabilities' health and academic performance. Many learners with disabilities stop attending school because of these significant challenges.

KEY DEFICIENCIES IN THE NATIONAL POLICY

The criteria are ultimately broad and vague.

The terms 'needy learners' who walk 'long distances' are not defined. In addition, the distance that learners walk should not be the only determining factor in deciding who is entitled to scholar transport. The kind of ground and natural obstacles that learners face are also important, as is weather, terrain and safety.

Further, the criteria don't emphasize that plans need to account for the best interest of each individual learner.

The National Policy also only provides that school principals must select learners who qualify for scholar transport. It does not allow for parents and learners themselves to take their cases to the department, in instances where they are unfairly left out by principals.

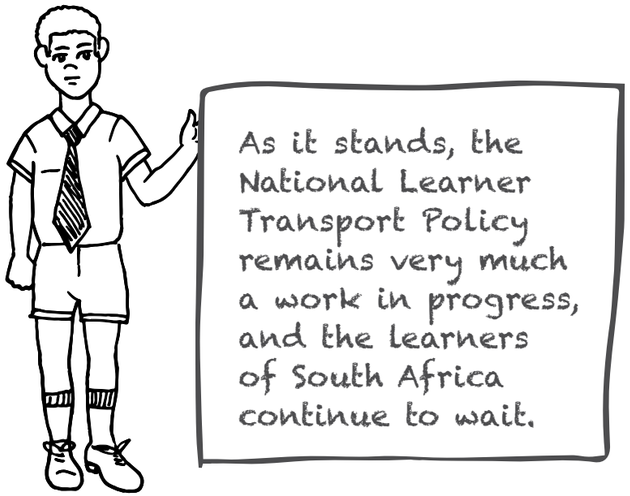
Principals are often overworked, and do not have enough time or resources to look at each child individually. For that reason, they sometimes perform a general assessment of distance from the school to the centre of a village, and use that as the distance for all learners who call that village home. This does not take into account that villages can be quite large, adding kilometres to learners' walks. Even if transport is provided for the village, learners often have to walk long distances to get to the village centre in order to catch a ride.

The National Policy also only seeks to provide transport to the nearest grade-appropriate school, and will not pay if parents choose a different school. In certain circumstances this could be problematic, especially when the there is a valid reason for walking past the closest school, such as overcrowding, lack of resources or poor performance.

Furthermore, the National Policy seems to be strict about not providing scholar transport in areas where public transport is available, completely ignoring the role of poverty. It excludes learners who live in areas where public transport is available but come from poor households unable to afford public transport. This prohibition is also problematic because it overlooks the fact that public transport, though theoretically 'available', might be inappropriate for or inaccessible to learners.

The National Policy envisions multi-stakeholder collaboration (dialogue between the provinces and different government departments). This is positive in principle, but the National Policy does not provide a sufficiently clear framework for coordination between departments.

According to the Policy, a National Interdepartmental Committee (NIDC) must be established consisting of representatives from the national Departments of Transport and Basic



Education, and the provinces. The NIDC is to report to the Ministers of Transport and Basic Education on the implementation of learner transport programmes.

The benefits of multi-stakeholder collaboration between the Departments of Transport and Basic Education and other stakeholders can only be fully realised once the National Policy is clear in its allocation of the various roles and functions to each department, as well as regarding what the funding commitments and contributions from each department must be.

The National Policy does not do this fully. Instead, it offers to produce another 'national policy advocacy programme that clearly defines the roles of the DOT and other stakeholders'. The National Policy is also not clear on the time frames for the development of the additional policy. It merely states that the government will establish a time frame in a future document that has yet to be produced.

The National Policy recognises that planning is fundamental to the success of learner transport provision. According to the National Policy, learner transport plans will developed at the provincial level.

- Implementing departments (including provinces and municipalities) in consultation with relevant stakeholders are responsible for learner transport planning
- A 'joint planning committee' will be established with representatives of the provincial departments of transport and education, as well as representatives of municipalities
- Provinces will develop provincial learner transport 'implementation plans and strategies' in line with the National Policy.

However, the provisions of the National Policy relating to planning are deficient in a number of respects:

- It is not clear who is primarily responsible for initiating planning at the provincial level, and establishing the 'joint planning committees'.
- As with many other aspects of the National Policy, there are no specific timelines for development of provincial plans, or for the approval or review of such plans.
- The National Policy provides insufficient guidance as to the content of the provincial plans. This allows for significant variance between provinces.
- The National Policy simply provides that Learner Transport Planning must 'start with determination of transport needs', which includes safety, infrastructure and drop-off/ pick-up points. Apart from safety, there is no further guidance in the National Policy on the basic requirements or considerations that should be taken into account in respect of transport-planning needs.

As it stands, the National Learner Transport Policy remains very much a work in progress, and the learners of South Africa continue to wait.

In the absence of proper government intervention, it currently falls to a few civil society organisations and community activists to bang on the doors of the departments and the courts, to ensure that learners who deserve and have a right to scholar transport are provided with it.

PROVINCIAL POLICIES ON SCHOLAR TRANSPORT

Some provincial governments, including that of the Western Cape, have created their own policies on transport. However, the Western Cape's policy has some of the same problems as the National Policy.

The Western Cape's policy states that for transport to be provided, there must be at least ten learners who require transportation. This policy could leave out students who come from particularly sparsely populated areas.

It also states that scholar transport will not be provided if there is public transport available. However, this does not consider whether or not the child can afford the public transport.

On the positive side, the Western Cape's policy does make allowance for grade R learners to be transported, stating that 'Learner transport will be provided, as far as is reasonably practical, to Grade R learners enrolled in an ordinary public school in rural areas in the Western Cape, where there are existing learner transport schemes operating…'.

The Gauteng provincial government's policy has unique wording which allows that 'in cases where other compelling matters prevail, fully motivated requests must be provided for consideration'. This means that even when a student is not entitled to transportation, if they present a strong case, they may be able to receive it.

In other provinces, the situation is less easily defined. KwaZulu-Natal, for example, has an official, published policy on learner transport; but in correspondence with Equal Education, has asserted that it does not. The reality in KZN is that the policy has been largely ignored, and transport is not available to learners who need it.

APARTHEID AND SCHOLAR TRANSPORT

The echoes of apartheid are felt in many aspects of life in South Africa, including scholar transport. Under apartheid, the government forcibly located many South Africans in inaccessible areas. Now, accessing school from these previously segregated communities is 'hampered by the long distances [learners] have to travel to get to school, threats to their safety and security, and the cost of transport'.

The segregated history of communities in South Africa also means that some areas have seen greater infrastructure investment than others. The racist policies of Apartheid Special Planning mean that, to this day, poor communities are often served by inadequate infrastructure.

Equal Education's work in KwaZulu-Natal has shown that gravel roads and weak bridges are commonplace. Addressing problems with infrastructure is an important part of addressing issues of scholar transport, but requires significant government work, and cooperation between different departments.

To fix roads and bridges would certainly be a large challenge for the government, but it would help communities and ensure that scholar transport is safer and more effective.

THE FOUR A'S OF EDUCATION

- **AVAILABILITY**
- **ACCESSIBILITY**
- **ACCEPTABILITY**
- **ADAPTABILITY**

**See table 12.2 on page 225 for a more comprehensive description.*

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS RELEVANT TO SCHOLAR TRANSPORT

South Africa's international obligations support an argument that the right to education requires schools to be easily accessible.

In a report on the cost of education in South Africa, Brian Ramadiro, the deputy director of the Nelson Mandela Institute for Education and Rural Development at the University of Fort Hare, argues that '

> there is a difference ... between the right to basic education and other socio-economic rights. In theory, this right is not conditional on the state's capacity to deliver on it. In concrete terms, this means: schools must be accessible...

ARTICLE 13 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (THE ICESCR) PROTECTS THE RIGHT OF EVERYONE TO EDUCATION

The Committee on Economic, Social and Cultural Rights (CESCR), which clarifies the nature and scope of the rights under the ICESCR, has adopted the '4 As' approach in its interpretation of the right to education. This is found in Article 6 of General Comment 13, which states that subject to conditions found in each State Party (a country that has agreed to the covenant), education shall exhibit four essential features: availability, accessibility, acceptability, and adaptability.

In terms of these essential features, 'availability' and 'accessibility' provide strong support for interpreting the right to education as including access to schools through the provision of scholar transport.

Section (a) of 'availability' states that 'all institutions and programmes are likely to require buildings or other protection from the elements'. This could include providing protection from the elements to children travelling to school via scholar transport, as many learners are subjected to dangerous weather conditions and rough or dangerous terrain on their long journeys to and from school.

INTERNATIONAL LAW RELEVANT TO DISTANCE, SAFETY AND INEQUALITY

In terms of 'accessibility', Section 6(b) of General Comment 13 states that 'educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party'. In addition, Section 6(b) states that accessibility has overlapping dimensions, which include the following, among others:

- Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.
- Physical accessibility – education must be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school), or via modern technology (e.g. access to a 'distance learning' programme).

These essential features from the General Comment show that the right to education should be understood to include a learner's right to physically accessing schools.

Learners who are forced to walk long distances to school are not in safe physical reach of education. The long distances travelled expose learners to dangerous weather conditions, terrain, rivers and wildlife. It also puts these vulnerable learners at risk of being assaulted, raped and robbed.

With this interpretation, the lack of safe and reliable transport to schools could be a violation of a learner's right to basic education.

In addition, Article 19(1) of the Convention on the Rights of the Child (CRC) states that:

> State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Many children have suffered injury and harm as a result of walking in bad weather conditions, on dangerous terrain, or by being exposed to violent and abusive people. This article may show that the state has a duty to take measures to protect a child from the harm that many children suffer when walking long distances to school.

In addition, Article 28 of the CRC protects the child's right to education. In particular, Article 28(1)(a) requires that State Parties recognise the right of the child to education, and aim to achieve this right progressively and on the basis of equal opportunity. States must make primary education compulsory and available to everyone, free of charge.

This could add further support to the suggestion that the right to education should include the right to learner transport. South Africa signed and ratified the CRC, and is therefore bound to act in accordance with it.

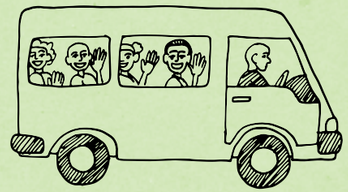
The right to education is also protected in Article 26(2) of the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights. Article 17 of the Charter states that 'every individual shall have the right to education'.

INTERNATIONAL LAW RELATING TO LEARNERS ARRIVING LATE FOR CLASS, IRREGULAR ATTENDANCE AND HIGH DROPOUT RATES

Article 11(1) of the African Children's Charter states that 'every child shall have the right to an education'. Furthermore, Article 11(3) states that:

> State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right, and shall in particular:
>
> (d) take measures to encourage regular attendance at schools and the reduction of dropout rates;
>
> (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Insufficient scholar transport places difficulties on learners to such an extent that learners are unable to attend class regularly, and/or drop out prematurely. In addition, the above provisions may lend support to the fact that the state has a duty to take steps to address the obstacles learners face while travelling to school, such as dangerous terrain.



CASE STUDY

TRIPARTITE STEERING COMMITTEE AND ANOTHER V MINISTER OF BASIC EDUCATION AND OTHERS – LRC CASE

This case dealt with three schools that were denied scholar transport under the Eastern Cape Learner Transport Policy and a fourth that was approved for transport but never saw it in reality.

The question the court had to determine was whether the right to a basic education contained the right to state-funded scholar transport for learners who live a certain distance away from school.

Justice Clive Plasket held that:

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

And:

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

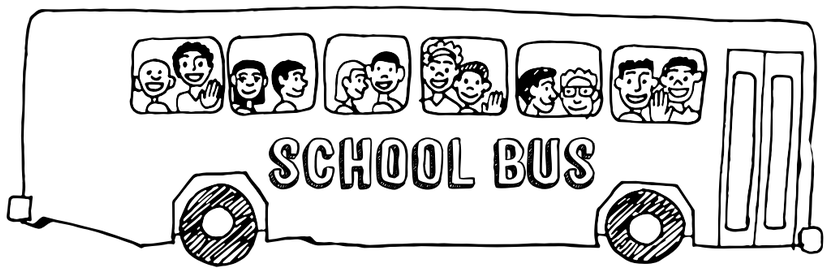
Like most provinces, the Eastern Cape's policy contains an arbitrary distance requirement of a minimum number of kilometres that learners must have to walk to qualify for scholar transport.

Justice Plasket held that:

> [T]he distance requirement is a guideline which has to be applied flexibly in order to achieve the ultimate purpose of providing scholar transport to all of those who need it. Precisely the same considerations apply to all of the other aspects of the [Eastern Cape] policy. In its application, it must be borne in mind that the [Eastern Cape] policy is not an end in itself, but a means to the department's end of meeting its obligations in terms of Section 29 of the Constitution.

This case was a significant victory for scholar transport by the Legal Resources Centre (LRC), and will inform all future litigation on this issue. It speaks perfectly to the problems facing learners who have to walk unreasonably long distances to school, and to the failure of the provincial governments to address these issues efficiently and appropriately.

The LRC ensured these learners no longer have to face arduous and dangerous journeys to school. This case also highlighted the need for uniform standards for scholar transport by way of a national policy.



CONCLUSION

Scholars face serious challenges on their commute to and from school, including long distances, the environment, personal safety, worse academic performance due to fatigue, and damage to textbooks.

The right to education is an integral part of South Africans' constitutional rights, which cannot be realised without adequate scholar transport. The national and provincial transport policies contain some limited helpful sections, but should largely be considered works-in-progress which can sometimes put learners in difficult or dangerous situations.

Finally, international legal instruments show that South Africa has an obligation to provide learners with adequate transport due to the dangers and travel distances they face.

Scholar transport is an important right for every learner. The policies put in place by provincial and national government provide a starting point for the creation of an effective transport strategy, but there are still many difficulties to overcome to ensure that transport is available for every child who has trouble getting to and from school.

Solminic Joseph is a lawyer and activist with the Equal Education Law Centre.

Julian Carpenter is a JD student at Osgoode Hall Law School in Toronto, Canada, and an alumnus of Dalhousie University. He interned with the Equal Education Law Centre for three months in 2016.

CASES

Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC); 2011 ZACC 13.

Tripartite Steering Committe and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG); 2015 ZAECGHC 67.

CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

POLICY AND GUIDELINES

Department of Basic Education & Department of Transport 'National Learner Transport Policy', 2015.

Department of Basic Education 'Guidelines for Full Service/Inclusive Schools' 2010.

Department of Basic Education 'Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres', 2007.

INTERNATIONAL AND REGIONAL INSTRUMENTS

The Universal Declaration of Human Rights (UDHR), 1948.

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

The Convention on the Rights of the Child (CRC), 1989.

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

The African Charter on Human and Peoples' Rights (African Charter), 1981.

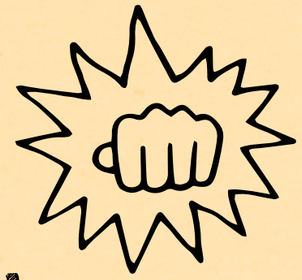
FURTHER MATERIALS AND READING

MJ Rogan 'Dilemmas in Learner Transport: An Impact Evaluation of a School Transport Intervention in the Ilembe District, KwaZulu-Natal' (2006).

Statistics South Africa 'General Household Survey 2013', 2014.

UN Committee on Economic, Social and Cultural Rights 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 1999.

TF Hodgson & S Khumalo 'Too Many Children Left Behind: Exclusion in the South African Inclusive Education System', 2016.



CHAPTER 17

SCHOOL VIOLENCE

Tina Power

Figure 17.1: Satirical cartoon commenting on the lack of safety and security at many South African Schools. (Zapiro, July 2007, http://mg.co.za/zapiro/fullcartoon/263)

INTRODUCTION

Going to school is more than just learning to read and write and do maths. The South African Schools Act of 1996 says that our schools are meant to:

> [L]ay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators.

A significant part of learning and developing is to feel safe. Unfortunately, school violence in South Africa is a widespread problem. It is caused by many different factors, and has adverse and sometimes tragic consequences for learners. The cartoon above illustrates how learners do not see school as a safe environment.

Violent acts are understood, according to the World Health Organisation, as the deliberate 'use of physical force, or power, threatened or actual' that 'results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation'.

School violence includes more than just acts at school; it is about the school environment and the school experience of learners. Patrick Burton and Lezanne Leoschut, from the Centre for Justice and Crime Prevention, explain that it does not only occur within the physical border of the school but includes 'acts that are, on a daily basis, associated with school, specifically travelling to and from school, or arriving at or waiting outside the school grounds'.

This overview chapter discusses some of the factors that contribute to to the high prevalence of violence in schools, and what the different types of violence are. It is also important to know what the law says about violence in schools, and how learners, parents and educators must respond if they become victims of or witness violence in schools. This chapter intends to equip learners, parents and educators with the necessary information and tools to help address school violence.

CONTEXT OF SCHOOL VIOLENCE IN SOUTH AFRICA

Violence was used as a tool of oppression during apartheid, but also as a tool of resistance; and the schooling system segregated black from white, and was used as another means to oppress the majority of South Africans.

Violence in schools, violence against learners and violence in communities was a common occurrence during apartheid. Our courts have noted that '[i]t is regrettable, but undeniable, that since the middle 1980s our society has been subjected to an unprecedented wave of violence' (*S v Williams*).

This culture of violence became deeply rooted in our society, and led many to adopt an ideology of violence. Experts such as Hamber have observed that:

> The root cause of political violence in South Africa has to be located within the social matrix and the long history of oppression, poverty and exploitation in the country…These factors, coupled with the socially sanctioned use of violence and the politicisation of everyday life, resulted in extraordinary levels of intra- and inter-community conflict.

In 1994, South Africa became a constitutional democracy; and there was a strong emphasis placed on creating a peaceful society that promoted respect, dignity, tolerance and non-violent solutions to problems. Our Constitution seeks to create a society that 'endeavours to move away from a violent past.' (*S v Williams*).

Although South Africa has made significant strides in entrenching a culture of human rights, the continued exposure to violence has had a very harmful impact on our schools.

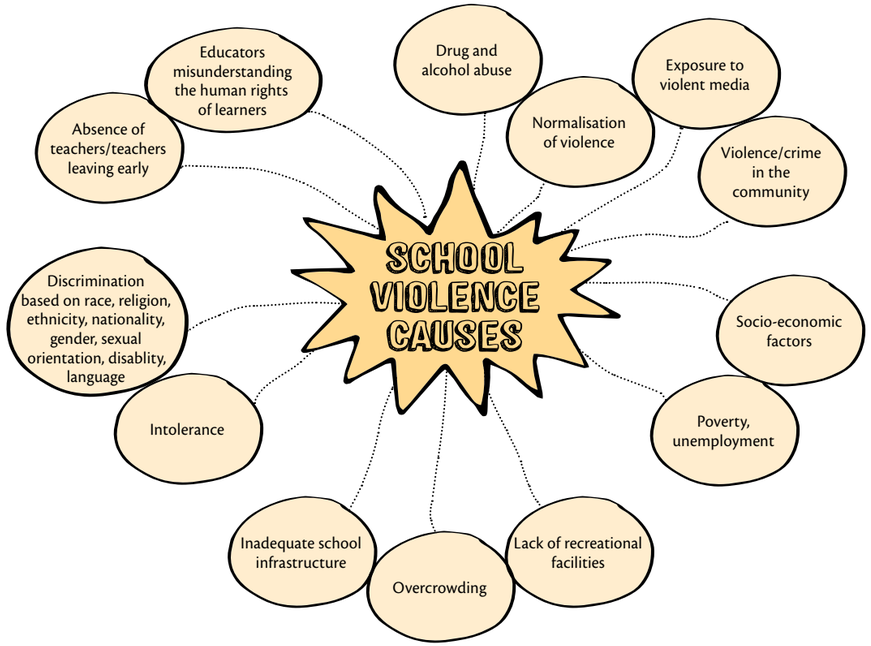


Figure 17.2: Factors contributing to violence in schools.

FACTORS CONTRIBUTING TO VIOLENCE IN SCHOOLS

There is no one cause of violence in schools; but rather, several intersecting factors that lead to school violence. The South Africa Council for Educators (SACE) states that 'school-based violence does not take place in a vacuum, but is rather influenced and shaped by contextual factors'.

EXTERNAL INFLUENCES

Studies indicate that school violence often occurs more in lower-income communities in South Africa. Socio-economic factors such as poverty and unemployment can make people feel disempowered and frustrated by their circumstances, leading them to use violence, rape and other forceful acts as a means of asserting power and being in control. Increased exposure to violence at home or in communities can also influence the prevalence of violence at schools. Violent games and TV programmes can perpetuate the normalisation of the use of violence.

INTERNAL INFLUENCES

While schools reflect the norms and values of society, they can also be at fault for enabling school violence and failing to prevent it. The use of inappropriate and illegal forms of discipline, such as corporal punishment, sets bad examples for both learners and educators. The power dynamics between educators and learners can lead to educators believing that their position entitles them to abuse learners, or expect sexual favours from learners in exchange for good grades. Disability, gender, race and sexual orientation can often be factors that lead to violent behaviour. Schools that are mismanaged and lack effective leadership often create spaces for incidences of violence to exist.

Whether the influences are external or internal it is important to remember that:

> Present-day school violence in South Africa must be understood with reference to the country's legacy of political struggle, as well as the associated economic disadvantage and social inequality.
>
> Pahad & Graham, Department of Psychology, Wits

EXAMPLE 1:

Ntombi is a learner at Phumelela High. She has complained to the principal about her teacher, who often says very inappropriate things to her about her looks and the ways in which he thinks about her. He also sends her pictures of himself that she doesn't like looking at. She has told the principal that this makes her feel uncomfortable, and that she wants the principal to speak to him. The principal told her that he would, but he never did, because he is friends with this educator and doesn't want to reprimand him.

Ntombi's teacher is sexually harassing her, which is a form of violence; but because of poor leadership and a failure to respect the dignity of learners, this school is failing to address school violence.

TYPES OF SCHOOL VIOLENCE

School violence can manifest itself in many different ways, and to differing degrees.

In a 2008 report, the South African Human Rights Commission (SAHRC) held that '[i]n South Africa, school-based violence is multi-dimensional and takes on various forms. How it manifests itself often depends on the context in which it arises'.

Table 17.1 below defines some common forms of school violence. These definitions have been taken from different pieces of legislation, such as the Children's Act, the Schools Act, and the Sexual Offences Amendment Act, as well as from various departmental policies and programmes.

Table 17.1: Some common forms of school violence as defined in legislation and policies.

ABUSE	Any form of harm or ill-treatment deliberately inflicted on a child, and includes: • Assaulting a child or inflicting any other form of deliberate injury to a child • Sexually abusing a child or allowing a child to be sexually abused • Bullying by another child • Exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.
ASSAULT	Unlawfully and intentionally: • Applying force to a learner • Creating a belief that force is going to be applied to the learner.
BULLYING	Bullying can be characterised as frightening or intimidating treatment to which a learner is repeatedly subjected to by another learner/learners or an educator, resulting in: • Physical harm to the learner or his or her property • Emotional harassment • Making the learner fear for his or her own safety or the safety of his or her property • The ultimate creation of a hostile environment that is counterproductive to learning.
CORPORAL PUNISHMENT	Any deliberate act against a learner to punish or contain him or her that inflicts pain or physical discomfort. This includes, but is not limited to: • Spanking, slapping, pinching, paddling or hitting a learner, with a hand or with an object • Denying or restricting a learner's use of the toilet • Denying meals, drink, heat and shelter • Pushing or pulling a learner with force • Forcing the learner to do exercise • Throwing things – such as a board duster – at a learner. *Corporal punishment is dealt with in more detail in Chapter 19.*
GANGS	A gang is a group with a sense of unity that seeks to intimidate and commit violent acts or other crimes, and which defends itself physically against violent acts of other groups.
GENDER-BASED VIOLENCE	Discrimination and gendered or sex-based harassment and violence, rape, femicide, sexual harassment and homophobia.

HARASSMENT	Directly or indirectly engaging in conduct that causes harm or threatens harm. This can include: • Following, watching, pursuing or accosting a learner, or loitering outside of or near the building or place where a learner lives, goes to school or waits for transport.
INJURY	Physical harm or damage to person or property.
INITIATION	Any act that forms the basis of being accepted or admitted into a group, and which places the initiate in a situation that could lead to physical or emotional danger, and which undermines the dignity of that learner. Initiation practices are prohibited by the Schools Act.
RAPE	Any person who unlawfully and intentionally commits an act of sexual penetration with another person without their consent. Sexual penetration includes any act which causes penetration to any extent whatsoever in: • The genital organs of one person into or beyond the genital organs, anus, or mouth of another person • Any other part of the body of one person, or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person • The genital organs of an animal, into or beyond the mouth of another person.
SEXUAL HARASSMENT	Unwelcome sexual attention, which includes: • Suggestive behaviour • Messages or remarks of a sexual nature • Intimidating or humiliating a learner • Implied or expressed promise of reward for complying with a sexually oriented request, such as good marks or being promoted to the next grade.
SEXUAL VIOLATION	Includes any act which causes direct or indirect contact of: • The genital organs, mouth or anus of a learner, and in the case of a female, her breasts • The masturbation of one person by another person • compelling a learner to self-masturbate or watching the masturbation of another person • The insertion of any object resembling or representing genitalia into a bodily orifice of another person • Forcing a learner to watch a sexual offence or sexual act.

EXAMPLE 2:

In April 2016, a teacher hit 13-year-old Siphokazi Tyalidikazi on her right hand with a hosepipe for not finishing her homework. The beating damaged the nerves in Siphokazi's hand, causing her to lose the use of that hand. She now has to learn to write with her left hand, which is slowing down her learning process.

'Cape Town pupil loses use of hand after caning' GroundUp, 4 April 2016

EXAMPLE 3:

In 2015, a school that caters for learners with disabilities in KwaZulu-Natal was reported for allegations of abuse. City Press reported that 'pupils have been physically and sexually abused in the hostel, and one pupil became pregnant as a result'. As a result of falling pregnant, this learner did not return to school. (This handbook deals with learner pregnancy in Chapter 8.)

'Hostel hell for disabled children' City Press, 20 September 2015

EXAMPLE 4:

A 12-year older learner, who was a non-verbal autistic child, contracted a sexually transmitted infection while at school. The Right to Education of Children with Disabilities Campaign (R2ECWD) explained that the 'absence of protection measures at the school' means that this learner still remains out of school.

These examples illustrate how school violence can prevent learners from going to school or participating in school activities. The last two examples also illustrate the vulnerability of learners with disabilities.

The World Health Organisation (WHO) explains that children with disabilities are more vulnerable to abuse and neglect then children who do not have disabilities. The WHO explains that there are many factors that contribute to the vulnerability of children with disabilities. These include stigma, powerlessness and social exclusion. The WHO explains that children with disabilities are 'often perceived as easy targets'.

While all learners should always be protected from violence in order for them to receive the education they have a right to, learners with disabilities – who already have difficulty accessing education easily – are even more vulnerable to violence than others.

School-based violence has an impact on learners in a variety of ways. Wounds, scars and other physical consequences or injuries can disrupt the ordinary learning experience, and affect a learner's ability to take part comfortably in learning; and it may also prevent a learner from going to school.

The different types of school violence can be committed by different people. They may be educators, learners, or staff members. While learners are most often the victims of school violence, they can also be the perpetrators. Bullying, initiation and gang violence are very prevalent in South African schools. The next section provides a brief discussion of bullying.

BULLYING

Bullying is understood as negative or aggressive behaviour that creates a pattern of victimisation; it can be verbal, non-verbal, physical, sexual or social. The Children's Act defines 'abuse' in relation to a child as any form of harm or ill-treatment, which includes bullying by another child.

Age, race, gender, disability or sexual orientation can be factors that contribute to bullying.

A workbook on 'Addressing Bullying in Schools', published by the Department of Basic Education and the Centre for Justice and Crime Prevention, explains that everyone has a role to play in combating bullying in schools.

1. WHAT SHOULD THE SCHOOL DO TO ADDRESS BULLYING?

Schools along with school governing bodies (SGBs) can adopt anti-bullying policies, which among other things:

- Define bullying
- Highlight why it is important to address bullying
- Explain the responsibilities of different role players
- Explain the consequences of bullying and the procedures for addressing bullying.

It is important for schools to have an effective anti-bullying policy, but it is more important that the principal, the SGB and the educators ensure that the policy is implemented, to ensure that the school environment is free from hostile behaviour and that the learners feel safe.

2. WHAT SHOULD LEARNERS DO IF THEY OR SOMEONE THEY KNOW IS BEING BULLIED?

Learners often feel they cannot speak out about bullying, because they are scared it will lead to further or more severe bullying. This is why it is important for schools to have policies and procedures in place such that learners feel safe in reporting incidents of bullying.

A learner who is bullied, or sees someone being bullied, can do the following:

- Report the bullying to an educator. If you do not feel comfortable doing this alone, then speak to someone you feel safe with and who you think is reliable, and ask them to approach an educator with you or on your behalf
- If you feel that your complaint was not taken seriously, you can approach another teacher or the principal
- If you have been bullied or have witnessed bullying, it can be helpful to speak to someone about it. If this is something you would like to do, you should ask your teacher to help set up counselling sessions for you. Bullying can be very traumatic and have very negative effects on a learner, so it is important that you have someone who can help you work through your experiences.

3. WHAT SHOULD A PARENT DO IF THEIR CHILD IS BEING BULLIED?

- Speak to your child and explain to them that this is not their fault. Reassure them that you love them and that you support them
- Ask them for all the facts, and ask them how you can help them
- Speak to your child's educator or to the principal about the bullying.

Sometimes bullying can be so severe that it requires someone to lay criminal charges. South Africa has laws against harassment, assault, the use of weapons, threatening behaviour and damage to property. If the bullying amounts to this behaviour it is important to report it to the school and to the police. Educators have a legal duty to report the abuse of a child; this will be discussed further on in the chapter.

It is important to understand that threats of violence and verbal assault can also have adverse consequences for learners, and that the 'impact of school-based violence can go beyond the physical harm that arises from violent incidents' (SAHRC). The psychological impact of threats of violence and verbal assault on learners can include depression, low self-esteem, and feeling isolated, scared or embarrassed. It can cause learners to dislike or want to avoid school.

EXAMPLE 5:

Mrs Modise does not like Thembi, and doesn't think she is smart. Mrs Modise often makes Thembi read out loud or do sums on the board, which she battles with. Mrs Modise encourages the other learners to laugh and call her names. The learners started calling her 'Uyisidom', which Mrs Modise now also calls her. Mrs Modise will say things like: 'Uyisidom! Why are you so stupid?', 'Uyiphuphu! You are never going to pass', and 'You don't belong in a class like this. You should go play with the toddlers'.

These are examples of verbal assault. Comments and ridicule like this cause Thembi severe emotional distress, and have a negative psychological impact. She no longer wants to go school, and doesn't think she will pass or ever achieve anything. Exposing or subjecting a child to such behaviour may harm the child psychologically or emotionally.

STATISTICS ON SCHOOL VIOLENCE

The South African Council of Educators (SACE) is a statutory body that was established to develop and maintain ethical professional standards for educators. All educators are required to register with SACE and abide by its Code.

Every year, SACE submits a report that provides a breakdown of all the complaints, per province, regarding alleged breaches of the code. In 2014/2015, SACE received 86 complaints of verbal abuse, victimisation, harassment and defamation. SACE received 161 complaints of unprofessional conduct, alcohol abuse and absenteeism. It reported that during the year, 94 complaints of sexual misconduct and rape were received. and 253 complaints of corporal punishment.

Other statistics, from the 2012 National School Violence Study, indicated the following:

- 13% of learners reported bullying
- 14% of learners claimed to have had someone at school threaten to say something about them that was intended to stigmatise them
- 13.3% of learners reported that they had been forced by someone at school to engage in activities, against their will, that they felt were wrong and did not want to engage in
- 12.2% had been threatened with violence by someone at school
- 6.3% had been assaulted
- 4.7% had been sexually assaulted or raped;
- 4.5% had been robbed at school.

Save the Children, an independent organisation which advocates for children's rights, has reported that children with disabilities are also three to four times more likely to be exposed to abuse, including physical, emotional and sexual abuse, as well as neglect.

In 2013, the Department of Women, Children and People with Disabilities and UNICEF reported the following:

- One in every five incidents of sexual abuse happens in schools
- One third of people who raped children were teachers
- One in every five boys is a victim to bullying.

Approximately two million learners have experienced some form of violence in schools.

If these numbers seem low, it is important to keep the problem of under-reporting in mind. Learners often feel disempowered or uncomfortable reporting incidents of violence, or are uncertain about how to report them, or do not think they are allowed to speak out.

This overview chapter and the chapters that follow will address this problem, and provide practical advice and guidance to learners, educators and parents on reporting all types of school violence.

We acknowledge that school violence comes in many different forms, and that the Department of Basic Education and the government have a responsibility to protect learners from all forms of violence. We have chosen to focus on corporal punishment and sexual violence in the following two chapters, as they have been identified as systemic problems throughout South African schools and incorporate many aspects of violent behaviour.

Complaints about these forms of violence are frequently received by SACE, the SAHRC and other public interest organisations. The SACE report concluded that most of the offences they dealt with related to corporal punishment, harassment and sexual misconduct.

LAW AND POLICY

This section sets out the laws, policies and programmes in place to address school violence. It is important that we are aware of what needs to be done, so that we can ensure that all role players meet their legal obligations to ensure the safety of all learners.

INTERNATIONAL LAW

The Convention on the Rights of the Child (CRC) was created internationally to acknowledge the inherent human rights of all children. South Africa ratified the CRC on 16 June 1995. This means that South Africa is obligated to act in accordance with it, and to ensure that its domestic laws are consistent with the provisions of the CRC.

Article 19 of the CRC places an obligation on states to:

> [T]ake all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

In a general comment made by the Committee on the Rights of the Child, it was stated that '[c]hildren do not lose their human rights by virtue of passing through the school gates'. The General Comment states further that 'education must be provided in a way that respects the inherent dignity of the child'.

Article 16 of African Charter on the Rights and Welfare of the Child (ACRWC) provides similar protection. It states that:

> 'Children should be protected from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.'

THE CONSTITUTION

Like all the people of South Africa, children are entitled to all the rights set out in the Constitution's Bill of Rights. When children are subjected to violence at school, various rights are violated. These include:

- Section 9: the right to equality
- Section 10: the right to human dignity
- Section 12: the right to the freedom and security of the person
- Section 28: the right of the child, which includes:
  - The right to be protected from maltreatment, neglect, abuse or degradation;
  - That in every matter concerning the child their best interest is of paramount importance;
- Section 29: the right to a basic education.

NATIONAL LAW

The National Education Policy Act of 1996 (NEPA) seeks to 'facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights'. This includes those rights listed above.

Other national laws can be divided into three broad sections in respect of school violence: what educators must do, what educators must refrain from, and the consequence of failing to refrain from prohibited acts.

WHAT EDUCATORS MUST DO

Mandatory Reporting

While educators have a general duty to 'acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa' and to 'respect the dignity, beliefs and constitutional rights of learners and in particular children', there are also more specific duties that are placed on educators with regard to school violence.

Section 110(1) of the Children's Act states that any educator

> who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

This mandatory reporting is a legal duty placed on educators. Failure to report in terms of this section is a criminal offence.

Duty of Care

South African law places a legal duty on certain people to take steps to make sure that other people are not harmed. In *Rusere v The Jesuit Fathers*, a case about a learner who lost vision in one eye after playing a game using grass shoots as arrows, it was acknowledged this obligation exists between schooling authorities and learners.

Section 28(1)(b) of the Constitution states that every child has the right to appropriate childcare when removed from the family environment. In *Hawekwa Youth Camp v Byrne*, a case about a learner on a school camp who fell from a bunk bed and fractured his skull, it was submitted that the Minister of Basic Education acknowledged that educators owed learners a duty of care, to take reasonable steps to ensure that the learners are safe from risks and dangers.

In the 2002 draft Regulations to Prohibit Initiation Practices in Schools, the Minster stated that '[e]ducators have a duty to care for and protect learners from violence because of their *in loco parentis* status'. '*In loco parentis*' means 'in the place of the parent'.

The high courts of South Africa and the Supreme Court of South Africa have repeatedly held (as recently as April 2016) that if a child is under the care and control of the school, the teachers of that school owe the child in their care a legal duty to prevent physical harm. *(Pro Tempo v Van der Merwe)*.

In other words, educators are required by law to try and make sure that learners are protected from any acts of violence.

WHAT EDUCATORS ARE NOT ALLOWED TO DO

South African Schools Act

Section 10 of the Schools Act prohibits the use of corporal punishment in schools, and states that an educator who administers corporal punishment to a learner is guilty of an offence. It also prohibits the use of initiation practices at schools.

The Employment of Educators Act, 1998 (EEA)

Section 18 of the EEA states, among other things, that misconduct includes unfairly discriminating against a learner

> … on the basis of race, gender, disability, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution.

The EEA lists the following as acts of serious misconduct:

- Committing an act of sexual assault on a learner, student or other employee
- Theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports
- Having a sexual relationship with a learner from the school where he or she is employed
- Seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee
- Making a learner or a student perform any of these acts.

The South African Council for Educators Code of Professional Ethics states that an educator must:

- Refrain from improper physical contact with learners
- Refrain from any form of sexual harassment (physical or otherwise) of learners
- Refrain from any form of sexual relationship with learners at any school
- Not use language or behaviour that is inappropriate in his or her interaction with learners.

The Protection from Harassment Act 17 of 2011 and the Sexual Offences and other related matters Act 6 of 2012 do not specifically mention educators. However, both these Acts criminalise a wide range of violence. These prohibitions are applicable to educators.

THE CONSEQUENCES

Under the EEA:

Disciplinary hearings can be held when there is an allegation of violence against a learner.

- If an educator is found guilty of misconduct, the educator can be discharged
- If an educator is found guilty of serious misconduct, the educator can face dismissal.

Sometimes educators who have been dismissed go to the Education Labour Relations Council (ELRC) to determine, based on the facts, if the dismissal was fair.

Under SACE:

SACE has a prescribed disciplinary procedure that is used when they receive a complaint of an alleged breach of the code. If an educator is found guilty of a breach:

- He or she can be reprimanded or cautioned
- He or she can be made to pay a fine not exceeding one month's salary
- His or her name can be removed from the SACE register (this can be for a specific period, indefinitely or permanently).

Under the Children's Act:

The Children's Act established the National Protection Register.

- Part B of the Register records persons who are found to be unsuitable to work with children
- Once a person's name appears on Part B, they may no longer be employed at an institution dealing with children.

Under the Sexual Offences Amendment Act:

The Sexual Offences Amendment Act provides for the establishment of the National Register for Sex Offenders.

- This keeps a record of the names of people found guilty of sexual offences against children and mentally disabled people
- People who employ educators are entitled to check the register to ensure that an educator is fit to work with children and people with disabilities.

PROVINCIAL PROTECTION

The legislation at the provincial level reflects the national legislation. However, some provinces have gone beyond this and have issued circulars and policies in an attempt to combat violence in schools. In 2012, the Western Cape Department of Education issued a circular titled 'Safe School Call Centre – Reporting of School Crime and Abuse'. The KZN Department of Education issued a circular in 2012 titled 'Measures to Counter Violence, Drug Abuse and Other Forms of Crimes in Public Schools'. KZN has also issued two policy guidelines, the most recent in 2015 on 'Guidelines for the Management of Child Abuse, Neglect and Exploitation for Public Schools in KwaZulu-Natal'. In 2014 the Gauteng Department of Education issued a circular about the 'Prohibition of Corporal Punishment in Public Schools'.

WHAT TO DO WHEN THERE HAS BEEN AN INCIDENCE OF SCHOOL VIOLENCE

This section will indicate briefly what steps to take when reporting violence in schools. The following chapters will go into more detail about reporting sexual violence and corporal punishment.

LEARNERS

If you or someone you know has been a victim of school violence, it is important to report it. Reporting school violence is necessary to ensure that the incident does not happen again, that the learner is supported and assisted, and that ultimately, your school is safe. It can be scary or intimidating for a learner to report school violence, so it is often helpful to have someone with you who can support you during this process.

Learners are encouraged to report the incident to a teacher. If the teacher is involved in the violence, to report the incident you can go to another teacher who you trust, or to the principal. You might feel safer if you tell a parent or caregiver about the incident, and ask them to report the matter with you or on your behalf.

When reporting, it is important to give as much information as possible. Sometimes this can be difficult, and you might not feel comfortable sharing everything; but learners are encouraged to share as many facts as possible, so that the school, police or SACE have enough information to address the problem properly.

School violence has wide-ranging and adverse effects on learners. Getting counselling and speaking to someone about what has happened can often be very helpful. If you need to talk to someone, you can ask a teacher, parent or caregiver to help set up counselling sessions for you.

TEACHERS

As discussed above, there is a legal duty on teachers to report school violence. Use the diagram on the right to report violence at schools.

PARENTS

Parents should play a very supportive role in addressing any violence that has been committed against their child at school. It is important as a parent to make your child feel safe. You must report any incidents of violence. You might need to fill out forms with your child, and take your child to counselling to ensure they are fully supported during this process.

HOW TO REPORT

This diagram explains the different reporting mechanisms for school violence. Learners, teachers and parents should take the following steps when reporting school violence.

It is important to remember that all these processes need to be done simultaneously. Different statutory bodies impose different consequences on teachers found guilty of an offence, so we need to ensure that all measures are taken to ensure that guilty teachers are appropriately punished, and that present and future learners are safe.

Learners, parents and teachers are also encouraged to report incidents of violence to organisations such as Childline, Lawyers Against Abuse, SECTION27, Centre for Child Law, Legal Resources Centre and Equal Education.

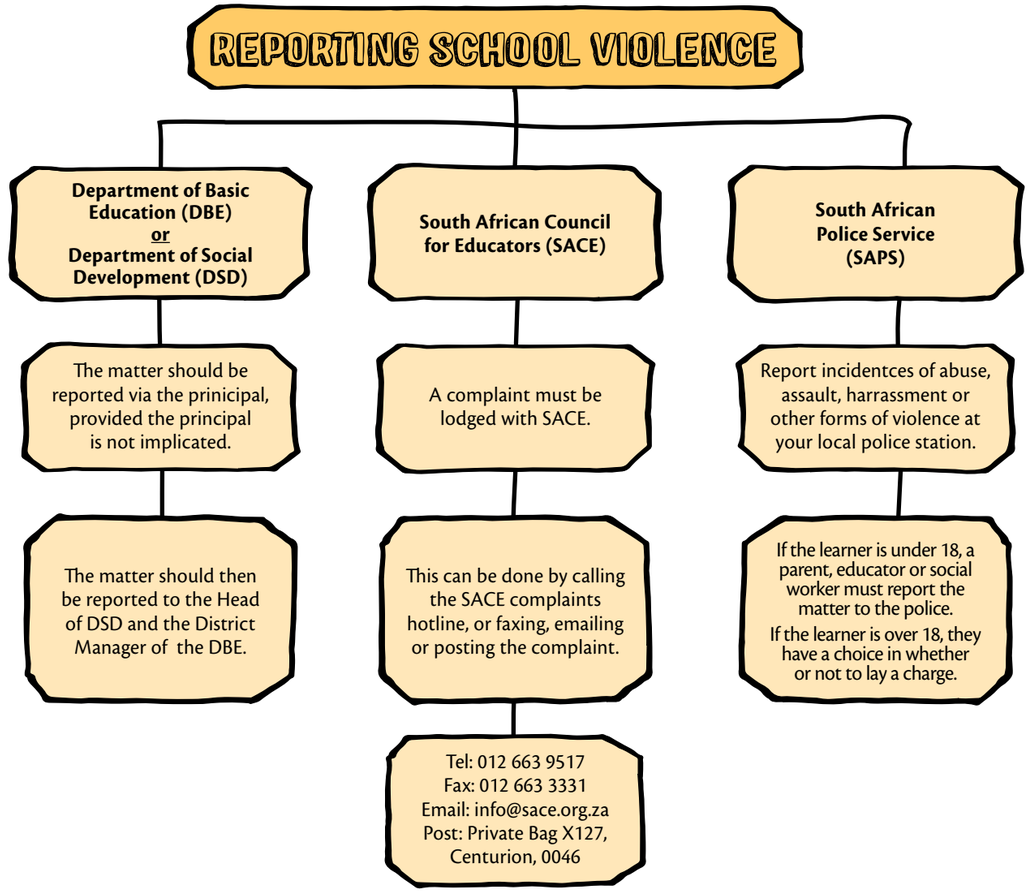


Figure 17.2: The three avenues of reporting incidents of violence in schools.

CONCLUSION

Violence in South African schools is a serious problem, and is caused by a wide range of intersecting factors. Since 1994, South Africa has tried to create a culture of peace, tolerance and respect.

Unfortunately, learners are still exposed to physical and psychological violence – and threats of violence – daily.

We have laws in place designed to protect learners. Those who fail to do so can and must be held responsible. 'It takes a village to raise a child', so all members of the village have a duty to ensure that children are protected from harm.

Communities should work together to promote and encourage non-violence. Schools also have a very important legal duty of creating a safe place for children. We all have a role to play, whether it is teaching our children good values and morals, setting a good example, respecting the dignity of children, reporting violence, or supporting learners who have been victims of violence.

'We owe our children – the most vulnerable citizens in society – a life free from violence and fear.' – Nelson Mandela

Tina Power is a former Students for Law and Social Justice Fellow at SECTION27. She is currently serving her articles at the Legal Resources Centre and has been accepted for an LLM in Human Rights Advocacy and Litigation at the University of the Witwatersrand.

CASE LAW

Pro Tempo v Van der Merwe 2016 (39) SA 853 (SCA); 2016 ZASCA 39.

Hawekwa Youth Camp v Byrne 2010 2 SA 312 (SCA); 2009 ZASCA 156.

Minister of Education & Another v Wynkwart NO (2004) (3) SA 577 (C); 2004 ZAWCHC 1.

S v Williams and Others 1995 (3) SA 632 (CC); 1995 ZACC 6.

Rusere v The Jesuit Fathers 1970 (4) SA 537 (R).

LEGISLATION

The Constitution of the Republic of South Africa, 1996.

Protection from Harassment Act 17 of 2011.

Children's Act 35 of 2005.

Employment of Educators Act 76 of 1998.

National Education Policy Act 27 of 1996.

South African Schools Act 84 of 1996.

POLICY AND GUIDELINES

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Department of Basic Education & Centre for Justice and Crime Prevention 'Addressing Bullying in Schools', 2012

KwaZulu-Natal Department of Education 'Policy Guidelines for the Management of Child Abuse and Neglect in KZN', 2010.

Department of Basic Education 'Speak Out Youth Report Sexual Abuse: A Handbook for learners on how to prevent sexual abuse in public schools', 2010.

Western Cape Department of Education 'Abuse No More Protocol', 2014.

Department of Education 'Draft Regulations to Prohibit Initiation Practices In Schools', 2002.

Department of Basic Education 'Opening Our Eyes: Addressing Gender-Based Violence in South African Schools – A Manual for Educators', 1998.

INTERNATIONAL LAW

The Convention on the Rights of the Child (CRC), 1989.

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

FURTHER READING

Childline, 'Procedures for Reporting Abuse', www.childline.org.za.

P Burton & L Lesoschut 'School Violence in South Africa: Results of the 2012 National School Violence Study' (2014).

South African Council for Educators (SACE) 'How to Lodge a Complaint', www.sace.org.za.

Centre for Justice and Crime Prevention School Violence Study (2013).

S Pahad & TM Graham 'Educators' Perceptions of Factors Contributing to School Violence in Alexandra' (2012) Vol 10(1) African Safety Promotion Journal.

South African Human Rights Commission 'Report of the Public Hearing on School-based Violence', 2006.

Save the Children 'Out from the Shadows: Sexual Violence Against Children with Disabilities', 2011.

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SECTION27, Centre for Applied Legal Studies & Lawyers Against Abuse 'My Teacher Hurt Me: What Should I Do', 2014. Also available in isiZulu, XiTsonga and Sepedi.

E Bornman, R Van Eeden & M Wentzel (eds) *Violence in South Africa: A variety of perspectives* (1998).

CHAPTER 18

SEXUAL VIOLENCE IN SCHOOLS

Kate Paterson

TERMINOLOGY

- **'Abortion'** means the termination (ending) of a pregnancy.
- **'Consent'** means you agree to do something, and you understand what you are agreeing to do. Consent can be given through words or actions. It cannot be forced or given because you are threatened.
- **'Harassment'** is unwanted conduct of a physical, verbal or non-verbal nature that is considered offensive by the person being harassed, where the perpetrator knew or should have known that the behaviour was offensive.
- **'In loco parentis'** is a Latin term for 'in the position of parents'. In this chapter it describes the responsibility of schools and teachers for the welfare of children. Teachers are expected to step into the shoes of parents and care for children as if they are their parents.
- **'Penetration'** is the insertion of any body part or object into a person's genital organs, anus or mouth.
- **'Perpetrator'** is a person who commits an unlawful act, such as an act of violence.
- **'Rape'** is a term used in criminal law for any penetration without consent, and all penetration of any person under the age of 12. This includes penetration of a boy or man without consent.
- **'Revictimisation' or 'retraumatisation'** refers to trauma experienced by victims of sexual violence because of a failure of the criminal justice system to protect them properly. This can occur, for example, through repeated postponements of a trial, or a failure to provide an intermediary through whom a victim can give evidence at trial.
- **'Sanction'** means official punishment imposed for breaking a law or rule.
- **'Sexual abuse'** includes rape, sexual assault and sexual harassment. It is sexual abuse for a person to force you to watch sexual movies or see photographs, or for someone to call you sexual names, or to touch you or make you touch them in a way that makes you uncomfortable.
- **'Sexual assault'** is a term used in criminal law for sexual abuse without penetration by a body part or object. It includes a person forcing you to touch their genital area.
- **'Sexual violence'** is any sexual act or attempted sexual act using intimidation, threats, force, harassment or emotional abuse.
- **'Statutory rape'** is a term used in criminal law to describe the crime of consensual sexual penetration of any person under the age of 16 by a person over the age of 18, or the penetration of a person who is under the age of 16 by a person aged 16 to 18 who is more than two years older than the younger person. See page 317 for more about the ages of consent.
- **'Victim'** in this chapter refers to a person who is the subject of sexual violence. Many people prefer to use the word 'survivor', because 'victim' makes it seem as though a person is permanently damaged by sexual violence. No person who is sexually violated is 'damaged goods', but all are people who have been hurt in unacceptable ways. We use 'victim' as the simplest language possible to identify a person who has recently been hurt in this way.
- **'Violence'** is behaviour that causes harm or may imminently cause harm to a person's safety or well-being, including through physical, emotional, verbal or psychological abuse, intimidation, harassment, stalking or damage to property.

OVERVIEW

This chapter will discuss sexual violence in schools: what it means for the rights of learners, and how to respond if you or someone you know has been a victim of sexual violence by a teacher or fellow learner.

Readers should also consult the chapters on **gender and sexuality** and the **rights of pregnant learners** for a better understanding of the full range of rights that learners have over their bodies.

If you want to know the steps to take after you or someone you know has been subjected to sexual violence, please refer to page 325 below. You may also want to use the handbook 'My teacher hurt me, what should I do?' which is available from SECTION27, the Centre for Applied Legal Studies, and Lawyers against Abuse.

INTRODUCTION

South Africa is one of the most violent societies in the world. In 2015, internationally, South Africa was ranked 147th out of 162 countries for having the worst levels of what is called 'societal safety and security'. This measures safety by looking at violent crimes outside of war zones.

Problems in terms of 'societal safety and security' are directly linked to poverty, substance abuse, unemployment and a failing education system. The kinds of violence we see in these conditions are generally committed by a person known to the victim in a personal space, such as their home or school. We will not be able to stop this kind of violence in our society altogether without improving these conditions, but we can help by holding perpetrators of violence to account.

Sexual violence is usually committed as a show of power by one person over another person where there is already an unequal power relationship between the perpetrator and the victim.

South Africa is a deeply unequal society, and violent crimes affect some groups of people more than others. Groups that are vulnerable to sexual violence include women, children, poor people, people with disabilities, and black people. This does not mean that white people, men or boys, and rich people cannot be victims of sexual violence; but it does mean that special measures should be taken to protect and promote the rights of women, children, poor people, people with disabilities and black people – and in particular, poor, young, black girls.

Some people still believe that sexual violence is committed because something about the victim makes the perpetrator unable to control their sexual urges. For example, a girl wearing a short skirt or lipstick is sometimes seen as provoking sexual urges in men that make them rape or sexually assault the girl. This is problematic on many levels:

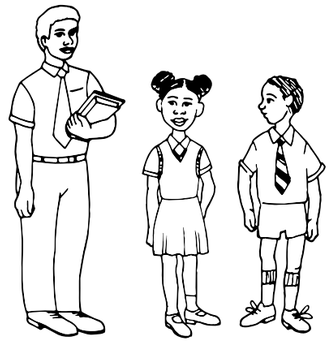
1. Firstly, it implies that a victim is to blame for something they did not consent to, could not control, and which hurt them
2. Secondly, it implies that men cannot control their actions if they feel sexually stimulated
3. Thirdly, it links sexual violence with sexual drive in a false way. It has been widely researched and agreed on that even though the violation is of a sexual nature, the crime is about the need to exert power, and not about sexual drive.

Sexual violence affects not only those who are physically hurt, but also people around them, and those who feel that they are at risk of being hurt because they belong to a vulnerable group. This is known as 'secondary victimisation', and can also affect a person's ability to participate properly in society.

Direct and 'secondary' victims of sexual violence sometimes find that their physical and mental health has been compromised, and that it is difficult for them to function properly in day-to-day life. If the person is of a school-going age, then it may be difficult to participate in and do well at school.

EVERYONE RESPONDS TO SEXUAL VIOLENCE DIFFERENTLY

- There is no 'right' way for a victim of sexual violence to respond
- Many people respond very emotionally, and may be hysterical, agitated and uncertain of the details of what happened to them. Other people may be quiet, serious and matter-of-fact, and remember very clearly what happened
- Some people will want to tell everyone what happened, but others might prefer to tell no-one for a long time
- Perpetrators often make victims believe that they somehow provoked or 'asked for' a sexual act. This can make a victim feel guilty and ashamed when they have done nothing wrong. There is usually nothing that a victim of sexual violence could have done to stop the incident from happening, and any person assisting a victim of sexual violence should be careful not to suggest that there was
- Victims may even feel sorry for the perpetrator, or suggest that they be forgiven. This has nothing to do with the truth of their claim.



SEXUAL VIOLENCE IN SCHOOLS

As we discussed above, sexual violence is usually committed by people with power against those without it, as a way of asserting that power. Schools must actively work to break this pattern of violence through educational programmes, and be a safe haven for learners. However, schools are more frequently becoming the site of the violence.

The United Nations Committee on the Convention for the Elimination of all forms of Discrimination against Women said in 2011 that there were 'grave concern about the high number of girls who suffer sexual abuse and harassment in schools' in South Africa, 'by both teachers and classmates, as well as the high number of girls who suffer sexual violence while on their way to or from school'. This Committee is a body of the United Nations that has oversight of how women and girls are treated in all countries that have ratified the Convention, including South Africa. You can read more about South Africa's international law obligations on page 320.

It is very difficult to find reliable data on the number of learners affected by sexual violence in schools, because most victims of sexual violence do not report the violence to official bodies.

INEQUALITY AND SEXUAL VIOLENCE

- Learners in poor schools are more likely to be victims of sexual violence
- Learners feel particularly vulnerable when they go to the toilets at school, particularly schools with poor infrastructure where toilets are more likely to be far away from classrooms and less likely to have secure doors
- Poor learners are more vulnerable to sexual advances by teachers, because teachers have status and money. Families of young girls will sometimes negotiate payment from the teacher who sexually abused the girl, in exchange for not reporting the teacher to the authorities.

POLICY AND LEGISLATIVE FRAMEWORK

In this section we set out the specific laws and policies regulating sexual violence in schools. Some of this legislation only applies to cases in which learners are sexually violated by teachers or principals. We will begin by setting out the laws that protect learners from all forms of sexual violence from teachers and other learners.

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Constitution gives us an umbrella of rights to protect learners from sexual violence.

It says in Section 12 that each person has the right to bodily integrity, and to not be treated in a cruel, inhuman or degrading fashion. This should be read with Section 10, which says that each person has the right to dignity. This means that all other learners and teachers at your school must not interfere with your body in a way that hurts you physically or emotionally.

The Constitution gives special protection to children through a section particularly dedicated to the rights of children. Among other things, it says that children have the right 'to be protected from maltreatment, neglect, abuse or degradation'. This gives special rights to children against abuse of any sort, and places a special duty on society to protect them.

Sexual violence in schools not only interferes with a learner's ability to protect his or her rights in terms of his or her body. It also usually affects a learner's ability to access his or her right to a basic education. This is because the learner often feels uncomfortable and threatened at school, and is scared, traumatised and unable to focus on learning. Many learners drop out of school because of the trauma, especially if the perpetrator remains in school with the learner. Everyone has both the right to a basic education and the right to learn in a safe and secure environment.

But what do these rights mean for each learner? The Constitution tells us that each person's individual rights must be respected and protected. This means that a person's dignity, bodily integrity and special rights as a child must not be interfered with. Section 7 goes further, though, and says that rights must be actively 'promoted' and 'fulfilled'. This means that measures must be taken to ensure that people can enjoy the full extent of the rights that they are given. This may include active steps by the state or other people.

The Constitution also speaks about how rights bind the state and other people. It says in Section 8 that each branch of the state (government, the legislature and the courts) has a duty to ensure that rights are respected, protected, advanced and fulfilled. State institutions, such as schools, are especially bound by this section to enforce the Bill of Rights. This means that schools and the Department have the duty to protect learners' rights to a basic education, and must actively protect learners from being hurt or violated. This includes properly punishing teachers who commit sexual offences, and disciplining learners appropriately.

Section 8 also says that individual people and companies are bound by the Bill of Rights. This means, for instance, that any person who interferes with another person's bodily integrity, dignity or rights as a child has infringed that person's constitutional rights, and must be held responsible for that.

The Constitution recognises the unequal starting position of bearers of rights, and states in Section 9 that each person has the right to equality. Sexual violence compromises the right to equality; as an example of this, learners who are poor, black, female and/or living with disabilities are the most likely targets of sexual violence. You can read more about equality and what it means in Chapter 4.

CRIMINAL LAW

SEXUAL OFFENCES ACT

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 ('Sexual Offences Act') criminalises certain sexual acts; including any non-consensual sex, and sex with a person under the age of 16 by a person over the age of 18. It also gives a very broad definition of sex, which includes any physical penetration with a body part or object into the genital organs or anus of another person, and insertion of a genital organ into another person's mouth. Non-consensual sexual acts that are not penetrative are still a statutory offence, called sexual assault.

In Section 54(1), the Sexual Offences Act specifically criminalises the failure to report any sexual offence that a person knows has been committed against a child. A person can be imprisoned for up to five years for this failure. This is important, because the first person a learner tells about being sexually assaulted or raped at school is often another teacher. If the teacher ignores the learner, or tells them that they should pretend the sexual violence did not happen, Section 54(1) means that the teacher can be jailed or otherwise punished by a court.

The Sexual Offences Act sets out that sexual acts are not voluntary if they result from an abuse of power or authority, because a person is 'inhibited' from indicating their willingness or unwillingness to participate in the sexual act. This means that when a learner has had sex with a teacher because the teacher threatened to fail the learner if he or she didn't, that teacher can be charged with the crime of rape.

The Sexual Offences Act sets out that an adult who commits a sexual act with a child under the age of 16 has committed the offence of statutory rape or statutory sexual assault, even if the child consents to the sexual act. A sexual act is defined very widely, and can be interpreted as including both holding hands and kissing.

Children between the ages of 12 and 15 cannot be criminally charged for engaging in consensual sexual acts with one another. However, this was not the case between 2007 (when the Sexual Offences Act came into being) and 2013.

THE AGES OF CONSENT

- Rape can be committed against a person of any age.
- A child under the age of 16 may consent to sex, but it will be considered 'statutory rape' if it is with a person over the age of 18. It is also statutory rape for a person between the ages of 16 and 18 to have consensual sex with a child under the age of 16 if there is more than two years' difference between their ages. This two-year rule only applies if the older child is 16 or 17 years old
- For example: If two 15-year-olds have consensual sex, neither of them can be charged with statutory rape. If a 15-year old and a 12-year old have consensual sex, the 15-year old cannot be charged with statutory rape. If a 17-year old has consensual sex with a 14-year old, the 17-year old will have committed statutory rape
- A child under the age of 12 cannot legally consent to sex. Even if a child under 12 indicates willingness to perform a sexual act, the law does not consider them old enough to make that decision. Sex with a child under 12 is always rape
- The offences set out in the SACE Act and/or Employment of Educators Act and/or the Schools Act are about abuse or neglect of all learners, regardless of their age. Many learners in Grade 12 are over the age of 18, but are still protected by these Acts because they are learners. The SACE Act is discussed on page 322
- An offence in terms of the Children's Act can only be committed against a person who is under the age of 18. The Children's Act is discussed on page 319.

IT IS A CRIME:

- For any person to force you to have sex with them
- For any person to force you to have sex with someone else
- For any person to force you to touch their body with any part of your body, including your hands and mouth
- For any person to force you to touch your body in a sexual manner
- For a person to force you to watch them touch themselves or someone else in a sexual manner.

THE CASE OF *JULES HIGH SCHOOL* AND *THE TEDDY BEAR CLINIC FOR ABUSED CHILDREN & ANOTHER V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT & ANOTHER*

Before 2013, the Sexual Offences Act criminalised sexual conduct between two consenting children under the age of 16. This meant that children could be prosecuted for having consensual sex under the age of 16, but also could be prosecuted for holding hands, hugging and kissing. If convicted, those children could be placed on the national register for sex offenders described on page 39, and would be restricted from working with children or adopting children in the future.

This was brought into the spotlight in 2010, when three children aged 14 to 16 from Jules High School in Gauteng were charged with 'consensual sexual penetration'. The sexual act was filmed on a cell-phone camera and widely distributed on the internet. At the time, the National Prosecuting Authority ordered the children to attend counselling at the Teddy Bear Clinic for Abused Children as a condition for the charges to be dropped. The young girl who had been involved in the sexual act committed suicide in 2014. Her family said it was because she had never recovered from the shame she'd experienced after the incident.

At the same time as the *Jules High School* case, in 2010, the Teddy Bear Clinic asked the Pretoria High Court to declare those sections of the Sexual Offences Act that criminalised sexual acts between consenting children to be inconsistent with the Constitution and invalid. The Pretoria High Court ruled in 2013 that those sections were unconstitutional, and sent the matter to the Constitutional Court for confirmation.

The Constitutional Court found that the sections infringed children's rights in Sections 10 (the right to dignity), 14 (the right to privacy) and 28(2) (that a child's best interests are of paramount importance) of the Constitution. It noted that a level of sexual activity is normal and healthy in adolescents, and that criminalising that activity was not only unfair on adolescents but also dangerous, because it would be difficult for them to make informed and healthy sexual decisions.

When a person alleges that they have been the subject of a sexual offence, a criminal case must be opened against the alleged perpetrator. The South African Police Service (SAPS) is required to investigate any alleged sexual offence through their Family Violence, Child Protection and Sexual Offences Unit. The Unit is specially trained to handle cases involving children who are victims of sexual offences.

The Service Charter for Victims of Crime in South Africa, which tells the SAPS how they should assist people who are victims of crime, says that victims of sexual offences must be interviewed about the crime in private, and that government must ensure that the victim has access to the social, health and counselling services and legal assistance that they need.

If the police turn away a person who reports an offence, fail to take a claim seriously, or do not make the necessary arrangements for the victim to be given medical assistance, then the officer involved is guilty of professional misconduct in terms of the National Police Instruction on Sexual Offences.

Once a victim of sexual violence has opened a case, he or she is known as the 'complainant'. Their role in the criminal case is to be a witness for the State against the person accused of the crime. The State prosecutes crimes because a crime is seen as being committed not only against an individual but also against the whole of society. A prosecutor appointed by the State will argue in court for the perpetrator to be convicted of the alleged crime. The person presiding over the court will be a magistrate or a judge.

THE CRIMINAL PROCEDURE ACT, 1977

The Criminal Procedure Act, 1977 sets out ways for children who are victims of sexual violence to be protected when they give evidence in court. For example, it says that non-verbal expressions such as gestures can be specifically considered as vocal evidence if the person gesturing is a child (Section 161(2)), and that an intermediary must be appointed to work with the child witness so that he or she is adequately prepared for trial, and experiences as little trauma as possible. The intermediary, who is usually a social worker, is a go-between for the magistrate, the prosecutor, the perpetrator and his or her legal representation.

If a person is convicted of a sexual offence against a child – including rape, statutory rape or sexual assault – the Sexual Offences Act says that the person may not be employed to work with a child in any circumstances.

Any person convicted of sexual offences against a child or against a person who is mentally disabled will have their name recorded in the National Register of Sex Offenders. Employers must apply to the Department of Justice and Correctional Services in the Promotion of the Rights of Vulnerable Groups Unit for a certificate confirming that a person is not listed on the national register of sex offenders. The register is not generally available to the public.

THE CHILDREN'S ACT, 2005, AND THE CHILDREN'S AMENDMENT ACT, 2007

The Children's Act gives content to and supplements the special rights of children in the Constitution. It binds natural and juristic persons, such as schools or state institutions. The Children's Act says that every decision regarding children must be made in the 'best interests of the child'. This includes that children must be protected from physical or psychological harm caused by 'subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence…'

It codifies the common law principal of in loco parentis, which refers to a person who steps into the shoes of a child's parents for a specific purpose. It means that a person acting in loco parentis, such as a teacher, has a responsibility to '(a) safeguard the child's health, well-being and development; and (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards'.

This partly explains why even a consensual romantic or sexual relationship between a learner over the age of 16 and a teacher is still unlawful. A teacher is supposed to be behaving like the learner's parent, and certainly not entering into any sexual relationship with them. A teacher bears responsibility for a learner in the same way that a parent bears responsibility for a child. Also, there is an unequal power relationship between teacher and learner. This makes it difficult for a relationship ever to be truly consensual. For example, a consensual relationship affects a learner adversely because a teacher has the power to determine whether a learner passes their subject, and can also influence other teachers at school.

In loco parentis also gives teachers

a responsibility to protect learners from being hurt by each other.

The Children's Act defines abuse as 'sexually abusing a child or allowing a child to be sexually abused', and places a duty to report both a sexual assault by a teacher and the rape of a minor. This means that a teacher who knows that a colleague is sexually abusing a learner can be held criminally liable for sexual abuse, because their failure to report means that they are implicated in allowing it to happen. The teacher must report the offence to the SAPS, and to the provincial Department of Social Development.

The Children's Act establishes the National Child Protection Register. This is separate from the National Register for Sex Offenders. It also keeps a record of abuse and designates people who are unsuitable to work with children. The people listed on the register are not allowed to work with or have any access to children.This includes people convicted of indecent assault and rape. The register is also private, but access is allowed to people in designated child protection organisations, as well as members of the police who work on child protection. Public schools are also obliged to check this list before employing anyone.

THE SOUTH AFRICAN SCHOOLS ACT, 1996

The Schools Act gives content to the state's constitutional obligation to create a secure environment for learning.

The Schools Act requires a code of conduct for learners to be drawn up by the School Governing Body, to regulate behaviour and relationships in schools. This code of conduct should clearly indicate what steps are to be taken against a learner who commits a serious offence at school, such as any act of sexual violence. This is a separate punishment from any criminal sanction that may be imposed on the learner.

The Guidelines for the Prevention and Management of Sexual Violence and Harassment in Public Schools, 2008 requires schools to develop their own programmes and guidelines for responding to sexual violence. A school management team should investigate any allegation of sexual violence or harassment. The management team will also manage the disciplinary proceedings.

INTERNATIONAL LAW

South Africa has ratified a number of international law conventions that inform the state's duty to keep learners safe at school. The state is bound by their international-law obligations, and courts must consider these in interpreting the Bill of Rights. The most important of these, for the purposes of sexual violence, are the following:

- The United Nations Convention on the Rights of the Child says that states must protect children from all forms of sexual abuse
- The state is also bound by the Convention on the Elimination of All Forms of Discrimination Against Women, which says states must take appropriate measures to change the way that society views and treats men and women and their perceived roles, so that all practices based on the idea of inferiority of women are eliminated. As we have discussed above, one of the best ways we can decrease incidents of sexual violence is to empower and strengthen vulnerable groups, towards creating a more equal society
- The Declaration on the Elimination of Violence against Women sets out states' obligations to eliminate all forms of violence against women, over time, through state policies and interventions; including the duty to 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons
- South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (known as the Maputo Protocol). This binds the state in similar ways as the Declaration on the Elimination of Violence against Women, but also speaks specifically about the state's duty to 'actively promote' education programmes to combat beliefs and practices that entrench and aggravate violence against women
- The Maputo Protocol also gives special protection to women with disabilities. The state has a duty to 'ensure the right of women with disabilities to freedom from violence, including sexual abuse…'.

LAWS APPLICABLE TO VIOLENCE PERPETRATED BY TEACHERS AGAINST LEARNERS

THE EDUCATORS ACT

The Employment of Educators Act, 1998 (the 'Educators Act') is a law developed to regulate the relationship between departments of education and the teachers they employ. Please note that in this section, we use the word 'teacher' to mean any person employed by the department of education at a public school.

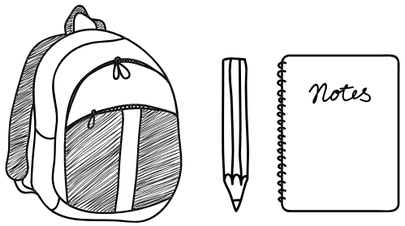
The Educators Act sets out disciplinary procedures to follow when a teacher in a public school commits an offence. Offences are separated into 'misconduct' and 'serious misconduct'.

If an allegation is made that a teacher in a public school committed misconduct or serious misconduct, the head of department or school principal should give written notice to the teacher of a disciplinary hearing. The hearing must be held no earlier than five days after delivery of the written notice, and no later than ten days after.

If it is found in a disciplinary proceeding that a teacher has committed general misconduct, the employer can choose what sanction to impose, ranging from compulsory counselling to suspension and demotion. The employer, at their discretion, may dismiss a teacher who conducts him- or herself in an 'improper, disgraceful or unacceptable manner', 'displays disrespect towards others in the workplace', or 'intimidates or victimises

DUTIES OF TEACHERS IN PRIVATE SCHOOLS

The Educators Act does not apply to private schools. The Independent Schools Association of Southern Africa (ISASA) has a standard code of conduct that private schools may use if they like, but generally the schools have their own policies that do not have the same force as national legislation. This means that there is no standard way that teachers who commit sexual violence are dealt with in private schools. However, teachers at private schools are still bound by the South African Council for Educators Act, criminal laws and the Children's Act and the Constitution. All of the obligations created in these laws still apply to private schools, and teachers in private schools must still be criminally charged if they have committed a sexual offence.



fellow employees, learners or students'. It should be noted that it is also general misconduct to commit a common-law or statutory offence, including a breach of obligations in the Children's Act.

If it is necessary for a learner to give evidence against a teacher at a disciplinary hearing, and it is likely that giving evidence will be traumatic for the learner, the presiding officer of the disciplinary hearing should appoint an intermediary through whom a learner can give evidence, in order to make the learner more comfortable with the process.

If, after an investigation into the conduct, it is found in a disciplinary proceeding that a teacher has committed serious misconduct, the employer has no discretion as to what sanction to impose. The teacher must be dismissed. Serious misconduct includes sexual assault committed on a learner, student or other employee, having a sexual relationship with a learner of the school where the teacher is employed, or causing a learner or student to do either of these things.

Teachers have the right to appeal any finding or sanction, and the sanction may be suspended pending finalisation of an appeal. This means that a teacher may continue teaching at a school, despite being found guilty of a dismissible offence of sexual violence. If an appeal is not concluded within 45 days, the Labour Relations Act, 1995 says that the teacher, or his or her union on behalf of the teacher, may refer the dismissal to the Education Labour Relations Council for dispute resolution.

THE SOUTH AFRICAN COUNCIL FOR EDUCATORS ACT, 2000

The South African Council for Educators Act ('SACE Act') requires SACE to compile a Code of Professional Ethics ('Code of Ethics') for all teachers. A teacher must not be employed unless they are registered with SACE. The SACE Act sets out that a teacher may be removed from the SACE register of teachers if the Code of Ethics is breached. Any form of sexual misconduct is a breach of the Code of Ethics. This includes any form of sexual abuse, improper physical contact, sexual harassment, and any consensual sexual relationship with a learner.

The SACE register should ensure that no educator found guilty of sexual misconduct can be employed by any other school.

RELEVANT ITEMS IN THE SACE CODE OF ETHICS

3.1: Teachers must respect the dignity and constitutional rights of learners.

3.5: Teachers must not humiliate or physically or psychologically abuse a learner.

3.6: Teachers must not have improper physical contact with learners.

3.7: Teachers must promote gender equality.

3.8: Teachers must not sexually harass learners in any way.

3.9: Teachers must take reasonable steps to ensure the safety of learners.

3.12: Teachers must not abuse their position of power.

7.2: Teachers must enhance the dignity and status of the teaching profession, and not bring the profession into disrepute.

THE PROBLEM WITH ALL THESE LAWS

As you can see, there are many different laws that regulate different areas of sexual violence in schools. Some of these laws don't work together very well. They use different terminology to describe the same things, which makes it difficult to know how things are supposed to be defined.

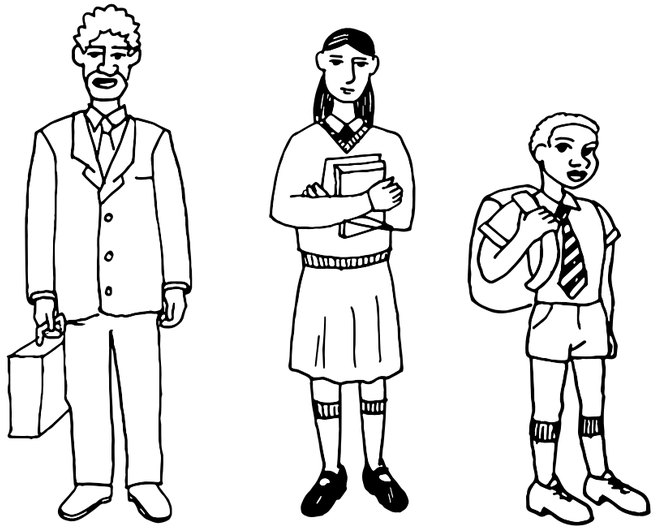
For example, the Department of Basic Education's Guidelines for the Prevention and Management of Sexual Harassment were published in 2008. Until then, many researchers looked to the Code of Good Practice on the Handling of Sexual Harassment Cases, 1998. This Code was set up to manage working relationships, so it uses terminology from labour relations; but it also uses wide enough definitions that it could be applied to learners. However, though it may work when applied to teachers harassing teachers, it is very difficult to apply to a learner-teacher or learner-learner relationship.

There are serious problems with coordination between the different systems put in place to protect learners and punish abusive teachers.

Principals must report any incident to the district office of the department of education, but are also supposed to report the matter to the police if the incident is 'sufficiently serious'. If the principal does not think the matter

HOW PRINCIPALS CAN HELP

The more time the different processes take, the more the learner will be re-traumatised by what has happened to them. Principals can help by reporting to the DBE, SACE and the police as soon as they find out about the sexual violence. They can use the mechanisms described in this chapter to suspend the teacher for the course of the investigation, and to assist the learner to move schools if necessary. Teachers and principals should also speak regularly to learners about their rights over their bodies and the remedies if those rights are violated, and ensure that sexual education in their school is given in an open and honest manner.



is serious enough, they must investigate the matter internally at the school. They are not required to report to the DBE and the South African Council for Educators at the same time as they report to the police. This means that three different processes may all start at different times and that SACE may never even hear about an incident at all.

As you will have seen from earlier in the chapter, there are also two separate registers for sex offenders. One is established through Chapter 6 of the Sexual Offences Act, and the other through Chapter 7, Part 2 of the Children's Act.

The National Register of Sex Offenders, established through the Sexual Offences Act, lists people who have been convicted of a sexual offence against a child or person with a mental disability. The purpose of the Register is to prevent those convicted of such an offence from being employed to work with children in the future.

The Child Protection Register, established through the Children's Act, also lists (in Part B of the Register) the names of people unsuitable to work with children. It includes a much broader range of people who cannot work with children, but appears to apply to fewer institutions than does the National Register of Sex Offenders. This may cause situations in which names appear on one list only, so that certain employers need to consult both lists, and others need consult only the National Register of Sex Offenders.

While these discrepancies are very serious, the most serious problem perhaps is that there is often a failure to implement any of the laws or procedures properly. This makes it difficult for learners to trust that the system will protect them, and makes it even less likely that learners will report a teacher or learner who hurts them. This can only be properly fixed with better alignment between SACE, the DBE, and the criminal justice system; but it helps for learners to know their rights, and to know the process that should be followed after sexual violence is committed.

A learner usually doesn't need legal representation to follow these steps, but they are much more likely to be able to follow each step properly if they have help from an adult they trust.

We set out the steps below, and list organisations that can be contacted for further assistance – legal or otherwise – at the end of the chapter.

WHAT TO DO IF YOU ARE OR YOU KNOW A LEARNER WHO IS A VICTIM OF SEXUAL VIOLENCE IN A SCHOOL

1. ASK SOMEONE FOR HELP

If you have been harassed, sexually assaulted or raped, try to find a reliable person who you can be honest with to help you through the process.

2. IF YOU HAVE BEEN RAPED OR SEXUALLY ASSAULTED

A. KEEP THE EVIDENCE

If you have been raped or sexually assaulted, you should try not to change your clothes, bath or shower before you have been to the hospital. Take a change of clothes with you to the hospital if you can. Whatever you do, do not put your clothes into a plastic bag, because the plastic can ruin the evidence. The evidence is very important in prosecuting the person who hurt you, especially when there is no-one who witnessed what happened.

B. GO TO THE HOSPITAL

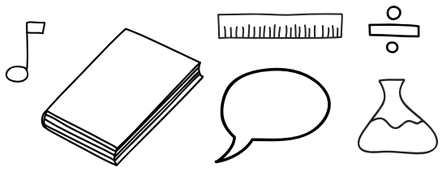
If you have been physically hurt by sexual violence in any way, you should go to a hospital as soon as you can. A doctor should give you all of the medical care you need to make sure you heal quickly. If you have been raped, you should do everything you can to get to a hospital within 72 hours (three days). If you go within three days, a doctor can give you the morning-after pill to prevent possible pregnancy, and PEP medication to prevent you from being infected with HIV. You do not need

USEFUL READING

We rely heavily in this section on an illustrated handbook compiled by the Centre for Applied Legal Studies, Lawyers against Abuse, and SECTION27, titled 'My teacher hurt me, what should I do?' The handbook is illustrated and very accessible for learners, and available in isiZulu, Sepedi, English, Xitsonga and Braille. You can access a copy through SECTION27, whose contact details are listed at the end of this book.

WHAT IF YOU FIND OUT THAT YOU ARE PREGNANT?

- Speak to your trusted person about your options. If you decide to keep the baby, there are people and organisations that can support you and help you to finish your studies.
- If you feel that you cannot or do not want to keep the baby, speak to the nurse or doctor about adoption or abortion.
- If you are less than 12 weeks pregnant, you automatically have the right to an abortion.
- If you are more than 12 weeks pregnant but the pregnancy came about because you were raped, you still have the right to an abortion up to 20 weeks.
- You do not need your parents' consent to have an abortion, but it is a good idea to discuss your options first with a counsellor or an adult you trust.



your parents' permission to receive this medication. The sooner you can get to the doctor, the better. Even if you can't get to a hospital within 72 hours, you should try to get there as soon as you can, for a doctor to do a full examination and give you any medication you may need.

It is also important to have the doctor inspect wounds that have been inflicted on you, for collecting evidence if you decide to take action against the perpetrator. The doctor may ask some uncomfortable questions, and need to examine your vagina or anus. You should be honest with the doctor, and the doctor should make you feel comfortable. The doctor cannot perform any tests or examine you in any way without your explicit permission.

The doctor should be able to get a J88 form from the hospital, which is a form that records the evidence they have collected. A copy of the form can be found at the end of this chapter. If they don't have the form, they still need to examine you and give you whatever medical attention and medication you need.

C. GO TO THE POLICE

Many people in South Africa do not trust the police, and do not trust that the police will assist them. A survey from 2015 showed that 83% of South Africans believe that the police are corrupt. This is particularly difficult when dealing with personal crimes such as sexual violence. Victims feel uncomfortable speaking even to people that they know and trust about sexual violence, and usually feel very uncomfortable reporting cases to the police.

Take your trusted person with you to speak to the police if you can. If you would feel more comfortable speaking with a female police officer, you have the right to do so. The police should take you to a separate room so that you can tell them what happened privately, but your person can stay with you while you speak to the police.

You can attend any police station that you choose. The police must open a docket and take your statement. Your statement should include everything you remember about the person who abused you, and the events leading up to the abuse. The police will help you to write down your statement, and must read it back to you. You must be completely happy with the contents of your statement before you sign it. If there is something that you are not completely sure about, you can ask the police to remove it or change it.

You should ask the police officer assisting you for the following information:

- The CAS number for your case
- A copy of the statement you made
- The phone number of the police station
- The name and phone number of the police officer in charge of investigating your case. You may only be able to get this the next day.

D. GOING TO COURT

If the learner has opened a criminal case with the police, the police will investigate the case and give all the information to a prosecutor. This can sometimes take a long time, and the learner has the right to call the investigating officer to get updates on their case during the course of the investigation.

A child should always give their evidence through an intermediary, in a separate room away from the court. Even if the victim is over 18, the prosecutor can motivate for an intermediary if the victim is too traumatised to give evidence in court.

3. GETTING A PROTECTION ORDER

If a learner is being harassed or abused by their teacher or another learner, they may apply for a protection order through the Protection from Harassment Act, 2011.

Remember that harassment is when a person persistently makes you feel uncomfortable, when they know (or should know) that they are making you uncomfortable. Sexual harassment is when the attention the person is giving you is of a sexual nature, for example when a person makes jokes about your breasts or bottom. The Protection from Harassment Act gives the courts power to make orders saying that a person has to stop harassing you. If the person continues to harass you after the order has been made, you must notify the police and they will arrest that person.

Sometimes a learner will need stronger protection than is offered in the Protection from Harassment Act. If a learner is sexually violated by their teacher, they can apply for a protection order through the Domestic Violence Act, 1998. Although this is usually only used for protection against family members, because of the in loco parentis relationship between teacher and learner it has been found to apply to teachers too. You can apply for a protection order through the Domestic Violence Act if you have been sexually abused, including emotional, verbal and psychological abuse, harassment or stalking.

A protection order through the Domestic Violence Act not only sets out what conduct a person harassing or abusing you should stop doing, but also limits where that person is allowed to go in relation to you. For example, it can say that a teacher is not allowed to come within a certain distance of your house. If you live with the person abusing you, it can even say that the person is not allowed into your shared house at all. The content will depend on what the court decides is appropriate and necessary in the circumstances.

In both types of protection orders, you will be given an interim order first. This means that the court will make an order saying that the person making you uncomfortable must stay away from you while the court considers whether to give you a permanent protection order. You must be sure to always keep copies of the interim and final order safe, and to take these documents with you to the police station if the person continues to harass or abuse you, or does anything they are not allowed to do in terms of the order.

You should not need a legal representative for this process. The clerk of the court must assist you with completing your application for a protection order. You can go to the nearest magistrate's court to your home, and ask to speak to the clerk of the court.

4. REPORT TO THE DEPARTMENT OF EDUCATION

If the violence was perpetrated by a learner, the school should follow the steps set out in their code of conduct for disciplining the learner. If necessary, they must contact the local police station to report a crime.

If the violence was perpetrated by a teacher, the teacher must also be disciplined by their employer, who is either the provincial department of education or the school governing body. As described above, this is separate from SACE process and from any criminal process already under way, but the department should also ensure that the police and SACE are aware of any process they are undertaking.

A person who has been abused by an ordinary teacher should report them to the school principal. If the principal is the perpetrator of the abuse, or if the principal does not report the abuse to the department soon, you or your family can write directly to the provincial department.

The Department must investigate the matter, and may suspend the teacher while they are doing so. For more information on this, please see the section under 'laws and policies' about the Employment of Educators Act at page 321 above.

5. MOVING SCHOOLS

Once an incident of sexual violence has been reported to the Department of Education, you can motivate to the Department to move schools. This can help sometimes if you are finding it difficult to learn in the space where you were sexually violated. You or your parents should write to the Department requesting a transfer, and setting out the reasons why you need to move schools. If you live more than five kilometres away from the new school and don't have transport to get to the school, the new school principal must try to arrange transport for you by writing to the District Coordinator of the Department of Education.

6. GETTING COUNSELLING

As discussed above, sexual violence affects different people in different ways. It will often make people unable to concentrate, sleep, or function normally in the ways they used to. Any person who has been sexually violated should try to get counselling. This is sometimes available through schools, but may otherwise be accessed through free counselling services such as Childline. The number for Childline is 08000 55 555. Counsellors will help you to deal with what happened to you, and have to keep all information you give them confidential.

Kate Paterson is an attorney at SECTION27 specialising in the right to a basic education.

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CHAPTER 19

CORPORAL PUNISHMENT

Faranaaz Veriava and Tina Power

INTRODUCTION

In February 2016, the *Times Live* reported that a Grade 3 Free State pupil had died after a teacher assaulted her with a hosepipe. Eight-year old Nthabiseng Mtambo had been repeatedly beaten on her head with a hosepipe for not doing her homework.

In 1996, the South African Schools Act, under Section 10, banned the use of corporal punishment in schools. In 2000 this was confirmed in the *Christian Education* case. Despite the ban on corporal punishment 20 years ago, teachers are still hitting children at school. It is illegal.

WHAT IS CORPORAL PUNISHMENT?

The United Nations Committee on the Rights of the Child defines corporal punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. The Committee gives some examples of different types of corporal punishment:

- Hitting – with a hand or an object (for example, a whip, stick, belt or hosepipe)
- Kicking, grabbing or throwing
- Scratching, pinching, biting, pulling hair or boxing ears
- Forcing children to stay in uncomfortable positions
- Throwing objects at a learner
- Burning (for example, with hot water or cigarettes).

The Western Cape Provincial government defines corporal punishment as:

> Any deliberate act against a child that inflicts pain or physical discomfort to punish or contain him/her. This includes, but is not limited to, spanking, slapping, pinching, paddling or hitting a child with a hand or with an object; denying or restricting a child's use of the toilet; denying meals, drink, heat and shelter, pushing or pulling a child with force, forcing the child to do exercise.

EXAMPLE 1:

In 2012, a group of Grade 4 learners were disciplined for not doing their homework. They were forced to stand in a 'motorbike' position, on their toes. One of the learners had a steel plate in his toes from an accident, and was not able to hold the position as long as the others; this learner was then beaten, for not keeping up.

This method of discipline is classified as corporal punishment, and is illegal.

EXAMPLE 2:

The Grade 7 learners of Mpeli Primary School have been taken on an outing to the Planetarium. All the learners are very excited about the trip, and are very loud. Mr Smith, their bus driver, gets very angry with the children. He stops the bus, pulls Skosi off the bus, and hits him, in front of all the other learners.

The ban on corporal punishment is not only applicable to educators but to any person, including other members of staff such as bus drivers.

KEY WORDS

This chapter focuses on corporal punishment, but there are other important terms to know.

Abuse Any form of harm or ill-treatment deliberately inflicted on a child. It includes:

- Assaulting a child or inflicting any other form of deliberate injury on a child
- Sexually abusing a child or allowing a child to be sexually abused
- Bullying by another child
- Exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

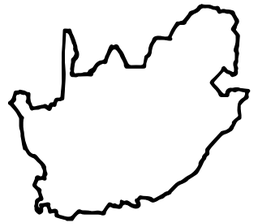
Assault Unlawfully and intentionally:

- Applying force to a learner
- Creating the belief that force is going to be applied to the learner.

Injury Physical harm or damage to person or property.

Code of Conduct A statement that sets rules that must be followed by members of the school community.

Positive discipline A form of discipline that is not punitive, but rather promotes punishment that facilitates constructive learning.



CORPORAL PUNISHMENT IN THE SOUTH AFRICAN CONTEXT

HISTORICAL OVERVIEW OF CORPORAL PUNISHMENT IN SOUTH AFRICA

Prior to 1994, corporal punishment was frequently relied on to ensure discipline in South African schools. It became acknowledged as an essential part of the schooling system. The predominant Christian National Education policy affirmed the role of the teachers as disciplinarians.

Generally, corporal punishment was used to discipline unruly children, and was also used as a means to 'toughen up' boys and 'turn them into men'; however, '(c)orporal punishment became one of the ways in which the racial and authoritarian apartheid system entrenched itself', according to a report titled 'Corporal Punishment of Children: A South African National Survey'.

Robert Morrell, a senior professor in education who has researched and written on corporal punishment, has noted that while corporal punishment was used in boys' schools – both black and white – white girls' schools were not exposed to corporal punishment, but black girls' schools were.

The reliance on corporal punishment and the values attached to it became deeply ingrained into the South African school system and society in general.

THE DEVELOPMENT OF THE PROHIBITION OF CORPORAL PUNISHMENT IN SOUTH AFRICA

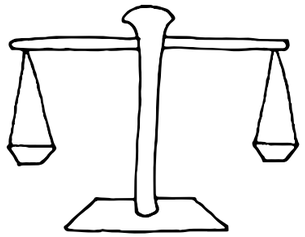
The end of apartheid brought with it the end of an authoritarian culture, and a shift towards a culture of human rights.

The social and political developments in South Africa created a shift in the education system towards an outcomes-based curriculum (Outcomes-Based Education or OBE), designed to facilitate more participative forms of learning in the new human rights culture. This was coupled with a new national legal framework for schooling. The South African Schools Act and National Education Policy Act (NEPA) of 1996 created a single, unified system of schooling in South Africa. NEPA seeks 'to facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights'.

The reformed schooling system is part and parcel of the transformation agenda for South Africa, and the banning of corporal punishment reflected the need to move away from a violent and authoritarian past towards an environment respectful of human dignity and bodily integrity.

Our Constitutional Court has confirmed these principles in two important cases. In *S v Williams*, the Court held that '[a] culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands'. In the Christian Education case, the Court held that there was a need for the legislature to 'make a radical break from our authoritarian past'.

More recently, the South African Human Rights Commission (SAHRC) issued a report on religious teaching that encourages physical chastisement in the home as a form of discipline of children. The 2016 Joshua Church Report reaffirmed that 'corporal [punishment] has been declared unconstitutional in all institutions having childcare responsibilities.' The report went on to say that it is 'explicitly stated that corporal punishment in institutional settings (like schools) violates the dignity of the child'.



DEBATES ON CORPORAL PUNISHMENT

The issue of corporal punishment at schools is by no means free of controversy.

Because corporal punishment was such an ingrained part of society, it has been difficult to shift or change people's attitudes towards it. This section will highlight some of the common arguments for and against corporal punishment.

ARGUMENTS FOR CORPORAL PUNISHMENT – 'SPARE THE ROD, AND SPOIL THE CHILD'

- Learners who receive corporal punishment are more hardworking
- A lack of consequences or punishment can increase violent behaviour by students
- Banning of corporal punishment has resulted in reduced levels of discipline
- Different methods of discipline are not as effective as corporal punishment
- Since the ban on corporal punishment, learners are behaving poorly and are ill-disciplined
- '[P]hysical punishment only became degrading when it passed a certain degree of severity' (*Christian Education*). Those in favour of corporal punishment contend that if it is administered justly, it is essential to discipline (they promote the idea of 'reasonable chastisement')
- Corporal punishment is a significant part of a cultural or religious belief.

The well-known Christian proverb 'Spare the rod, and spoil the child' suggests that without corporal punishment children will become ill-disciplined and spoilt. It suggests that beating a child is an important part of the development of a child, and ensures that a child will become diligent and free from sin.

ARGUMENTS AGAINST CORPORAL PUNISHMENT

There is increasing evidence that corporal punishment has harmful effects.

In May 2016, the Universities of Michigan and Austin in America published the findings of a study about corporal punishment. The study spanned 50 years, and included more than 150 000 children. It found that 'spanking is linked to aggression, antisocial behaviour, mental health problems, cognitive difficulties, low self-esteem, and a whole host of other negative outcomes'.

The study found that there were no redeeming effects of corporal punishment. These findings were published in the *Journal of Family Psychology*, by E Gershoff and A Grogan-Kaylor.

Arguments against the use of corporal punishment include:

- It is an ineffective deterrence mechanism:
  - Evidence suggests that rather than acting as a deterrent, corporal punishment breeds aggression and hostility
  - It makes learners unhappy, which in turn contributes to absenteeism and learners dropping out of school
- Corporal punishment perpetuates the acceptance of violent behaviour in society
- It doesn't encourage learners to behave appropriately
- It has the potential to weaken the relationship between the learner and the educator, which is crucial for the development of the learner
- It causes psychological harm, including:
  - Emotional damage
  - A negative impact on self-esteem
  - Negative feelings about going to school
  - Negative outcomes for academic performance.

The European Commission of Human Rights held that:

> Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being … The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough … to describe it as degrading…

AN 'OFFICIAL AMBIVALENCE' TO THE PROHIBITION

Twenty years after the laws banning corporal punishment came into effect, it is clear that there is still a high prevalence of corporal punishment being administered in schools across the country. It has been suggested that this is in part due to a lack of support for the ban among educators.

Marius Smit, an Associate Professor in the School of Education at North West University, and a proponent of corporal punishment, states that '[e]ducators feel disempowered' without the traditional form of discipline. However, the 'official ambivalence' to the prohibition is largely as a result of inadequate training of educators about alternative forms of discipline, and the failure of a nation-wide attitude shift away from corporal punishment.

While there are educators and parents who believe that corporal punishment is the only viable way to ensure control in a classroom, there are many instances in which corporal punishment is used to assert power and control, rather than for discipline and to improve and maintain the learning process.

These are not examples of 'reasonable chastisement'. Rather, they are examples of the excessive and uncontrolled use of force, and of cruel abuse. So, while educators argue that corporal punishment is needed to maintain discipline, it is clear that these uses of violence are a means of exerting power over a learner for reasons unrelated to discipline.

Parental support of corporal punishment contributes to the 'official ambivalence' of the ban. Many parents were raised in an era in which corporal punishment was commonplace, and like educators, they have not made the necessary shift in accepting the new laws. It is likely that if parents support the use of corporal punishment in schools, they also promote its use at home. This leaves learners being exposed to unsafe environments both at home and at school.

EXAMPLES OF WHEN CORPORAL PUNISHMENT WAS NOT USED FOR DISCIPLINE:

1. A learner was hit with a broken hosepipe until he or she agreed to have sexual intercourse with an educator.
2. A learner was threatened with a knife for refusing to go home with an educator.
3. A group of learners who were allegedly giggling in class were beaten and expelled.
4. A learner was unable to wear his damaged shoes; the mother had written a note to the school explaining the situation, but the educator was not satisfied and punished the learner by hitting him until he fell.
5. In Gauteng, a learner was verbally abused and harassed by an educator for wearing a string in accordance with the child's religion.

STATISTICS ON CORPORAL PUNISHMENT

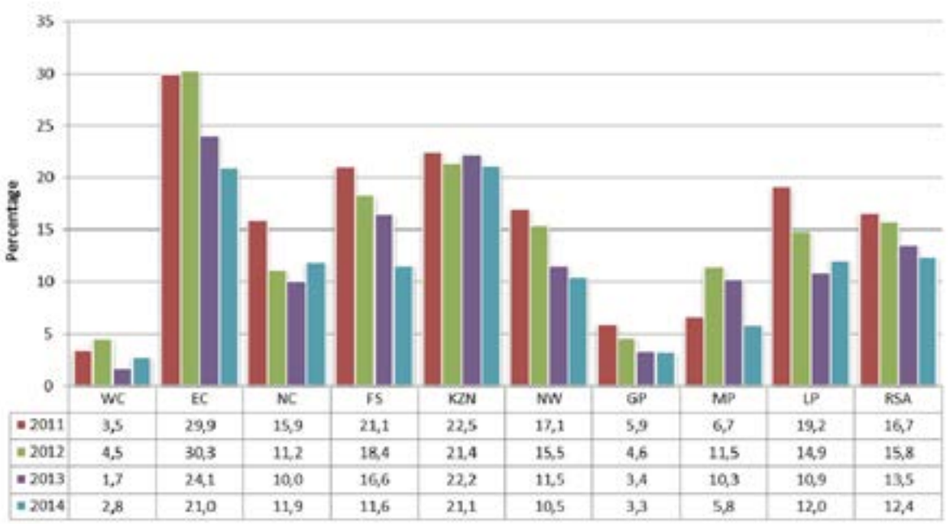
GENERAL HOUSEHOLD SURVEYS (GHS)

The General Household Surveys, produced by Statistics South Africa (StatsSA) annually, include figures for the proportion of learners who have experienced corporal punishment in schools in that particular year.

The GHS observed that there has been a decrease in reported corporal punishment since 2011. The Eastern Cape and KwaZulu-Natal were recognised as the provinces with the highest incidences of corporal punishment. Even though the percentage of learners who experienced corporal punishment at school has decreased nationally since 2011, the actual numbers of learners experiencing corporal punishment remains high. The figure of 12.4% translates to approximately 1.7 million learners being exposed to corporal punishment in 2014. The GHS data also show evidence that the practice of corporal punishment has been on the increase steadily in particular provinces, such as Limpopo, Western Cape and Northern Cape.

This graph shows the percentage of learners who experienced corporal punishment across the provinces between 2011 and 2014.

Figure 19.1: Percentage of learners who experienced corporal punishment 2011 and 2014



NATIONAL DEPARTMENT OF BASIC EDUCATION

In 2014, the Minister of Basic Education provided the numbers of reported cases of corporal punishment, as well as the total numbers of reported cases of corporal punishment between 2011 and 2014, and the number of educators found guilty.

Table 19.1: Reported cases of corporal punishment and the numbers of educators found guilt, 2011-2014.

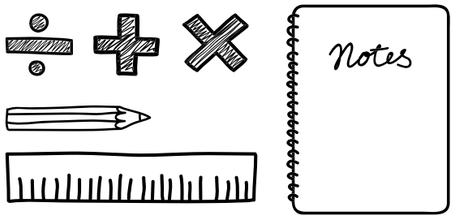
	REPORTED CASES OF CORPORAL PUNISHMENT			REPORTED CASES & GUILTY OUTCOMES (2011-2014)	
PROVINCE	2011/2012	2012/2013	2013/2014	TOTAL	NUMBER FOUND GUILTY
Eastern Cape	11	2	11	24	2
Free State	5	4	4	13	2
Gauteng	31	14	21	66	5
KwaZulu-Natal	14	24	5	43	9
Limpopo	6	6	8	20	3
Mpumalanga	6	8	4	18	1
North West	6	9	4	19	4
Northern Cape	1	-	1	2	-
Western Cape	99	115	188	402	3
TOTALS	**179**	**182**	**246**	**607**	**29**

SOUTH AFRICAN COUNCIL OF EDUCATORS (SACE)

The South African Council of Educators (SACE) is a statutory body that was established to develop and maintain ethical and professional standards for educators. All educators are required to register with SACE, and to abide by its Code of Professional Ethics. Every year SACE submits a report that provides a breakdown of all the complaints per province of alleged abuse by educators. Between 2014 and 2015, SACE received 253 complaints of instances of corporal punishment. Alongside is a breakdown of the number of corporal punishment complaints received per province by SACE in its 2014-2015 Annual Report.

Table 19.2: Corporal punishment complaints received by SACE, 2014-2015.

PROVINCE	COMPLAINTS OF CORPORAL PUNISHMENT AND ASSAULT
Eastern Cape	8
Free State	5
Gauteng	22
Kwa-Zulu Natal	25
Limpopo	10
Mpumalanga	8
North West	7
Northern Cape	3
Western Cape	165
Total	**253**



2012 National School Violence Study (NSVS)

In 2012, a National School Violence Study exposed the prevalence of corporal punishment in South African schools. The study showed that 49.8% of the nearly 6 000 learners who were interviewed had been corporally punished. Provinces that showed high levels of corporal punishment included KwaZulu-Natal, Eastern Cape and Free State; those with fewer learners reporting incidents of corporal punishment included Gauteng and Western Cape.

LEARNERS WITH DISABILITIES

In 2012, in a report on 'Violence Against Children in South Africa', UNICEF concluded that children with disabilities were more vulnerable to and more likely to experience physical abuse than children without disabilities.

This concern is not unique to South Africa. Human Rights Watch, in a report on 'Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools', has also noted that educators 'are more likely to use corporal punishment on children with disabilities than on their non-disabled peers'. There are very few statistics on corporal punishment of learners with disabilities, but this is not to say that it is not occurring. In UNICEF's report, it was explained that '[C]hildren with disabilities are easy targets for abuse because they may be less able to report the abuse and often have lower self-esteem than other children, are less able to defend themselves and are more dependent on, and thus perhaps trusting of, adults'.

Educators are often not trained to appropriately assist learners with disabilities, and educators might not be aware of, or understand, the specific disability of a learner. This can lead to educators being impatient with learners, making learners with disabilities 'easy targets' when it comes to corporal punishment.

OBSERVATIONS

The GHS indicated that in 2014, there were 14 million learners in the country. According to the GHS, 1.7 million learners had experienced corporal punishment; and according to SACE, 253 cases had been reported, while the Minister of Basic Education could account for 246 complaints.

There appears to be a great variance between the number of learners experiencing corporal punishment in a province, and the number of cases that are eventually reported and investigated. The NSVS indicated that a far higher number of learners experience corporal punishment than is reported.

As is the case with school violence and sexual violence in schools, there is a problem with under-reporting of corporal punishment. The lack of reporting is linked to the lack of education around the prohibition of corporal punishment: there are still many learners who consider it the norm.

Provinces such as the Western Cape have been very proactive in issuing circulars and providing educational aids about the ban; so while there are higher numbers of cases of corporal punishment in the Western Cape, it could be because learners, parents and educators are aware of their rights and are informed about the reporting process.

These numbers are only reflective of a percentage of the number of learners who are corporally punished. The following section explains what laws can be used to empower learners, educators and parents, so that they are able to speak out about corporal punishment.

LAW AND POLICY

INTERNATIONAL LAW

Various international legal instruments have recognised the rights of the child, the right to education, and the right not to be treated in a cruel or degrading way. South Africa has ratified many of these, and is legally bound to ensure that these rights are protected and enforced.

In 1995, South Africa ratified the Convention on the Rights of the Child (CRC). By so doing, our government is obliged to take measures to ensure that our laws reflect the standards and ideals set out in the CRC. Article 19(1) requires state parties to:

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual violence, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.

The CRC places an obligation on state parties to take steps 'to ensure that school discipline is administered in a manner consistent with a child's human dignity' (Art 28(2). Furthermore, Article 37(a) of UN CRC requires countries that have signed it to ensure that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.

South Africa is also a signatory to the African Convention on the Rights and Welfare of the Child (ACRW). The ACRW places similar obligations on state parties as mentioned above in Article 19(1) of the CRC. The ACRW further commits member states to 'take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child…'.

'Appropriate measures', in the context of corporal punishment, would include 'legislative measures' to protect learners from 'physical or mental abuse'. It would also include public education programmes for the promotion of positive discipline.

THE CONSTITUTION

Our Constitution has various rights intended to protect learners from being subjected to corporal punishment.

- **Section 12(1)** gives everyone the right to freedom and security of the person, which includes the rights:
  - To be free from all forms of violence
  - Not to be tortured in any way
  - Not to be treated or punished in a cruel, inhuman or degrading way
- **Section 28(1)(d)** states that every child has the right to be protected from maltreatment, neglect, abuse or degradation
- **Section 10** gives everyone inherent human dignity and the right to have their dignity protected.

NATIONAL LAWS

THE BAN ON CORPORAL PUNISHMENT

In the 1995 *S v Williams* judgment, the Constitutional Court said that prohibiting corporal punishment was an important part of moving away from our violent history. As a result, the Court held that juvenile whipping is no longer allowed in South Africa as a form of punishment.

Section 10 of the Schools Act prohibits corporal punishment in schools, and states that:

> (1) No person may administer corporal punishment at a school to a learner
>
> (2) Any person who contravenes subsection (1) is guilty of an offence, and liable on conviction to a sentence which could be imposed for assault.

In the *Christian Education* case, the Constitutional Court had to balance the rights listed above against the religious rights of the parents. In this case, the parents argued that 'corporal correction' was an important part of their Christian faith, and that a blanket prohibition on corporal punishment in schools was a violation of their rights to practise their religion freely.

The Court looked at all the constitutional and international obligations placed on our government, and affirmed that there is a duty to 'take all appropriate measures to protect the child from violence, injury or abuse'. In addressing the parents' arguments and the balancing of rights, the Court said that 'the parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously.' The Court said that the prohibition on corporal punishment is not preventing schools from maintaining their specific Christian ethos.

This case indicates that the Constitution is respectful and accommodating of people's values and beliefs, but when actions stemming from these beliefs do not coincide with the protection of our children from cruel and degrading treatment, those actions won't be allowed.

PROTECTING LEARNERS FROM CORPORAL PUNISHMENT

South Africa's national laws have been very clear in expressing the need to protect learners from any form of mistreatment.

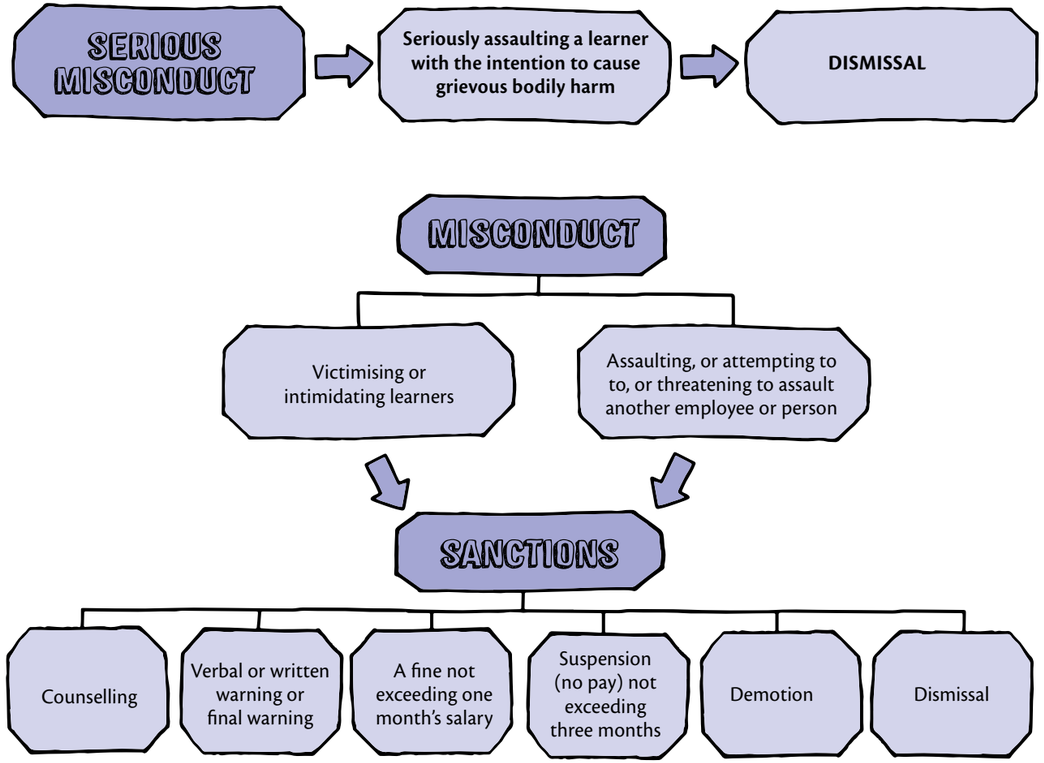


Figure 19.2: Possible outcomes when an educator is found guilty of misconduct.

NATIONAL EDUCATION POLICY ACT OF 1996

The National Minister for Education must develop policies about the control and discipline of learners, ensuring that 'no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any educational institution'.

THE CHILDREN'S ACT OF 2005

Section 7(1)(h) of the Children's Act says that the best interest of the child is of paramount importance in every matter concerning the child, and specifically states that the child's physical and emotional well-being must be taken into consideration in all matters concerning the child.

Section 110(1) of the Children's Act says that an educator who on reasonable grounds concludes that a child is being abused must report this in the prescribed manner to a designated child-protection organisation, the provincial department of social development, or a police official. Failure to report in terms of Section 110 is a criminal offence. Educators are therefore legally obliged to report acts of corporal punishment being administrated by other educators.

SANCTIONS

Where there has been a complaint of corporal punishment against an educator at a school, the district office for that school will conduct preliminary investigations of the allegations. Depending on the outcome of the investigation, the district official will refer the case to the Labour Relations Directorate for further investigation and disciplinary hearings.

EMPLOYMENT OF EDUCATORS ACT

Schedule 2 of the Employment of Educators Act of 1998 (EEA) governs the procedure for disciplinary hearings against educators. The EEA distinguishes between misconduct and serious misconduct, and attaches different sanctions to each.

The EEA states that if the misconduct is also a criminal offence, separate and different proceedings will occur. It does not make provision for legal representation in disciplinary hearings; but it allows for the presiding officer to appoint an intermediary, if the learner is under 18 and will suffer 'undue stress' during proceedings. The EEA further states that educators can also be dismissed if they contravene Section 10 of the Schools Act.

SACE

The South African Council for Educators has a prescribed disciplinary procedure for use if there is a complaint of an alleged breach of the code.

There is an initial investigation of the alleged breach. The matter may then be referred for a disciplinary hearing. The SACE disciplinary procedure has developed comprehensive rules to govern the disciplinary hearing, in terms of which the rules of natural justice apply. The procedure also provides for an appeal within SACE.

SACE may impose the following sanctions where an educator is found to be guilty of a breach:

- A caution or reprimand
- A fine not exceeding one month's salary
- Or the removal of the educator's name from the register for a specified period, or indefinitely, or subject to specific conditions.

CHILDREN'S ACT

The Children's Act provides for the establishment of a National Protection Register. Part B of the Register was established to have a record of persons who are unsuitable to work with children. A court, either in civil or criminal matters, or a 'forum established or recognised by law in any dispute in any disciplinary proceedings concerning the conduct of that person relating to a child' may make a finding that a person is unsuitable to work with children. In criminal proceedings, a person may be found unsuitable to work with children if they are found guilty of murder, attempted murder, or assault with intent to do grievous bodily harm with regard to a child. Once a person's name appears on Part B of the register, that person may no longer be employed at an institution dealing with children.

MEC FOR EDUCATION DEPARTMENT OF LIMPOPO V MOKAGDI SEBATHA

An educator applied lashes with a plastic pipe to the head of a six-year-old child. The main injury was bruising to one side of the head. The reason given by the educator for the corporal punishment was that the child had been absent the day before. The matter was reported to the police, and the educator pleaded guilty and was fined R300. The child was moved to another class.

The Limpopo DOE instituted disciplinary proceedings against the educator in consequence of which she was dismissed. The educator referred the matter for arbitration. The arbitrator found that while there was a ban in place for corporal punishment, the penalty was too severe. He took into account the remorse the educator had shown, her length of service, and the bruise that in his view was of a minor nature. The educator was reinstated.

On appeal, the Labour Appeal Court had to decide on the appropriateness of the dismissal.

The Labour Appeal Court held that a dismissal could occur even if an educator was found guilty of misconduct rather than gross misconduct.

The employer in these cases is certainly entitled to say that, notwithstanding any remorse, notwithstanding an impeccable record, given the violence perpetrated upon a minor child, dismissal may well be justified in such a case.

The reinstatement of the educator was nevertheless allowed on the basis that the Limpopo DOE's review was out of time by several years, and therefore could not be condoned.

CASE STUDY

STANDER V EDUCATION LABOUR RELATIONS COUNCIL

An educator had been teaching for over thirty years. He was found guilty of slapping a Grade 11 learner and was dismissed. He took the disciplinary process on review. The court set aside the dismissal and referred the matter back to the Education Labour Relations Council.

The court held that the Commissioner had failed to take into account certain factors relevant to the substantive fairness of the dismissal. This included the length of service of the educator. The educator did not deny the commission of the offence. He had accepted that what he had done was wrong, and had subjected himself to a further medical assessment and treatment. It was not in dispute that the offence was the result of provocative behaviour on the part of the learner. The relationship with the school had not broken down. It would appear from the version of the school that disciplinary action was only taken because of pressure from outside the school. There was no evidence that he would commit a similar offence again.

PROVINCIAL LAWS

All nine provinces have adopted provincial legislation that prohibits corporal punishment in schools. The Northern Cape, Mpumalanga, Gauteng and the Free State have gone further, and included provisions stating that 'anyone who administers corporal punishment in schools will be guilty of an offence, and is liable on conviction to a sentence which would be imposed for assault'.

Some provinces have been more proactive than others, and have sent out circulars and published regulations in attempts to address the current levels of corporal punishment in schools in South Africa.

In 2002 the Western Cape Department of Education issued a circular after a growing number incidents of corporal punishment had been reported. The circular aimed to reinforce what the laws and policies on corporal punishment were, as well as what the consequences of administering corporal punishment are.

In 2014 the Gauteng Department of Education issued a similar circular, with the purpose of promoting an understanding of assault and corporal punishment. The circular emphasised that corporal punishment was not to be used, and that 'positive discipline' was to be used.

In 2016, KwaZulu-Natal issued a circular 'to promote an understanding of the acts of corporal punishment, and to ensure that corporal punishment is not administered at our schools'.

It is not surprising that the three provinces with circulars are the ones with the highest number of reports of corporal punishment.

The two cases studies on this page and the page before are both about educators corporally punishing learners.

These cases illustrate that inconsistent approaches are often taken when dealing with corporal punishment. The law is clear on the matter, but the differing sanctions flowing from the different laws have created problems when matters have been reported. However, this should not deter a learner, parent or educator from reporting corporal punishment.

The following section suggests that there are three channels that must be followed when reporting corporal punishment. The reason for this approach is to avoid cases falling through the cracks, and ensuring that those who do wrong are appropriately dealt with.

WHAT TO DO WHEN A LEARNER HAS BEEN CORPORALLY PUNISHED

Many cases of corporal punishment are reported in schools, but few educators are found guilty, so it is important to know what to do if you or someone you know has experienced corporal punishment, so that the educator can be appropriately sanctioned. Here's what you can do:

LEARNERS

If you or one of your classmates has been corporally punished, it is important to report it so that it does not happen again. Sometimes it can be intimidating to report incidences like this, especially when it is very common in your school.

It helps if you can talk to someone you trust to help you with reporting.

The steps below explain the different ways in which you must report an incident. These steps do not need to be done in this order, but it is important that all three are done.

WHAT IS A FORM 22?

This is the prescribed form that is used for the 'reporting of abuse or deliberate neglect of a child'. It is set out in Regulation 33, Section 110 of the Children's Act.

WHERE CAN YOU GET A FORM 22?

These forms can be found on the internet, or they can be collected from local police stations or social services. Schools should also keep copies of the form.

HOW TO FILL OUT THE FORM:

A separate form must be filled out for each learner.

The follow information is required:

- The details of the learner (age, gender, date of birth)
- Contact details of a person whom the child trusts
- Details of alleged abuser
- Details of parents
- Nature of the abuse – physical, emotional indicators
- Brief explanation of occurrences, and
- If there has been any intervention.

STEP 1: DEPARTMENT OF SOCIAL SERVICE & DEPARTMENT OF EDUCATION

- Report the matter via the principal, provided the principal is not implicated in the matter. If the principal is implicated, report directly to the Departments of Social Services and of Basic Education
- Complete a form 22
- The form should go to the Head of the Department of Social Development, and the District Manager in the Department of Basic Education, and a social worker. You can ask an adult at your school for these details
- Once a form 22 has been filled out, it triggers a child protection investigation by a designated social worker.

STEP 2: SAPS

- All incidents of corporal punishment must be reported to SAPS so that a case of assault can be opened against the educator
- You can report an incident of corporal punishment at your local police station
- If you are under 18 years of age, a parent, social worker or educator should accompany you to the police station and report with you
- If you are over 18, you have a choice whether or not to lay a charge.

STEP 3: SACE

- You must lodge a complaint with SACE
- This can be done by calling the hotline, faxing, emailing or posting your complaint
- You need to give as many facts, dates and details as possible.
- If you are helping a classmate or reporting an incident on their behalf, their name must be included in the complaint
- If you do not feel conformable lodging a complaint you can do it anonymously, and it will be accepted. If you choose to do it this way, SACE will need the following in order to do a proper investigation:
  - Name of person who allegedly abused the learner
  - Name of the school involved
  - Name and grade of learner involved
  - Specifics of the incident, including date.

When you report corporal punishment people might ask you lots of questions. You do not have to give out information you are not comfortable with, but when you are talking to a policeman, policewoman or social worker it is helpful for them to have as much information as possible so that they can investigate the matter properly.

EDUCATORS

Educators are legally required to report incidences of corporal punishment, and must follow the same steps.

PARENTS, THIRD PARTIES AND COMMUNITY MEMBERS

Parents, third parties and community members should also be empowered to report corporal punishment. They must follow the steps above. They can report an incident on behalf of a learner, or can assist a learner in reporting the incident.

HOTLINES AND NGOS

Cases involving violence/harassment by educators can also be reported via various hotline options:

SACE
Tel: 012 679 9700

DEPARTMENT OF BASIC EDUCATION:
Helpline: 0800 202 933

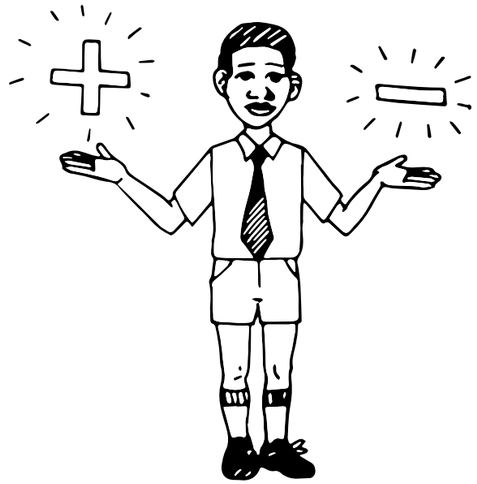
WESTERN CAPE DEPARTMENT OF EDUCATION – SAFE SCHOOLS CALL CENTRE
Toll-free number: 0800 45 46 47

POLICE CHILD PROTECTION UNITS
Tel: 10111
childprotect@saps.org.za

CHILDLINE SOUTH AFRICA
08000 55 555

CHILD WELFARE SOUTH AFRICA
0861 4 CHILD (24453)
011 452 4110

Organisations such as the Centre for Child Law, Legal Resources Centre, SECTION27, and Equal Education can also be contacted to assist with such matters, and to provide learners and families with legal advice.



ALTERNATIVES TO CORPORAL PUNISHMENT

In *S v Williams*, the court said:

> There is indeed much room for new creative methods to deal with the problem of juvenile justice. The court used community service as an example that would meet the punitive element of sentencing while allowing for the education and rehabilitation of the offender.

Kader Asmal, former Minister of Basic Education, said 'extensive research shows that corporal punishment does not achieve the desired end – a culture of learning and discipline in the classroom'.

This section aims to highlight alternative methods of discipline that can and must be used in place of corporal punishment.

Raising Voices, an NGO that works at preventing violence against women and children, defines positive discipline as:

> a different way of guiding children. It is about guiding children's behaviour by paying attention to their emotional and psychological needs. It aims to help children take responsibility for making good decisions, and understand why those decisions were in their best interests. Positive discipline helps children learn self-discipline without fear. It involves giving children clear guidelines for what behaviour is acceptable, and then supporting them as they learn to abide by these guidelines.

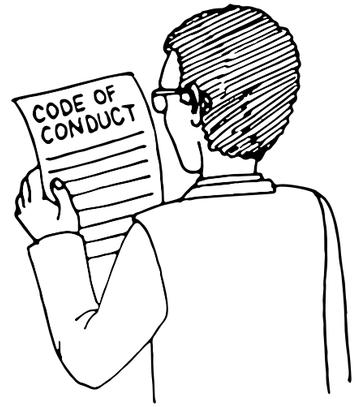
On the next page is a table that lists key words to explain the difference between positive discipline and corporal punishment.

Table 19.3: Helpful keywords explaining the difference between positive discipline and corporal punishment.

POSITIVE DISCIPLINE	CORPORAL PUNISHMENT
• Corrective • Nurturing • Learning • Tolerance, respect, dignity • Development • Non-violent • Inclusivity • Safety • Conflict resolution	• Authoritarian • Controlling • Fear • Punitive • Humiliating • Threats • Isolation • Pain & suffering

USEFUL PHRASES FOR POSITIVE DISCIPLINE	BAD STATEMENTS
• 'Please can everyone quiet down now.' • 'We are going to begin our life science lesson, and everyone needs to listen carefully.' • 'Do you understand why it important that we all quiet down?' • 'If you listen carefully and work quietly, I will let you out to break a little earlier today.' *Note: Some of these are examples that might be more useful for younger learners*	• Commands – 'Sit down now and be quiet!' 'Write 100 times, "I will not waste my time on silly things."' • Forbidding statements – 'Don't do that!', 'Stop that now!' • Criticising statements – 'You are so stupid!' 'What is wrong with you?' • Threatening statements – 'If you don't stop that, I will hit you.'

USEFUL ACTIONS FOR POSITIVE DISCIPLINE	BAD ACTIONS
• Keep eye contact with learners, and nod or smile at them when they are good. • Give them a few extra minutes of playtime at the end of the day when they have been well behaved. • Give learners stars on a 'star board' for their successes and good work. *Note: Some of these are examples that might be more useful for younger learners*	• Physically punishing a child. • Tearing up a learner's work or throwing work at a learner. • Not letting learners go to break. • Making learners sit or stand in uncomfortable positions.



CODE OF CONDUCT

As stated in *Christian Education*, part of the transformation of education requires a 'coherent and principled system of discipline' to be established. Part of this process is seen in Section 8 of the Schools Act, which provides that a School Governing Body (SGB) must, 'after consultation with learners, parents and educators of the school', adopt a code of conduct.

The KZN Department of Education defines a code of conduct as 'a statement that sets rules that must be followed by members of the school community'. The Schools Act states in Section 8(2) that a Code of Conduct is 'aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process'. All learners will be bound by the code of conduct of their school.

Adopting a code of conduct must be a consultative process in which all stakeholders get the opportunity to participate. It is important for parents and learners to be involved in these processes, and to engage with the issues relating to methods of discipline, to ensure that learners are safe and that the school's environment is conducive to learning.

The Minister is entitled to publish guidelines to assist SGBs in adopting their codes of conduct. In 1998, the Minister published such guidelines. These guidelines say that codes of conduct must be consistent with the constitution, and further require that 'positive discipline' is promoted. Guidelines urge teachers to understand the 'importance of mediation and co-operation, to seek and negotiate non-violent solutions to conflict'.

I support the Global Initiative to eliminate all corporal punishment at home, at school, in institutions and community … Violence begets violence and we shall reap a whirlwind. Children can be disciplined without violence that instils fear and misery, and I look forward to church communities working with other organisations to … make progress towards ending all forms of violence against children. If we really want a peaceful and compassionate world, we need to build communities of trust where all children are respected, where home and school are safe places to be and where discipline is taught by example.

ARCHBISHOP EMERITUS DESMOND TUTU

Codes of conduct should include the levels of misconduct, as shown in the example below.

Table 19.4: An example of levels of misconduct assigned to specific behaviours.

LEVEL 1 MISCONDUCT	LEVEL 2 MISCONDUCT	LEVEL 3 MISCONDUCT	LEVEL 4 MISCONDUCT	LEVEL 5 MISCONDUCT
• Being late for class • Failing to do homework • Talking in class	• Using abusive language • Being dishonest • Smoking cigarettes	• Hurting another learner • Being very disruptive in class • Racist and sexist remarks • Stealing and vandalism	• Selling drugs • Threatening a person with a weapon • Engaging in sexual activities	• Sexual abuse and rape • Breaking and entering Murder

The Codes of Conduct must also include the disciplinary actions for the different levels of misconduct. These can include warnings, suspensions and expulsions. It is also important to include the disciplinary process that must be followed when dealing with misconduct; this process can include hearings that are fair and give both parties the chance to present their case. Chapter 3 on School Governance provides further information on this topic.

It is important to promote the use of positive discipline, and to participate in the adoption of codes of conduct. Learners are vulnerable members of society who must be treated with dignity and respect. Creating a society free from violence cannot be achieved unless we show our learners how to be respectful of one another.

Faranaaz Veriava is legal counsel at SECTION27. She has a BA LLB from the University of the Witwatersrand and an LLM in Human Rights and constitutional Practice from the University of Pretoria, where she is currently registered for an LLD in education.

Tina Power is a former Students for Law and Social Justice Fellow at SECTION27. She is currently serving her articles at the Legal Resources Centre and has been accepted for an LLM in Human Rights Advocacy and Litigation at the University of the Witwatersrand.

CASES

South African

Christian Education South Africa v MEC of Education 2000 (4) SA 757 (CC) 2000 ZACC 11.

MEC for Education Department: Limpopo v Sebetha 2008 ZALAC 20.

Stander v Education Labour Relations Council (2011) 32 ILJ 978 (LC) 2010 ZALC 164.

S v Williams and Others 1995 (3) SA 632 (CC) 1995 ZACC 6.

European Court of Human Rights

Campbell and Cosans v UK Merits, App No 7511/76, A/48, [1982] ECHR 1, (1982) 4 EHRR 293, IHRL 33.

CONSTITUTION AND LEGISLATION

The Constitution of the Republic of South Africa, 1996

Children's Amendment Act no 41 of 2007.

Children's Act 38 of 2005.

The Employment of Educators Act 76 of 1998.

National Education Policy Act 27 of 1996.

The South African Schools Act 84 of 1996.

INTERNATIONAL AND REGIONAL INSTRUMENTS

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

The Convention on the Rights of the Child (CRC), 1989.

FURTHER READING

Global Initiative to End All Corporal Punishment of Children 'Corporal punishment of children in South Africa', 2016.

ET Gershoff & A Grogan-Kaylor 'Spanking and child outcomes: Old controversies and new meta-analyses.' (2016) Vol 30(4) *Journal of Family Psychology*.

F Veriava 'Promoting Effective Enforcement of the Prohibition Against Corporal Punishment in South African School' (2014).

DN Bryen & J Borman 'Stop Violence Against People with Disabilities: An International Resource' (2014).

Western Cape Education Department 'Abuse No More Protocol: Dealing Effectively with Child Abuse, Deliberate Neglect and Sexual Offences against Children', 2014.

P Burton & L Lesoschut 'School Violence in South Africa: Results of the 2012 National School Violence Study' (2014).

M Smit 'Compatibility of democracy and learner discipline in South African schools' (2013) Vol 1 *De Jure*.

Department of Women, Children and People with Disabilities & UNICEF 'Violence Against Children in South Africa', 2012.

Raising Voices 'Positive Discipline: Creating a Good School without Corporal Punishment, Alternatives to Corporal Punishment', 2009.

Gauteng Department of Education 'Guidelines and Procedures for Dealing with Suspected and Confirmed Cases of Child Abuse', 2008.

Western Cape Education Department 'Learner Discipline and School Management: A practical guide to understanding and managing learner behaviour within the school context', 2007.

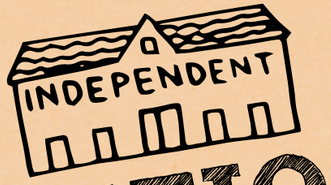
United Nations Educational, Scientific and Cultural Organisation (UNESCO) 'Positive Discipline in the Inclusive, Learning-Friendly Classroom: a Guide for Teachers and Teacher Educators', 2006.

Department of Education 'Alternatives to Corporal Punishment', 2000.

The South African Council for Educators 'Code of Professional Ethics' www.sace.org.za.

The South African Council for Educators 'Code Disciplinary Procedure' www.sace.org.za.

The South African Council for Educators 'How to Lodge a Complaint' www.sace.org.za.



CHAPTER 20

EDUCATION RIGHTS IN INDEPENDENT SCHOOLS

Shaun Franklin

INTRODUCTION

Since the end of apartheid, South Africa's education system has emphasised the need to harness private resources in both the public and the independent schooling sectors, to assist it in addressing the tremendous backlogs and inequalities in education caused by apartheid-era education policies and spending practices.

Though independent schools serve a relatively small percentage of the country's learners, the industry has seen significant growth over the past decade. This rise in enrolment is due in large part to the growth in low- and middle-fee independent schools that market themselves as an alternative for working-class and lower-middle-class families who are concerned with the quality of education made available to their children in what is widely recognised as the under-resourced and poorly performing public schooling sector.

The increased enrolment in independent schooling presents a number of legal and social challenges for South Africa.

At the forefront of these legal considerations is the impact that the right to a basic education and other rights have on the private contractual arrangements made between independent schools and the parents of the learners who attend them. Also, to what extent is the state mandated to promote, protect, respect and fulfil the right to a basic education for learners who attend or apply to independent schools?

Other legal issues concern the rights of private individuals and associations to establish and run independent schools that advance certain pedagogical, linguistic, cultural or religious beliefs and practices.

The South African Constitution and a number of national and provincial laws, policies and regulations give rise to an assortment of rights for parties who operate – and learners who attend – independent schools.

This chapter will explore these issues by reviewing the legal and regulatory framework concerning independent schools, including laws and regulations governing:

- The right to establish and operate an independent school
- The rights of learners who apply to and attend independent schools
- Limitations on the ability of independent schools to exclude learners, and the rights of learners to not be discriminated against for unfair reasons
- Quality standards for independent schools, and the role of the state to register, accredit and monitor independent schools to make sure that they provide education that is of an adequate quality
- The rights of independent schools to apply for and receive state subsidies.

But what are the legal and philosophical implications of a growing independent-school industry in South Africa? What impact does privatisation of education have on the constitutional right to a basic education, and the state's ability to develop a quality public education system that advances constitutional notions of equality, social justice and transformation? These are also things we will touch on in this chapter.

TYPES OF SCHOOLS IN SOUTH AFRICA

The notion of public versus private education is in some ways difficult to distinguish in South Africa. This is because state school-funding policies have relied on school fees to maintain quality schools for middle-class and wealthy learners, who attend mostly formerly white schools.

Around 60% of South African learners attending public schools attend no-fee schools. The rest go to schools that charge fees. Some of these schools charge less than R1 000 a year, while others charge more than R30 000 per year.

School fees are used to enhance the level of education offered at schools in a number of ways. The money can be used to hire additional teachers, top up teacher salaries, and to offer extra-curricular arts and sports programmes and a greater array of subject choices.

It can also be used to improve the school's infrastructural and sports facilities, which are often far superior to begin with due to their having been inherited from grossly unequal apartheid spending practices. Fees may also pay for a wide range of learning and teaching support materials that are usually not available to learners who attend no-fee or low-fee public schools.

The state's school-fee policy results in a public education system that offers schools of vastly varying levels of quality. Under this system, schools located in wealthier areas and attended by wealthier learners are able to offer more in terms of educational resources and quality schooling than schools that either do not collect or collect very little in school fees.

South Africa's public education system therefore features largely unequal public schools that in many ways resemble a quasi-privatised system of public education. This inequality has an impact on learners' performance. Learners in poor, rural and township areas tend to go to under-resourced and often dysfunctional public schools, and their academic outcomes are generally lower. Learners who go to better-resourced and high-functioning public schools generally have better academic results.

Learners may also attend independent schools. Unlike public schools, independent schools are permitted to limit admission to only learners who are able to pay tuition fees, as well as satisfy a number of other admission requirements that will be discussed below.

Despite their private nature, however, independent schools may receive state subsidies if they satisfy a number of criteria, including that they charge limited tuition fees, submit to greater state oversight, and adhere to retention and performance standards.

SOME DIFFERENCES BETWEEN NO-FEE AND FEE-CHARGING PUBLIC SCHOOLS AND INDEPENDENT SCHOOLS

1) NO-FEE PUBLIC SCHOOLS

- No-fee public schools are made available to communities who fall into the bottom three wealth quintiles. These schools are prohibited from charging school fees, though they may solicit and accept donations.
- No-fee schools are provided with additional non-personnel funding under the norms and standards for school-funding allocations, but are granted very minimal additional benefits in terms of personnel funding, which accounts for between 80% and 90% of provincial education expenditure.

2) FEE-CHARGING PUBLIC SCHOOLS

- School governing bodies are empowered to determine whether or not to charge school fees, and how much those school fees should be. School fees in South Africa range from less than R1 000 a school year to over R30 000 a year.
- Fee-charging public schools must waive or reduce school fees for learners whose household income qualifies them for fee waivers.
- Admissions – All public schools are prohibited from denying admission to learners because (1) their parents are unable to pay or have not paid school fees, (2) they refuse to subscribe to the school's mission statement; or (3) their parents refuse to enter into a contract which waives any claim for damages arising out of the education of the learners. All public schools are also prohibited from administering admission tests to prospective learners.
- All public schools are prohibited from discriminating against learners based on race and from unfairly discriminating against learners in any way.
- Language – public school governing bodies are empowered to determine the school's language policy; however, this decision must take into account the interests of the learners from the surrounding school community, and not just the learners who happen to attend the school at the time.

3) INDEPENDENT SCHOOLS

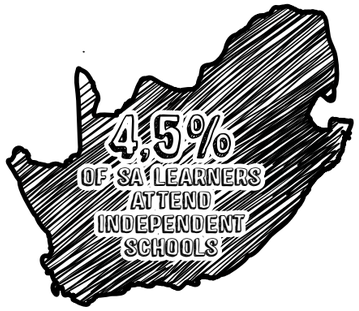
- Independent schools are free to charge whatever school fees they wish, though charging school fees above certain thresholds may make them ineligible for state subsidies.
- Independent schools are not mandated to provide fee waivers, and may refuse to admit learners whose parents are unable to pay school fees. They may also refuse to admit learners whose parents failed to pay tuition fees in the past.
- As long as certain conditions are met, such as due process considerations, independent schools may under certain circumstances expel or suspend learners whose parents have not paid tuition fees.
- Independent schools are not prohibited from administering admission tests, and may deny admission to learners who refuse to subscribe to the school's mission statement. However, independent schools are prohibited from discriminating against learners based on race, and from unfairly discriminating against learners for a number of other reasons, such as religion, culture, gender and sexual identity.
- Independent schools are free to determine their own language of instruction without regard for the needs of the surrounding community, and may advance particular religious and cultural beliefs and practices.
- Independent schools are free to set their own classroom sizes and school capacity without regard for the educational needs of the province.

HOW BIG IS SOUTH AFRICA'S INDEPENDENT-SCHOOLING INDUSTRY?

According to the Department of Basic Education, 566 194 South African learners attended 1 786 ordinary independent schools during the 2015 school year. These figures account for approximately 4.5% of the 12.8 million learners in South Africa who attended ordinary schools between Grade R and Grade 12.

Attendance at ordinary independent schools has more than doubled since 2002, when 278 661 learners attended independent schools, representing just 2.3% of the learners attending ordinary schools during that year.

The Centre for Development and Enterprise estimates that approximately 250 000 learners in South Africa attend low-fee independent schools charging less than R12 000 a year. However, the extent to which learners attend independent schools versus public schools differs dramatically between provinces. In 2015, approximately 11.7% of Gauteng learners in ordinary schools attended independent schools, while as few as 2.4% of learners attending ordinary schools in KZN attended independent schools.



WHY INDEPENDENT SCHOOLS?

There are a number of reasons that parents choose to send their children to independent schools rather than public schools.

Some parents send their children to independent schools because they believe that private schools offer educational programming and facilities that are of a superior quality to those of the public schools that their children would otherwise attend. This is an understandable concern in South Africa, where it is widely acknowledged that many public schools suffer from poor learning conditions, and demonstrate low levels of learner achievement.

Other parents may choose to enrol their children in private schools because they want their children to be taught in an environment that conforms to their religious, philosophical or cultural beliefs and practices or language preferences.

INEQUALITY WITHIN THE INDEPENDENT SCHOOLING SECTOR

Independent schools in South Africa are marketed to parents in a variety of forms and feature vastly varying degrees of quality.

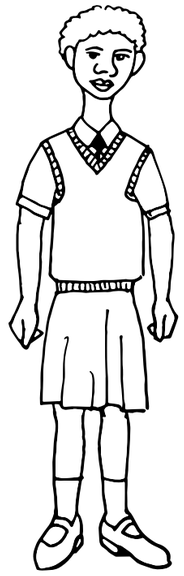
The schools are mostly dependent on the socio-economic status of the learners who attend them, just as public schools are.

Some private schools charge very high tuition fees, with some annual fees exceeding 20 times the average amount that provinces spend on each public school learner each year. These schools offer:

- low learner-teacher ratios
- small classroom sizes
- broad curriculum choice, taught by highly credentialed teachers
- a history of high learner achievement
- extracurricular opportunities not available at public schools
- state-of-the-art facilities and learning and teaching materials.

At the other end of the spectrum are independent schools that are marketed to parents as low-fee schools.

These schools claim to provide superior educational opportunities compared to competing neighbourhood public schools, which are often overcrowded and widely described as dysfunctional. The DBE has reported that many public schools, particularly in township and rural areas, are staffed with teachers with low levels of subject knowledge and a low degree of pedagogical skill, and suffer from high rates of absenteeism. They often lack essential facilities such as adequate classroom space and stocked libraries, and consistently demonstrate poor learner results.



> Regardless of the reason for attending independent schools, increased enrolment in that sector carries a number of social costs ... [including] continued inequality in education, and a lack of diversity and integration along class, linguistic and – invariably – racial lines.

Low-fee independent schools often charge fees that are less than the average amount that provinces spend on each learner in public schools, and may under certain conditions rely on state subsidies to meet their basic operational needs.

While some private schools function as non-profit institutions, other independent schools – particularly those marketed towards poor or working-class parents – are owned and operated by for-profit, publicly traded corporations.

Accordingly, independent schools in many ways mimic the public school system, in that independent schools marketed towards learners from different socio-economic classes offer education at widely varying levels of quality.

Still, in a country with high rates of poverty and unemployment, it must be stressed that the majority of South Africans cannot afford to send their children to independent schools.

THE IMPACT OF INDEPENDENT SCHOOLS ON THE PUBLIC EDUCATION SECTOR

Regardless of the reason for attending independent schools, increased enrolment in that sector carries a number of social costs. These costs, which will be explored further below, include continued inequality in education, and a lack of diversity and integration along class, linguistic and – invariably – racial lines.

The privatisation of education in South Africa and the inherent inequalities stemming from the unequal public and independent school systems inevitably have an impact on the degree to which education can contribute to the social transformation envisioned by the South African Constitution.

Unequal access to quality education is particularly significant in South Africa, where generations of apartheid-era education policies and unequal government educational expenditure along racial lines have persisted for generations. The consequences of these policies have been severe, and have resulted in massive educational backlogs for black learners that continue to persist in schools and communities today; and invariably, contribute to the most unequal distribution of income in the world, and very limited opportunity for socio-economic mobility.

As difficult as it is to improve the public education system, the task only gets harder when wealthier learners buy their way out; and so, leave behind a public system attended by only the poorest and most vulnerable learners from marginalised communities.

Greater movement towards privatised education bears the additional cost of a stratified society, in which everyone gets the education that he or she can afford.

THE CONSTITUTION AND THE RIGHT TO ESTABLISH AND MAINTAIN AN INDEPENDENT SCHOOL

THE SOUTH AFRICAN CONSTITUTION AND INDEPENDENT SCHOOLS

Section 29(3) of the South African Constitution provides for the right to establish and maintain independent schools. It states that:

> Everyone has the right to establish and maintain, at their own expense, independent educational institutions that:
>
> a. do not discriminate on the basis of race;
>
> b. are registered with the state;
>
> c. maintain standards that are not inferior to standards at comparable public educational institutions.

Section 29(4) of the South African Constitution specifically allows for the state to subsidise independent educational institutions.

Section 29 of the South African Constitution states that:

> Everyone has the right –
>
> a. to a basic education, including adult basic education; and
>
> b. to further education, which the state through reasonable measures must make progressively available and accessible.

Section 29 of the Constitution guarantees that all South Africans, regardless of how rich or poor they are, must be able to access a basic education.

In addition to providing for the right to access a basic education, Section 29(3) of the Constitution also provides that private parties, such as religious institutions and non-profit and for-profit organisations, have the right to establish their own educational institutions at their own expense.

THE HORIZONTAL APPLICATION OF THE RIGHT TO A BASIC EDUCATION ON PRIVATE PARTIES WHO ESTABLISH AND OPERATE INDEPENDENT SCHOOLS

Does the right to a basic education apply to independent schools and the learners who attend them?

Section 7 of the South African Constitution mandates that 'the state must protect, promote and fulfil the rights in the Bill of Rights'. While this provision makes clear that the state must act in a way that advances the right to a basic education, it does not place the same responsibilities on private parties.

But the right to a basic education does have an impact on independent schools, through Section 8(2) of the Constitution.

In *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others*, the Constitutional Court touched on this issue when it reviewed whether a private land owner could evict a public school from its property for failing to pay rent. In that case, the Court stressed that while private parties did not have the same duties as the state to advance the rights guaranteed in the Bill of Rights, the Constitution did require private parties not to interfere with or diminish the enjoyment of the right to a basic education.

In this case, this meant that once the owner – in this case a trust – had allowed the school to be operated on its property, it was obligated, at least, to minimise the potential impairment of the learners' right to a basic education.

Like other private parties, independent schools must therefore act in a way that minimises the harm that their actions or activities have on their students' right to a basic education.

ADMISSIONS

One of the primary characteristics that distinguishes independent schools from public schools is the ability of independent schools to be far more selective in their admission process than public schools.

Public schools are prohibited from denying admission to learners on a number of grounds. The South African Schools Act precludes public schools from administering tests to applicants during the admission process. The Schools Act also prohibits public schools from denying admission on the grounds that a learner's parents are unable to pay school fees, or that the learner does not subscribe to the mission statement of the school.

Independent schools' admission processes, on the other hand, do not carry the same restrictions.

Independent schools are permitted to administer admission tests, and to deny admission to any learner who is unable to pay school fees or who does not subscribe to the school's mission statement or ethos.

While independent schools are able to implement far more stringent admission criteria than public schools, they are not allowed to discriminate against learners on the basis of race. They are also prohibited from making admission decisions or employing admission practices that unfairly discriminate against learners on the grounds set out under the Promotion of Equality and Prevention of Discrimination Act 4 of 2000 (PEPUDA).

THE RIGHTS OF LEARNERS APPLYING TO AND ATTENDING INDEPENDENT SCHOOLS

Learners attending independent schools have rights that may most easily be understood as falling into two different categories.

Firstly, learners have private contractual rights with their schools.

This means that learners have the contractual right to the goods and services that schools promise to them and their parents in contractual agreements or promotional materials. These rights can include things such as:

- The length of the school year/ number of school days
- The material that will be completed in the curriculum throughout the school year
- Subject availability
- Maximum classroom size
- Learner-teacher ratio
- Teacher credentials
- Access to learning and teaching resources such as textbooks, libraries, computers and science equipment
- Extracurricular activities
- Sports and art facilities.

Learners and their parents may have the right to take legal action against a school that promises certain goods and services but fails to deliver them.

Secondly, learners at independent schools have rights that are set out in the South African Constitution, and other laws and regulations. These rights include the right to a basic education, and the right to not be subjected to unfair discrimination.

PROHIBITION AGAINST DISCRIMINATION BASED ON RACE AND OTHER FORMS OF UNFAIR DISCRIMINATION

Section 29(3) of the South African Constitution explicitly prohibits independent schools from discriminating on the basis of race.

This means that independent schools may not discriminate against learners who attend or apply to the school, or teachers or other school staff, on the basis of race. This prohibition applies to both direct and indirect forms of racial discrimination. The Department of Basic Education (DBE) has further pointed out that unlawful racial discrimination covers both school policies and actions that explicitly discriminate against learners on the basis of race, as well as those that cover up a school's attempt to discriminate on the basis of race.

The DBE's position here helps to identify instances in which a school's policies or actions may be suspect.

One example of a suspect policy that could be judged to be covering up racial discrimination would be a school's decision to refuse admission to learners because they reside in certain geographic areas – areas that are known to be demographically comprised of populations that fall within a certain race.

CASE STUDY

CURRO HOLDINGS SCHOOL

The prohibition against racial discrimination in independent schools extends beyond the admission process. Schools are also prohibited from treating learners differently, based on their race, while they are attending school.

In 2015, the Gauteng Department of Education (GDE) investigated a Curro Holdings school that had been reported for a number of racially suspect practices, including segregating classrooms by race, hiring all-white teaching staff, and not including African languages as part of the school's curriculum.

Curro Holdings is a for-profit chain of independent 'Christian values' schools that provides instruction in both English and Afrikaans. The chain of schools advertises that it offers varying levels of educational quality and classroom size depending on the tuition fees that the parents of the school's learners are able to afford.

After the GDE threatened to close the school for its unlawful practice of separating classrooms by race, the school admitted that its practice of segregation was wrong; and according to the GDE, acted quickly to respond to the complaint by reallocating learners of minority groups throughout the school's three English classrooms.

The school initially denied that it had acted in a discriminatory way, by claiming that it had segregated the classrooms by race as a way to ensure that children were able to make friends with children of their own culture. After further investigation, however, the school admitted that it had separated the Grade R learners by race in order to prevent a repeat of the 'white flight' that had occurred two years before, when (according to the school) white parents removed their children from the school due to the racial composition of the classrooms.

The findings at the Curro school highlight a number of issues that are central to concerns that have been voiced over the rise of independent schools in South Africa.

Firstly, the practices of the school make clear that racial segregation in schools is unlawful, and must not be permitted by government, who in this instance protected the rights of the learners at the school by intervening.

Secondly, the discriminatory practices used here show that schools may not use race when determining how to treat learners who attend a school. The Constitution's prohibition against racial discrimination makes it illegal for a school to use race as the basis for classroom placement – a form of discrimination reminiscent of the harmful apartheid policies that mandated racial segregation in schools.

Finally, the school's practice of segregating classrooms based on race highlights the inherent dangers that exist in the private education system. Independent schools are often vulnerable to conflicts of interest between the desire to respond to perceived market demands, and the obligation not to discriminate based on race or for other unfair reasons.

These conflicts become even more problematic when independent schools are for-profit companies, as Curro Holdings was here. These schools have a fiduciary duty to maximise profits for their shareholders.

Profit interests create an incentive structure that prioritises enrolling and retaining the learners who can pay the highest tuition fees and collecting as much revenue as possible, over the rights and interests of the learners.

The public education system has a constitutional mandate to advance notions of equality and provide education at a level that creates opportunity for socio-economic mobility, social transformation, and social cohesion. A vibrant private education system, on the other hand, carries the inherent risk that it will protect the status quo in order to satisfy the demands of the parents who are willing to pay the most – regardless of the social cost of their demands.

PROHIBITION AGAINST DISCRIMINATION BASED ON UNFAIR DISCRIMINATION

Apart from the prohibition against race discrimination in Section 29(3) of the Constitution, independent schools are prohibited from unfairly discriminating against learners, applicants and others on a number of other grounds, including gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Legal issues around unfair discrimination in independent schools are complicated by the rights of independent schools and of the individuals that establish and maintain them.

Section 31 of the South African Constitution provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community, to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The Constitutional Court also emphasised in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* that individuals and associations have the right to establish independent schools in order to preserve linguistic, cultural or religious beliefs and practices. Consequently, independent schools may be entitled to greater latitude than public schools when implementing a curriculum that demands that learners participate and adhere to certain linguistic, religious and cultural practices.

But what happens when a school's religious practices conflict with the rights of learners? Can an independent school expel learners who refuse to participate in school prayers, or other forms of religious instruction? Would such action be considered unfair discrimination on the basis of religion, conscience or belief?

Or does an independent school have the right to further its chosen linguistic, cultural and religious practices and beliefs by mandating that all learners participate in religious practices, as a way to foster a school environment that it believes is capable of advancing its chosen beliefs and customs?

Section 15 of the Constitution specifies that state and state-aided schools may conduct religious observances, so long as attendance at them is free and voluntary. It is not as clear, however, whether non-state-subsidised independent schools must allow learners to opt out of such observance.

Chapter 4 explains when forms of discrimination may be found to be unfair. In summary, a reviewing Court will look at:

- The impact that the discrimination has on the learner, and the degree to which the affected learner is part of a group that suffers from patterns of discrimination
- The degree to which the discrimination is narrowly tailored to achieve a legitimate purpose
- Whether and to what extent the discrimination achieves that purpose; and
- The extent to which the school has attempted to accommodate the learner.

As an example in applying these considerations: would an independent school's policy requiring all students to participate in religious practices as part of the school's curriculum unfairly discriminate against learners who do not wish to participate, due to their personal religious beliefs?

A 1998 High Court judgment in *Wittmann v Deutscher Schulverein, Pretoria and Others*, provides an example of what can happen when the religious rights of an independent school conflict with the rights of its learners.

In that case, the court held that a Christian German independent school was free to expel a learner who refused to attend religious instruction classes and school prayers. The court justified the expulsion because (1) the school's rules and regulations required the learner to attend religious classes, (2) the learner had agreed to abide by the school's rules and regulations, and (3) the learner had the opportunity to 'opt out' by attending school elsewhere.

But was this case correctly decided? Did the school's decision to expel the learner for refusing to participate in religious instruction and prayer unfairly discriminate against the learner on the basis of religion, conscience, or belief?

The school's decision to expel the learner would inevitably have had a negative impact on the learner's right to a basic education. An expulsion disrupts the school year and forces the learner to adapt to a new school setting, and to endure the educational and social difficulties caused by relocation.

The School's policy to mandate participating in educational instruction and prayer also impairs the learner's right to freedom of conscience, thought, belief and opinion. The Constitutional Court in *Christian Education South Africa v Minister of Education* emphasised that:

> freedom of religion includes both the right to have a belief and the right to express such a belief. It also brings about the fact that the freedom of religion may be impaired by measures that coerce persons into acting or refraining from acting in a manner that is contrary to their beliefs.

Here, the school arguably sought to coerce the learner into participating in religious practices and observance by threatening expulsion.

WHAT IS DISCRIMINATION?

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) defines discrimination as any act or omission, including a policy, law, rule, practice, condition or situation, which directly or indirectly –

(a) imposes burdens, obligations, or disadvantages on; or

(b) withholds benefits, opportunities, or advantages from any person on one or more of the prohibited grounds.

WHAT ARE THE PROHIBITED GROUNDS FOR DISCRIMINATION?

Section 9(3) of the South African Constitution states that neither the state, nor any person, may: 'unfairly discriminate directly or indirectly against anyone on one or more grounds, including race or gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

the Equality Act prohibits unfair discrimination on the grounds listed in Section 9 of the Constitution, as well as discrimination on additional grounds that are found to (1) cause or perpetuate systemic disadvantage; (2) undermine human dignity; or (3) adversely affect the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to one of the listed prohibited grounds.

But the school would argue that it has a right to advance its religious beliefs. It would further say that fostering an environment in which all learners participate in religious instruction and prayer is the best way to achieve that legitimate purpose. Finally, the school would argue that it accommodated the learner by giving her the option to opt out by enrolling in a public school or a different private school.

How would you decide? Was the impact of the discrimination severe enough here to justify intervention against the school's policy on religion practices? Could the school have taken narrower means to achieve its purpose of fostering a religious environment and furthering its religious beliefs, for instance by mandating participation in classes about religion, but making prayer and other forms of religious observation optional?

These issues highlight the complex considerations that must be taken into account when determining whether an independent school's policies or actions unfairly discriminate against its learners.

The DBE has made clear that independent schools are prohibited from taking discriminatory actions, such as denying admission to learners who identify as gay, expelling pregnant learners, or refusing to admit a learner of a certain faith into a secular school. But how would you classify an independent school's decision to deny admission to a learner with a physical disability, or expel a learner after discovering that he has a learning disability?

FREEDOM FROM CORPORAL PUNISHMENT

The Schools Act prohibits all schools, including independent schools, from inflicting corporal punishment on their learners.

Section 10 of the South African Schools Act provides that:

1. No person may administer corporal punishment at a school to a learner.
2. Any person who contravenes subsection (1) is guilty of an offence, and is liable on conviction to a sentence which could be imposed for assault.

In *Christian Education South Africa v Minister of Education*, the Constitutional Court held that all schools are prohibited from inflicting corporal punishment on their learners. The Court further emphasised that this prohibition applies even to independent schools that claim that their religious beliefs require them to use corporal punishment as a form of discipline.

This case is important for a number of reasons.

Firstly, it shows that parents are limited in their ability to consent to violations of their children's rights in school.

Secondly, the state may limit a parent's ability to consent to a violation of his or her child's rights, even if the consent is provided to the school in order to further the parents' genuinely held religious beliefs.

Finally, this case shows that the state may prohibit an independent school from acting in a way that violates the rights of its learners – even if the school's conduct is religiously motivated. In reaching its finding, the Court emphasised the delicate balancing test that must take place between the school's right to freedom of religion on the one hand, and the state's compelling interest in protecting the rights of learners and children on the other.

COLLECTION OF TUITION FEES

The commercial relationship between independent schools and the learners who attend them presents a number of concerns over the extent to which schools may suspend, expel or take other harmful actions against learners whose parents fall behind on tuition payments.

Many contracts that parents sign when they enrol their children in independent schools allow the school to suspend or expel the learner if tuition payments are not paid on time.

Some schools even go as far as withholding learner reports if tuition payments are not made, so that learners are prevented even from enrolling in a new school until the previous school receives the fees owed to it. These actions clearly interfere with the learner's ability to access basic education; but the extent to which they are lawful in independent schools is not always clear under the law.

Section 25(13) of the DBE's National Protocol on Assessment Grades R – 12 standardises recording and reporting processes for Grades R to 12, within the framework of the National Curriculum Statement. That policy document prohibits all schools, including independent schools that offer the National Curriculum Statement, from withholding a learner report for any reason. Accordingly, independent schools that offer the National Curriculum Statement are prohibited from withholding a learner report in order to force parents to pay overdue school fees.

The Independent Schools Association of South Africa (ISASA), which advises its members against withholding learner reports, emphasises that the regulation does not prevent schools from using other means, such as legal action, to obtain fees that may be overdue in terms of the contract between the school and the parent.

ISASA advises schools that they may exclude learners for non-payment, provided that due process has been followed.

ARE INDEPENDENT SCHOOLS ALLOWED TO EXPEL OR SUSPEND LEARNERS WHO HAVE NOT PAID THEIR TUITION FEES ON TIME?

Section 41(7) of the Schools Act prohibits public schools that charge fees from taking action against learners for the non-payment of school fees, including suspension from class and denying learners access to school reports or transfer certificates. The Act does not prohibit independent schools from suspending or expelling learners who have not paid tuition fees on time.

However, that doesn't necessarily mean that independent schools may suspend or expel learners for failure to pay tuition fees on time under all circumstances.

When considering this issue, one must keep in mind that independent schools, as private parties, are not mandated to affirmatively promote the rights of learners to the same extent that the state is. Independent schools therefore are not obligated to provide free education to learners who cannot afford tuition.

However, independent schools must act in a way that – at the very least – minimises the negative impact of their actions on the ability of learners to attend schools.

This mandate – to minimise the negative impact of their actions on the ability of learners to attend school – has an impact on the rights of independent schools and learners, since a school's decision to suspend or exclude a learner inevitably negatively impacts the ability of that learner to attend school. A school's decision to suspend or expel a learner for unpaid tuition fees must therefore take the learner's circumstances into account, and must at the very least consider whether the learner is able to transfer to a different school, and the extent to which such a transfer would have a negative impact on the learner.

A school's ability to suspend or expel a learner midway through the school year could potentially be limited under certain circumstances, such as if the nearby public schools all exceed capacity, or if the school fails to take the appropriate steps for the learner to transfer to a new school.

Any decision to suspend or expel a learner for unpaid fees after the school term has started must also satisfy due-process considerations. These considerations include rights that parents have under their enrolment agreements with the school.

For instance, parents must receive adequate warning prior to the expulsion or suspension, so learners and their families are able to either find a way to settle their debts, or make arrangements to enrol in a new school, before the learner is suspended or expelled..

STATE REGULATION OF INDEPENDENT SCHOOLS

The Schools Act and the South African Constitution list a number of responsibilities that both the state and independent schools have towards learners applying to or attending independent schools. Taken as a whole, these responsibilities seek to ensure that all independent schools meet minimum standards, and that the rights of learners who choose to attend independent schools are protected. Accordingly, provincial and national education departments must monitor independent schools to ensure that independent schools are complying with all statutory and regulatory requirements.

RIGHTS AND RESPONSIBILITIES OF INDEPENDENT SCHOOLS

THE STATE MUST:

1. permit qualifying private parties, at their own expense, to establish and maintain independent schools;
2. develop and implement measures to register independent schools;
3. ensure, through regulatory and other measures, that all independent schools are fulfilling their obligation to maintain standards that are not inferior to the standards at comparable public schools;
4. ensure that independent schools are not discriminating against learners based on race, or in other ways violating their rights, such as the right to a basic education and freedom from unfair discrimination.

INDEPENDENT SCHOOLS MUST:

1. comply with state regulations, including compliance with registration requirements, accreditation with the Council for Quality Assurance in General and Further Education and Training (Umalusi), and the employment of educators who are registered with the South African Council for Educators (SACE);
2. maintain standards that are not inferior to the standards at comparable public schools;
3. minimise the negative impact that their actions or activities have on their students' right to a basic education; and
4. if the school receives state subsidies, comply with state subsidy requirements.

INDEPENDENT SCHOOLS MAY NOT:

1. discriminate against learners or applicants on the basis of race or for other unfair reasons as defined under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA);
2. withhold report cards due to unpaid school fees; or
3. administer corporal punishment against learners.

INDEPENDENT SCHOOLS HAVE THE RIGHT TO:

1. advance particular linguistic, cultural or religious values, beliefs or practices provided that they do not discriminate based on race or unfairly discriminate on other grounds. Subsidised independent schools, however, are more limited in how they may introduce religious education, practices and observances at their schools.

RIGHTS AND RESPONSIBILITIES RELATING TO REGISTRATION OF INDEPENDENT SCHOOLS

- The state has a duty to close illegally operating independent schools, and to report offences relating to the illegal operation of schools for possible criminal prosecution. It is important that the state follows through with these measures in order to protect the rights of learners who attend illegally operating schools, or who may otherwise attend unregistered schools in the future if they remain open in spite of the state's directive
- Parents and guardians of learners must also be vigilant in ensuring that the independent schools in which they seek to enrol their children are properly registered and operating legally, by ensuring that those schools have up-to-date registration certificates from the relevant provinces in which the schools are located.
- The registration certificate must be displayed on the school's premises, so that parents may have access to them. Parents who are concerned or have questions about the registration status of an independent school should contact their provincial education department.

REGISTRATION OF INDEPENDENT SCHOOLS

According to the Constitution, all independent schools must be registered with the province in which they are located, prior to enrolling learners.

Section 46 of the Schools Act outlines the conditions under which the state must register independent schools. The Act requires each provincial education department to develop grounds on which the registration of an independent school may be granted or withdrawn by the provincial head of department. A head of department must then register an independent school if he or she is satisfied that:

- The standards to be maintained by such a school will not be inferior to the standards in comparable public schools
- The admission policy of the school does not discriminate on the grounds of race
- The school complies with the grounds for registration as defined by each provincial education department.

Section 46 of the Schools Act makes it a criminal offence to operate an independent school that has not been registered by the provincial head of department. Any person who operates such an unregistered school may be liable for a fine or imprisonment of up to three months upon conviction.

Each province has its own additional requirements for the registration and de-registration of independent schools.

Provincial education departments have cited recurring concerns over illegally operating unregistered schools. The Western Cape Education Department, for example, ordered four illegally operating unregistered independent schools to be closed at the start of the 2016 school year.

It is important that parents of children attending independent schools ensure that the school is registered. Provincial education departments have warned that they will not recognise attendance that occurs at unregistered independent schools as formal education.

QUALITY ASSURANCE AND ACCREDITATION OF INDEPENDENT SCHOOLS

Umalusi is mandated to accredit private providers of education and training, including independent schools.

While the provincial registration process enables independent schools to operate, independent schools must be accredited by Umalusi in order to offer qualifications on the General and Further Education Training Qualification Framework, including the National Senior Certificate.

Independent schools must be accredited by Umalusi every seven years, a process which includes periodic reporting and evaluations along with site visits, used to evaluate the level of quality provided by all registered independent schools.

Teachers employed by independent schools must be registered with the South African Council for Educators (SACE).

STATE SUBSIDIES FOR INDEPENDENT SCHOOLS

Independent schools may apply to their relevant provinces to be considered for state subsidies.

In order to qualify for a state subsidy, independent schools must satisfy a number of criteria, including that they have been registered for at least one year, that they charge limited tuition fees, and that their learners meet performance and retention standards.

Section 48 of the Schools Act empowers the Minister of Basic Education to grant subsidies to independent schools, and to determine norms and standards for the granting of subsidies. It is up to each province to appropriate funds for independent schools, and to grant subsidies to qualifying independent schools.

Section 48 of the Schools Act empowers provincial education departments to terminate or reduce subsidies if a condition of the subsidy is not met. Before reducing or terminating subsidies, however, the province must :

1. Furnish the school with a notice of intention to terminate or reduce the subsidy, and reasons for the termination or reduction
2. Grant an opportunity to make representations as to why the subsidy should not be reduced or terminated
3. Allow the school to appeal the termination or reduction of a subsidy.

THE STATE'S REASONS FOR SUBSIDISING INDEPENDENT SCHOOLS

The Department of Basic Education has justified granting subsidies to qualifying independent schools on the basis that it has the constitutional responsibility to provide basic education to all learners, and that independent schools perform a service that would otherwise have to be performed by the state.

The National Norms and Standards for School Funding (NNSSF), a national policy implemented by the national DBE each year, sets standards for provinces in terms of when independent schools may be qualified to receive state funding, and the amount of funding that should be made available to them.

The policy further emphasises that there is a cost efficiency to subsidising independent schools, as public subsidies to independent schools cost the state considerably less per learner than if the same learners were enrolled in public schools.

However, because of the extreme inequalities and backlogs in the provision of public education, the state has limited independent school subsidies to those schools that serve explicit social purposes. The NNSSF therefore only subsidises independent schools that are well managed, provide good-quality education, serve poor communities and individuals, and are not operated for profit.

HOW SUBSIDIES ARE CALCULATED, COMMUNICATED AND PAID TO INDEPENDENT SCHOOLS

Under Section 187 of the Amended NNSSF, provincial education departments award subsidies to qualifying independent schools on a progressive five-point sliding scale. These amounts are payable at levels of 60%, 40%, 25%, 15% or 0% of the provincial average estimate per learner expenditure (PAEPL) at public schools.

The PAEPL is calculated by dividing a province's expenditure on public ordinary schools by the number of learners attending public ordinary schools. Only independent schools that charge tuition fees that are not greater than two-and-a-half times the PAEPL may be eligible for subsidies. Under the sliding scale, schools with lower tuition fees receive greater subsidies.

The NNSSF requires provincial education departments to communicate information to independent schools about the subsidies that they will receive for the following school year by 30 September every year.

The information provided to schools must include the provincial average estimate per learner for primary and secondary learners, and an indication of the subsidy category under which the independent school falls, so that independent schools may plan their budgets and fee schedules for the following year.

Provinces, however, may note in their subsidy letters to schools that the figures provided are only estimates, and may therefore differ from the actual subsidies allocated the following year. Provinces are permitted to amend the subsidies communicated to schools once the provincial budgets for the following fiscal year have been finalised.

Provincial education departments may deviate from the subsidy and fee levels set out in the NNSSF 'only on good cause shown' to the Department of Basic Education.

The NNSSF directs that provincial education departments must ensure that the first term's subsidy is paid to all qualifying independent schools by 1 April in each school year. Subsequent subsidy payments must be paid no later than six weeks after the beginning of each school term.

CASE STUDY

REDUCED SUBSIDIES TO INDEPENDENT SCHOOLS IN KZN

In *KwaZulu-Natal Joint Liaison Committee v MEC of Education, KwaZulu-Natal and Others*, the Constitutional Court considered whether a province may refuse to pay independent schools the full subsidies that have been promised to them.

Independent schools have frequently complained about provinces failing to pay qualifying independent schools their subsidies on time and in full. That provinces have failed to pay schools the funding owed to them is not unique to independent schools, however, as many public schools too have complained about not receiving their allocation of non-personnel funding from their respective provinces in full and on time.

In this case, the provinces sent independent schools qualifying for subsidies letters informing them of estimates of the subsidies that they would receive the following school year. Midway through the school year, and after the date when independent schools were supposed to have received their subsidy payments, the province informed 97 qualifying low-fee and middle-fee independent schools that the estimated subsidy payments communicated to them the previous year would be cut by 30%.

The province blamed the subsidy reductions on budget cuts and the unanticipated need to fund additional independent schools. It further defended its decision to cut subsidies to independent schools on the basis that the subsidies were communicated to the schools in estimated terms, and not as exact amounts owed to them.

Can a promise to pay an estimated subsidy give rise to the right for the schools to receive the full subsidy promised to them?

The Court said yes. It ordered the province to pay the qualifying independent schools the full amount.

The Court based its order on the rule of law that a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for payment has passed.

In reaching this finding, the Court highlighted the rights of learners who attend subsidised independent schools, including that the 'unqualified' right to a basic education applies to learners at independent schools, and that provincial MECs are empowered under the Constitution and the Schools Act to issue subsidies to qualifying independent schools. The Court explained its decision to order the province to pay the schools the full subsidies promised to them by stating:

> So while it is correct that the state is not obliged to pay subsidies to independent schools, when it does so in terms of national and provincial legislation it is acting in accordance with its duty under the Constitution in fulfilling the right to a basic education of the learners at the schools that benefit from the subsidy. And once government promises a subsidy, the negative rights of those learners – the right not to have their right to a basic education impaired – is implicated.

This case raises a number of issues that are fundamental to the rights of learners attending subsidised independent schools. It also raises a number of concerns around the value of the state's policy to subsidise independent schools.

Once a province promises to pay a subsidy to an independent school, the rights of learners at that school are implicated, since there is a legitimate expectation that schools will rely on the funding when they prepare their budgets for the following school year.

Learners and their parents take a number of factors into consideration when deciding whether to attend a public or an independent school, including the fees that the school charges and the resources that the school will make available. The failure to pay the promised subsidies has an impact on those learners and their right to a basic education. Unpaid school subsidies mean that the school would either have to demand additional tuition fees from parents, or offer fewer resources as a result of the state's budget cuts.

Finally, the nature of the right to a basic education binds the state, even with respect to independent schools. So a provincial education department may be required to follow through with promises it has made to independent schools, if its failure to do so negatively impacts the rights of the affected learners.

Given limits to education budgets, one must also consider the impact that this case, as well as public subsidisation of independent schools in general, will have on learners who attend poorly resourced public schools.

Many public-school learners are too poor to afford to attend subsidised independent schools similar to those involved in the case. Budget cuts inevitably require provincial education departments to prioritise funding some programmes over others.

State subsidies for independent schools have a number of negative effects on the public education system, including providing an incentive for engaged and committed learners, parents and teachers to leave the public education sector for private schools.

The state's subsidy structure threatens to increase inequality in education. It provides subsidies to independent schools that charge fees that are greater than the average per-learner amount that each province pays into the public-schooling sector. Some of these learners therefore attend subsidised schools that are able to spend more per learner than is being spent in the public-education sector.

So this case also concerns the need for the state to prioritise the funding of a quality public education system available and accessible to all learners, over funding a privatised system that is able to exclude learners for a number of socio-economic, linguistic, cultural, religious, academic and other reasons.

ADDITIONAL REGULATORY REQUIREMENTS FOR SUBSIDISED INDEPENDENT SCHOOLS

Independent schools that receive school subsidies are required to comply with a number of conditions. The school must:

- Be registered with the provincial education department
- Have applied to the province in the prescribed way
- Have been operating for a year
- Be registered as a non-profit organisation
- Be managed according to the province's management checklist
- Agree to unannounced inspection visits by provincial officials
- Not be in direct competition with a nearby, uncrowded public school of equivalent quality.

It also has to meet or exceed a number of learner-performance targets on the National Senior Certificate (NSC) and the Annual National Assessment (ANA) exams. Subsidised high schools must:

1. Attain Grade 12 pass rates that are equal to or higher than the provincial average Grade 12 pass rate for public schools in the prior year
2. Not have more than 20% of Grade 11 and 12 learners be repeaters from the year before in that school
3. Not be engaged in practices used to artificially increase the school's Grade 12 pass rate
4. Not retain learners more than once per school phase.

Similar retention, throughput and performance conditions are applied to subsidised independent primary schools. For instance, learners must take the Annual National Assessments (ANAs) for Grades 3 and 6, and score equal to or higher than Grade 3 and 6 learners at public schools in that province in literacy or numeracy.

Provincial education departments may require that subsidised independent schools fulfil additional requirements. For example, KwaZulu-Natal requires independent schools to show that teachers at the school are not paid more favourably than educators employed by the province.

CONSTITUTIONAL LIMITATIONS PLACED ON SUBSIDISED INDEPENDENT SCHOOLS

Subsidised independent schools are also limited in how they carry out religious education, instruction and prayer.

Section 15 of the South African Constitution limits the manner in which state-aided institutions are permitted to conduct religious observances. As state-aided institutions, subsidised independent schools may conduct religious observances only if:

1. The observances follow rules made by the appropriate public authorities
2. They are conducted on an equitable basis
3. Attendance at these observances is free and voluntary.

As state-aided institutions, subsidised independent schools are therefore more limited in their right to include religious education as a part of their curriculum than non-subsidised schools. These requirements particularly affect a subsidised school's ability to favour certain religions over others in the school's admission requirements or curriculum content. They also prohibit subsidised schools from mandating that all learners participate in religious instruction or prayer as a condition for admission or continued enrolment.

LEGAL AND PHILOSOPHICAL ISSUES

The rise of privatised education in South Africa raises a number of legal and philosophical issues and concerns.

Many of these concerns arise out of conflicting rights and interests among various stakeholders in both the public and private sectors. This chapter has mostly provided an overview of the various rights and responsibilities of these stakeholders.

However, a review of education rights as it relates to independent schools would be incomplete without considering the impact and potential effect that privatised education has on South Africa's public education system. It has consequences for constitutional notions of democracy, freedom, equality, human dignity and social transformation that the right to a basic education is intended to advance.

To what degree is the notion of privatised education consistent with the state's interest in resolving South Africa's history of racial inequality and segregation through a quality national system of schooling? Should the State be in the business of subsidising private low-fee schools that are permitted to exclude learners based on their inability to pay school fees?

These questions and others have given rise to a debate over the degree to which the state should advance and provide incentive for growth in independent schooling. This debate is also particularly relevant when it comes to the for-profit education sector. Should we be concerned that for-profit schools or non-profit schools run by for-profit corporations will have the incentive to favour the rights and interests of shareholders over the best interests of learners?

ARGUMENTS FOR GREATER ACCESS TO INDEPENDENT SCHOOLS

These debates are taking place at a time when a great deal of national attention has been focused on the failures of South Africa's public education system, which is frequently described as being in a state of crisis.

The public sector's poor performance has been blamed on the state's failure to offer learners properly managed and adequately resourced schools, with sufficiently trained, skilled, motivated and supported teachers.

Those in support of privatisation point to the private sector's ability to resolve these shortcomings by:

- Improving the level of standardisation and assessment, of both learners and teachers
- Addressing poor management and teaching practices, by providing schools with incentives to function efficiently through marketplace accountability governed by consumer choice
- Reducing the power and influence of teacher unions. These are frequently viewed as corrupt, and as contributing to corrosive patronage networks. Teacher unions are also seen to be negatively interfering with the ability of schools to improve teaching in classrooms and hold teachers accountable for their and their students' performance in the classroom.

THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHT TO EDUCATION AND PRIVATISED SCHOOLING

In a 2015 report, Kishore Singh, the United Nations Special Rapporteur on the right to education, voiced a number of concerns over what he described as the need to protect education from the forces of privatisation.

Mr. Singh's concerns centred on the need for the state to ensure that all children, not just those from wealthy households, are able to access quality schools. The Special Rapporteur's report highlighted a number of fundamental considerations and policy recommendations that states should adhere to when empowering and regulating privatised education, including that:

- Governments should recognise that the highest-quality universally available education for the lowest cost will always come from an effective public education system
- Education must be valued and safeguarded as a public good. Governments must guarantee and regulate both private and public educational institutions, to ensure that norms and principles of the right to education are respected in all situations
- The state, regardless of its policies towards private enterprise, must remain primarily responsible for fulfilling the right to education. It has constitutional and international legal obligations to protect, promote and realise the right to education
- Public-private partnerships in education should not lead to reduced government investment in education, but should rather be complementary to the maximum resources that governments can provide for the right to education
- The pursuit of private interests and the commercialisation of education should have no place in the education system of a country, or in any future education agenda
- To protect the rights of all learners, governments must carefully regulate private schools, with diligent monitoring and enforcement, especially in developing countries where the public system is overwhelmed and unable to cope with rapidly rising demand. These regulations must ensure that public-private partnerships in education are harnessed to the broader public interest, and reflect the humanistic mission of education. It must also be centred on the concept of education as a social good.

THE SOCIAL COSTS OF INDEPENDENT SCHOOLS

The rise in independent schooling in South Arica carries a number of social costs. They draw slightly or significantly more affluent families away from the public schooling sector, which has unavoidable social consequences. For instance:

- Parents who might have professional or other skills becoming unavailable to participate in school governing bodies, or be vested stakeholders in the success of the public education system
- Students in public schools being denied the academic benefit of being in classrooms with slightly more affluent learners
- A society segregated by the socio-economic circumstances of its learners, without the benefit of having a public education system which offers a space for social cohesion
- The diversion of teachers (who probably benefited themselves from education and training from public educational resources) to the private sector
- Increased inequality, caused by a system where everyone receives the quality of education they can afford
- The long-term risk of undermining South Africa's tax system, because the less the middle-class needs public service delivery in areas such as education and healthcare, the less inclined they will be to pay taxes to fund them
- In the case of subsidised independent schools, the diversion of limited resources away from public schools to a system governed by private enterprise which is empowered to exclude learners who are too poor to afford tuition.

These arguments for and against improved access to independent schools, either through direct government support or by the implementation of a regulatory environment conducive to the establishment and operation of independent schools, invite a number of legal, philosophical and policy-related questions, including:

- Do independent schools increase the quality and efficiency of the public education system through competition, when most learners are too poor to afford to attend even low-cost independent schools?
- Do low-fee independent schools offer education of an adequate quality, when financial and profit considerations provide incentives to them to cut costs?
- To what extent can or should subsidised independent schools be able to exclude learners based on their ability to pay – or on other reasons for which public schools are prohibited from excluding learners?
- Should subsidised independent schools, like public schools, have a duty to consider the needs and interests of the broader schooling community, and not just those of the learners who happen to attend the school at the time?
- Should the state be more concerned with independent schools that claim to be non-profit but may be creating the opportunity for profit in other ways, in the form of high administrative salaries or contracts with for-profit companies who perform services such as operating schools, supplying teachers, leasing property, or the provision of learning and teaching support materials and resources?

CONCLUSION

The laws and policies that govern South Africa's independent schooling system raise a number of issues that are central to the rights and interests of the learners and parents of learners who attend independent schools, and the private individuals and organisations that establish and maintain them.

This chapter has provided an overview of the rights and responsibilities of the various role players involved in making sure that learners access quality independent schools that uphold the rights of learners. However, the legal and policy landscape governing independent schooling is complex, and continues to leave a number of issues and concerns largely unresolved and untested in courts; with social costs that for the most part have gone unacknowledged by government and industry.

Shaun Franklin is an American lawyer who currently resides in Johannesburg. He has worked with a number of South African organisations, including Equal Education and the Equal Education Law Centre, on matters concerning educational law and policy, and international constitutional jurisprudence.

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CHAPTER 21

TAKING RIGHTS FORWARD: MOBILISATION, ORGANISATION AND PUBLIC PARTICIPATION

Daniel Sher and Hopolang Selebalo

INTRODUCTION

THE STATE OF EDUCATION IN SOUTH AFRICA

South Africa has a long and well-known history of unequal education. The most famous instance of this is the apartheid-era Bantu Education Act of 1953, which built on older colonial education and saw the creation of multiple, racially-segregated education departments (including education departments in each 'independent' homeland) with different curricula and radically unequal funding.

Since the end of apartheid, the various departments of education have been united, and racially segregated schools have been outlawed. The amount of money spent by the government on school children has been equalised across races, and government has introduced a small degree of pro-poor school funding (not counting infrastructure or teacher salaries).

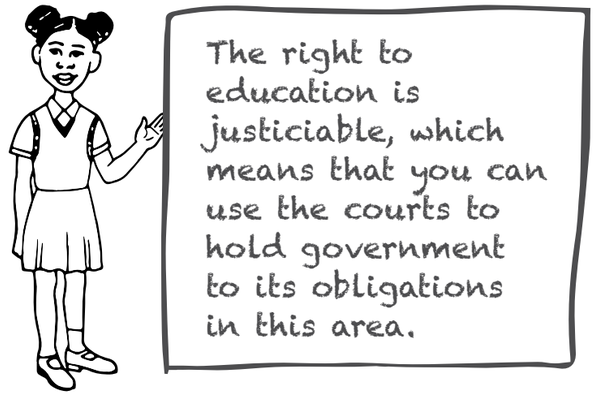
Access to schooling has improved significantly, particularly for learners in township and rural schools.

According to the South African Human Rights Commission '...South Africa has seen improvements in access to education... to benefit previously disadvantaged children. Since 1994 enrolment rates have improved, reaching 98% in Grades 1-9...' The poorest 60% of schools are now no-fee schools.

However, the education system is still deeply unequal, and many learners receive low-quality education, particularly at former 'African' schools. The Minister of Basic Education, Angie Motshekga, has gone so far as to describe South Africa's education system as being in a state of 'crisis', and a 'national catastrophe'. She stated that the system is plagued by 'pockets of disasters', including teacher absenteeism in 'former African schools', lack of school infrastructure and mismanagement in some provincial education departments, textbook shortages, and unfilled vacancies, among others.

It can be inferred from the Minister's remarks that the crisis in education in South Africa is both physical and pedagogical. The physical crisis can be seen in the lack of basic resources, such as sanitation, textbooks, furniture, and even classrooms. The pedagogical crisis, on the other hand, is represented by the absence of good-quality teaching and the resulting low levels of skills. The Department of Education itself has reported that:

> In South Africa, virtually all children of a primary school-going age are now enrolled in school. But numerous local and international surveys conducted over the last decade or so have shown that the majority of these children are seriously underperforming in basic literacy and numeracy. In the Trends in International Maths and Science Study (TIMSS) of 2003 the average score for South African [learners] was the lowest out of the 46 participating countries in both mathematics and science at the grade 8 level ... Approximately 78% of South African children scored below what educational experts designated as a low benchmark score in PIRLS [Progress in International Reading Literacy Study].



RIGHTS AND THE NEED FOR PUBLIC ACTION

Section 29 of the Constitution establishes the right to education. Unlike some other rights, the right to education is unqualified, and must be immediately realised. This means that the government is not allowed to say that it cannot afford to uphold this right because of other priorities or budget commitments – it must do everything it can to uphold it. This right has both negative and positive aspects.

- The negative component refers to a government obligation not to take action that unfairly discriminates against people, for example on the basis of race.
- The positive component requires the government to go further, and take action which will promote and provide education which meets the needs of its people, by establishing and maintaining an education system.

It is clear from the previous discussion that the right to education is not yet being fully realised. However, it is powerful even in cases such as this: ordinary people can use the right to education as a lever for change, by arguing that it is being violated, and therefore, there must be some action taken.

This can take place at different levels. At a local level, you could use the right to argue for taking action about issues such as:

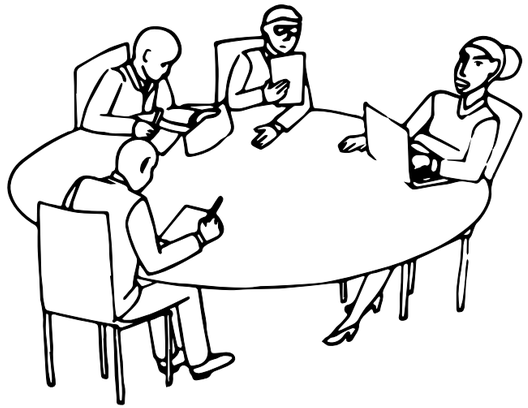
- Unfair discrimination taking place in your school
- Exclusion of learners who cannot pay school fees (and the illegal charging of fees by no-fee schools)
- Disciplinary procedures
- Decision-making
- Teacher vacancies
- Lack of basic infrastructure.

At a national and provincial level, you might be interested in changing:

- **Policy**, such as campaigning for laws that specify the basic infrastructure a school needs to function
- **Budgeting**, such as participating in the budget-making process to make sure that there is enough money allocated to build the infrastructure required
- **Implementation**, for example by auditing whether infrastructure upgrades that were promised have been delivered.

The right to education is justiciable, which means that you can use the courts to hold government to its obligations in this area. But going to court can be costly, and is sometimes out of reach for learners and parents in poor communities. Also, the government does not always obey court orders.

For ordinary learners, parents and community members, a more viable first option (or a strategy to be used in combination with use of the courts) is to make their voices heard in a way that can influence school governance structures and policy-makers. In the main, this does not happen when they are speaking alone. Rather, public support for the issue needs to be mobilised, and supporters need to be organised into a structure that can lead the campaign and amplify the demands. Once this happens, you can take advantage of formal opportunities for public participation in decision-making, as well as staging your own events, such as protests.



SCHOOL GOVERNANCE

HOW ARE SCHOOLS GOVERNED?

Although we tend to think of the principal as the most powerful person in a school, the South African Schools Act gives a lot of decision-making power to school governing bodies (SGBs). Their mandate includes:

- Managing a school's money
- Recommending teachers to be appointed
- Drafting a school's code of conduct, and deciding religious and language policy for the school
- Holding educators and principals accountable
- Ensuring children's well-being at school.

This is important, because SGBs are bodies that include democratically elected parents and learners. SGBs are made up of the following people:

- The principal
- A maximum of five teachers
- One non-teacher staff member
- Two Representative Council of Learners (RCL) members
- Parents (there must be one more parent member than the other members of the SGB combined).

Parents thus have a majority voice in SGBs, and are able to decide issues that affect their children's education. Learners themselves also have a voice.

USING GOVERNANCE STRUCTURES FOR CHANGE

Let's say you have identified an issue in your school. It could be anything from dirty and broken toilets, to teachers using corporal punishment, to not having after-school programmes. If you have spoken to your teachers about it and nothing has changed, your next step might be to take it to the SGB. You could do this by:

- Speaking to the learner or parent representatives, and asking them to raise your issues
- Attending the meetings of the SGB, and raising them yourself.

A longer-term strategy is to focus on SGB elections. These happen every three years for parent members, and every year for learner representatives. However, if a parent member leaves the governing body (for example, if their child finishes school), there must be a by-election to choose a parent who will replace them within 90 days of the vacancy. You can use SGB elections to help advance your issue, by:

- Attending SGB elections, and asking questions about the candidates' views on the issue you are concerned about
- Encouraging parents to attend and vote in the SGB elections
- Encouraging parents and learners who support the issue you are concerned about to stand for election; or stand yourself.

MOBILISATION AND ORGANISATION

In order to get your issues onto the agenda, or to elect members who agree with your agenda, you will need to build support for the issue, by convincing learners and parents that this issue is important, and showing them a way that they can take action about it – such as voting in a particular way, or joining a march. This is known as mobilising, and it can take many forms. It can simply be people going door-to-door in a community, and asking people to support their action.

However, even if you manage to mobilise parents and learners, you may not be able to win the changes you seek immediately. Your SGB may not be willing to change your school, or it may not be able to. It may not have the money to repair the toilets, or the facilities to set up after-school programmes. The conditions in township and rural schools are shaped by broader structures of inequality. Given this, you may need to take your campaign further than just one school.

- Are other schools also experiencing these issues?
- How can you link up with them?
- Who, in a position of power, can you make demands on?

A danger inherent in mobilisation is that it often doesn't last. While the public may come out in their masses and support your campaign enthusiastically, they can easily become discouraged if there is no quick victory; not everyone will have the determination to follow through and continue to put pressure on decision-makers. As an activist in this field, it is your job to make sure that the issue does not disappear from the public's mind. You must make it clear that the campaign may take time, explaining each development that occurs, and being sensitive to what your supporters think about the strategies used.

More than this, though, to build a campaign which is strong and popular and that can last long enough to achieve meaningful change, you must start to organise. This means to set up structures that can lead the campaign – an organisation of some sort. Organising is a way of bringing supporters, or affected people, into a campaign in a way that goes deeper than mobilising: it often includes a process of political education or conscientisation, which gives them the skills and political analysis needed to take strategic action. This allows them to help direct the way the campaign goes. A strong organisation will be better at hearing the voices of its members, and it will be able to amplify these voices.

In building a strong campaign it is always worthwhile to note the following:

- The issue that is being raised ought to find resonance with the people
- Those intended to participate ought to understand that the relief/solution to the problem will not come immediately
- The leaders of the campaign ought to constantly be engaging their members on strategy and tactics
- The leading organisation ought to make strategic partners who will be in support every step of the way
- You must engage society by communicating clear demands to the media; also, members ought to be on the ground communicating these demands themselves
- As the campaign gains momentum, all members of the organisation ought to be able to express the demands, as expressed in the memorandum of demands, in public
- The body (public or private) must be thoroughly engaged on the demands, proof of prior communication must be kept; and most importantly, channels of communications ought to be constantly open, even in the midst of the dispute.

EQUAL EDUCATION

Equal Education (EE) is an education-rights social movement that works to organise learners in poor and working-class schools. EE's activism centres on the power of youth. In five provinces, high-school members – known as equalisers – attend weekly youth groups. Here they learn about inequality in the education system, receive political education, and work on and discuss campaigns. Equalisers are empowered, and mobilise to challenge unjust practices in their own schools through collective action: there have been many school-level protests around issues, from teacher vacancies to corporal punishment and exclusion of pregnant learners. They also form part of a growing, informed and vocal number who are no longer prepared to accept an unequal, low-quality education system: equalisers give force and moral weight to EE's broader campaigns.

Moral justification is a key part of Equal Education's success. Its campaigns have gathered wide support and have won funding, policy and practical victories for poor, under-resourced schools and learners – in part because they have tapped into what many people think is right, and what the government accepts (in theory) that it should be doing. While moral justification is not enough to bring education to the fore in the public agenda – mobilisation is still required, to turn people's moral instinct into political support – it is a factor that inspires greater mobilisation, such as the 20 000 people who were prepared to march to parliament in support of Norms and Standards for School Infrastructure.

SOCIAL AUDITS

Recently, Equal Education has begun using social audits as a powerful tool to hold government to account. A social audit is a process whereby communities measure whether promises made about services have been kept, and services delivered. EE members in Gauteng have audited sanitation in schools, and members in the Western Cape have audited sanitation and school safety. These audits were not conducted by EE members alone. Crucial to the social audit process has been building partnerships with community organisations and civil society, who extend the reach of the audit into their own areas, and add voters to the movement – most EE members are not old enough to vote yet.

In Gauteng, EE members based in Tembisa audited the state of sanitation in their schools. In total, they audited 11 high schools, or over two thirds of the high schools in Tembisa. They found that at over half the high schools audited, more than 100 students shared a single working toilet. Many schools also had broken or non-functioning taps.

EE met with government officials, who ignored requests to develop a plan to solve this sanitation crisis. Finally, in September 2014, 2 000 EE members marched to the Gauteng Department of Education offices. The MEC, Panyaza Lesufi, responded by promising R150 million to upgrade sanitation in 580 schools across the province.

While EE had members in Tembisa, Daveyton and KwaThema who could monitor whether these promises were kept there, it did not have the reach to monitor the upgrades across the entire province. To do this, it built a coalition of partner organisations, including church organisations such as the South African Council of Churches, civics such as the Alexandra Civic Organisation, the Gauteng Civic Association and the South African National Civic Organisation (SANCO), and community organisations such as Sidinga Uthando and Bua Funda. Members of this coalition audited the sanitation conditions in over 200 schools around the province.

The audit found a sanitation crisis in schools around the province. In 30% of the high schools audited, over 100 learners were sharing a single working toilet. One in five toilets were either broken or locked. About 70% of schools did not provide access to soap, and 40% did not provide access to toilet paper or sanitary pads. Over 25% of schools had more than 400 students for one maintenance staff member. These findings were released at a summit, and the MEC accepted all demands to rectify the situation 'unconditionally'.

Social audits have simultaneously mobilised, educated and politicised supporters and members on the issues of school infrastructure, sanitation and safety. Mobilisation occurs because the process of running the audit provides people with a way to participate. Education occurs because to conduct the audit, people had to learn about the issues, such as school sanitation. Politicisation occurs because through the process, people see and express how political inequalities affect them directly.

By organising, you are acting as an enabler, bringing people into knowledge, and structures, that will help them to demand change.

COALITION-BUILDING

By organising, you are acting as an enabler, bringing people into knowledge, and structures, that will help them to demand change. This can spread far beyond the campaign you could have run on your own. When you organise, you will probably reach beyond your own community too. This is how you can link up with other schools. It is also possible that there will already be organisations, or community members, who are active in those areas. Forming links with them can help by:

- growing the size of your campaign
- extending the campaign geographically without having to organise from scratch in new areas
- adding politically important groups to the campaign. For example, if you are directing your campaign towards government, forming links with adult activists or organisations can increase the pressure on elected officials, because they can be voted out of power by adults. As learners, you are largely not yet allowed to vote. But this is not the only kind of coalition that can form: another example is forming links with an organisation representing a constituency that you don't cover. For example, if you are mostly organised in urban schools, it would be powerful to link up with an organisation that works in rural schools as well.

You should start by speaking to locals about what is going on in that community, and who is active in it. Try to gain an understanding of who holds power in the community, and what assets that community has. When deciding who to reach out to, ask yourself:

- Do they share some/all of your goals?
- Will working together be strategic? How can they help your campaign?
- Is the campaign flexible enough to accommodate them, and possibly include some of their demands?

Coalition-building is more likely to be successful when it doesn't try to take over or dissolve the existing organisations to form a new one (although eventually this may happen). Rather, you need to work with the partner organisations, and share decision-making about the direction of the campaign.

As the campaign grows, you will need to make demands at the right level. Schools are clustered into circuits, and then districts. A few districts make up a provincial department of education. Find out which circuit and district your school falls into, and who is responsible for the issue you are working on. If they will not help you, you can take your demands to a higher level of government. But in order to convince them, you need to continue growing your support.

PROTEST

You will probably start a campaign on education rights by trying to speak to people who have the power to change it – a teacher, the SGB, a district official, or even the Minister of Basic Education. However, they may not listen to what you have to say, or even agree to meet with you. A common next step is to protest. The success of protest depends on mobilising well, so that there are plenty of supporters ready to take part in the protest. It draws public attention to your issue, and shows the person or organisation in question the strength of the support behind your demands. Protests are an important way in which the right to education can be advanced.

Protests are protected by provisions in the Bill of Rights, but are also regulated. Many people have criticised the laws concerning protests as being relics of apartheid control, and possibly unconstitutional. It is also true that police suppression of protests often goes far beyond what is allowed by law. However, it is nonetheless important to know your rights and the regulations to do with protests. The following information is drawn from Right2Know's guide, 'Protesting Your Rights: The Regulation of Gatherings Act, Arrests and Court Processes'.

KNOW YOUR RIGHTS

The Bill of Rights has three provisions, which – taken together – protect the right to peaceful political protest.

- **Section 16** protects freedom of expression, so long as it does not involve distributing war propaganda, or inciting violence or hatred.
- **Section 17** protects your right to assemble, picket, demonstrate and present petitions, so long as you behave peacefully and are unarmed.
- **Section 18** protects your right to freedom of association.

The government is only allowed to limit these rights in very specific circumstances. In the terms stated in Section 36, these limitations must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It is up to the courts to decide whether government limitations meet this requirement.

THE GATHERINGS ACT

The Regulation of Gatherings Act (1993) sets out rules for how any gathering that takes place in a public place, and involves protest or criticism, may take place. This protest can be directed towards an individual or an organisation, whether private or public, and can be about an issue, or a specific law or policy.

DEMONSTRATIONS VS. GATHERINGS

In terms of the Gatherings Act, a demonstration is a march or picket of 15 people or fewer. This can happen without the authorities being notified.

A gathering is a march or picket of more than 15 people. It is also understood as an event that expresses criticism or contestation. A gathering requires that you notify the local authorities in advance.

NOTIFICATION

You need to notify the responsible officer of the local municipality, by filling in a form called 'Notice under Regulation of Gatherings Act'.

- This must happen at least seven days before the protest.
- If this is not possible, you must still notify the authorities, and explain why seven days' notice was not given
- If notice is given less than 48 hours before a protest, the responsible officer is allowed to prohibit the protest without providing any reasons
- However, if you submit notice seven days in advance, and the local authorities have not contacted you to meet within 24 hours of your submission, the gathering is automatically legal.

There is a popular misunderstanding that the Gatherings Act says that you must get permission to protest from police or other authorities. This is not true, because protest is an exercise of your constitutional rights. Unfortunately, the authorities themselves often claim that this is the case, and do not give this permission, as a way of squashing criticism of the government. Alternately, they sometimes try to negotiate with the protesters to change the time or route, or interrogate the political reasons for the protest.

PROHIBITION OF GATHERINGS

In exceptional circumstances, a gathering can be prohibited by the responsible officer. However, this is not the same as refusing permission. 'Permission' implies that it is up to the authorities to decide whether or not to allow the protest. In fact, protests are legal except in very specific cases. In these cases, it is the job of the authorities to show why the protest cannot be permitted. They must do the following:

- Have an affidavit saying that the gathering will result in serious disruption of traffic, injury to participants/others, or extensive damage to property
- Meet the convenor to discuss the notice and try to negotiate a safe gathering
- Give a letter to the convenor with written reasons for prohibiting the gathering.

If a protest has been prohibited, anyone participating in it is committing an offence. However, if you feel your protest has been unfairly prohibited, you may approach a court (no lawyer required) to ask them to allow it to go ahead.

ORGANISING A PROTEST

In terms of the Gatherings Act, you need to choose a convener for the protest. This is the person who leads the protest. They must submit the notification form to the local authorities, and meet with the authorities when required. A deputy convener must also be chosen, in case the convener is unavailable.

Planning a protest is not just about mobilising supporters and submitting notice. You also need to spend time thinking about how to manage (and possibly transport) a large group of people. The organisers should clearly divide roles between themselves. It is a good idea to have marshals, to keep the protest in a defined area. Make sure to keep a copy of the notification of protest form and all communication with the authorities with you during the protest. The police may well ask to see it, or question whether you have received permission for the march. The convener should be available to speak with them.

CREATIVE PROTEST

Protests are about making your voices heard. Marches and pickets are popular kinds of protest, but there is no limit to the different kinds of protest you can organise. Creativity in protest is important as a form of self- or communal expression, but also because you need to find new and exciting ways to grab people's attention, and shape the way that people talk about and understand your issue. 'Read-ins', 'teach-ins', solidarity visits, fasting, participating in co-ordinated action: all of these are forms of protest.

EE AND THE RIGHT TO PROTEST

During April 2015, Equal Education held sleep-in protests in three cities: Cape Town, Pretoria and King William's Town. Its members were demanding that the Minister of Education, Angie Motshekga, publicly disclose the nine provincial plans for implementing the Minimum Norms and Standards for Public School Infrastructure. These demonstrations followed multiple letters and a request in terms of Section 18(1) of the Promotion of Access to Information Act, during which period the officials repeatedly made vague assurances that the plans would be released. While it was difficult to gain access to these plans, obtaining 'permits' to demonstrate about the plans proved equally difficult.

In Pretoria, a last-minute email was received from the City of Tshwane, denying Equal Education permission to demonstrate. The reason provided was that the sidewalk is for the use of pedestrians, and no person is allowed to carry on any business or cause any obstruction on it.

The demonstration and sleep-in in Cape Town was to be held outside Parliament, near the statue of Louis Botha. Equal Education submitted the required notice in terms of the Gatherings Act to the Participation Unit, which reports to the City Manager. This was done in terms of the Act, seven days prior to the protest. Equal Education gave notice that 100 members would picket and sleep outside Parliament's gates from 1 to 3 April 2015. The Gatherings Act provides that any negotiations the authorities wish to conduct must be arranged within 24 hours of receiving the notice of protest. To limit the encroachment on the right to protest, the Act says that if the authorities fail to call such a meeting within the prescribed period, the protest can go ahead in accordance with the notice.

EE heard nothing from the City of Cape Town until 3:20pm on Monday, 30 March 2015, two days before the planned sleep-in. At that time, Equal Education was invited to attend a meeting at the Civic Centre the following afternoon, less than 24 hours before the demonstration was due to commence. The meeting was attended by officials from the City of Cape Town, SAPS and the Public Order Policing Unit, traffic officers, Equal Education and parliament Protection Services. Officials insisted that the 'permit' not be issued without the approval of the Speaker of parliament. The National Key Points Act was cited as the reason for this, as well as the fact that the EFF had disrupted parliament during the State of the Nation Address. All protests to Parliament, they said, required the permission of the Speaker. The City of Cape Town initially refused to issue a 'permit', and instead instructed a city official to review all of Equal Education's gathering permits over the past five years.

When the meeting was reconvened, the City of Cape Town agreed to issue a conditional permit, provided permission was also obtained from the Chief Magistrate of Cape Town, the City Manager, and the Speaker of parliament. In violation of the Gatherings Act, the City of Cape Town failed to provide written reasons for this refusal to issue an unconditional permit.

The Speaker of parliament has no authority to deny marches to parliament under the National Key Points Act or any other law. The fact that the Speaker's permission was raised as a prerequisite echoed the events of 2010, when Equal Education was prevented from marching to the Union Buildings without the permission of the Presidency. The City of Cape Town stipulated that the permit was conditional on government agreeing to receive Equal Education's memorandum, but this condition was eventually deleted. The implication of claiming that you cannot protest unless the state acknowledges you means that a recalcitrant department could avoid a protest by simply refusing requests to receive memoranda at protests.

The Gatherings Act does require the additional permission of the Chief Magistrate of Cape Town for marches to Parliament; but in numerous marches to Parliament, Equal Education has never been the subject of this condition being enforced. Following the delayed meeting, the Equal Education Law Centre began preparing an urgent application to have the Western Cape High Court confirm the Speaker's lack of authority over protests.

In the meantime, the City Manager, the Chief Magistrate and the Speaker's office each insisted that they could issue approval only after one of the others had granted it first, creating an endless cycle limiting the organisation's right to protest. It was only hours before the sleep-in was due to begin that the Speaker's office gave oral approval, which prompted formal approval from the Chief Magistrate.

PUBLIC PARTICIPATION

This chapter began by looking at governance structures within schools, and opportunities to participate in them. As your campaign grows, you may take advantage of the formal provisions for participation in national structures, particularly parliament, which is intended to be open and responsive to the public. This can help to shape policy and budgeting, as well as contributing towards holding the government accountable.

Members of the public can petition parliament about an issue. They can also make written or oral submissions to parliamentary committees.

Members of parliament sit on different committees. The committees are intended to provide oversight for different areas of the government's work. At times the committees make a call for submissions from the public, but you can make a submission at any time, by sending it to the secretary and chairperson of that committee.

In cases where no call for submissions was made, it is largely at the secretary and chairperson's discretion whether or not the committee considers your submission. This is difficult when they are members of the party of government: they may have little interest in a submission that is critical of government.

In light of this, Ben-Zeev and Waterhouse have explained that 'access to committees requires investment into relationship-building with MPs and Chairpersons…'. Although this approach can be frustrating, taking into account that engagement between MPs and the public should not be dependent on personal relationships, it can be fruitful in some instances. Organisations need to be adaptable to the political nature of parliament. You can attend committee meetings and sittings of parliament to make these connections; all MPs' email addresses are also provided on the parliament website.

Once a relationship with an MP has been established, you can use them to ask questions of government for you. When it comes to flagging important issues or asking pertinent questions, it is best to move between the different political parties that make up a committee, rather than align too closely with one or another. Opposition MPs tend to be more receptive to requests for information or clarity on particular issues than those of the ruling party.

EDUCATION POLICY

There are two parliamentary committees that oversee basic education: the Portfolio Committee on Basic Education (which is part of the first house of parliament, the National Assembly), and the Select Committee on Education and Recreation (which is part of the second house of parliament, the National Council of Provinces).

BUDGETS

Oversight of the National Treasury, and budgeting, falls to the Standing Committee on Appropriations. As part of the process leading to parliament approving the Division of Revenue Bill (which outlines government spending for the year), the Committee calls for public comment. Despite the immediately realisable nature of the right to education, government's defence against a lot of education activism is the claim of budgetary constraints. Engaging on the budgeting process itself can therefore allow activists past this roadblock, into a space where their input can shape funding priorities.

PARLIAMENT AS A SITE OF STRUGGLE

Using available opportunities for public participation does not mean you cannot continue to mobilise and protest. In fact, doing so adds weight to your arguments. For example, if you are invited to present a submission you have made to a committee, you might decide to fill the committee room with supporters or members, or to hold a picket outside parliament at the same time, to demonstrate the depth of support for your case.

CASE STUDY

EQUAL EDUCATION'S PUBLIC PARTICIPATION

Prior to the national elections of 2014, EE's relationship with the Portfolio Committee on Basic Education was fairly robust. The chairperson of the committee, at the time, was receptive towards EE's contributions. If a written submission had been made by the social movement, more often than not the committee would invite EE to make an oral presentation, and a dialogue would ensue. These written submissions were not always prompted by the calls for submissions that are put out by committees, but were also prompted by the tabling of particular reports; for example, the Basic Education Annual Report, the Minister of Basic Education's Budget Vote speech, or the Committee's Budget Review and Recommendation Report.

After the elections, the make-up of the Basic Education committee was altered. With the arrival of new MPs and the departure of others, the relationship with the committee became fractious. As opposed to previous years, MPs from the ruling party were not as willing to meet with EE to discuss the challenges in the education sector, or to engage with any written contributions. Nor was there willingness to engage in one-on-one meetings, outside of the committee rooms.

In October 2014, for example, EE made a submission to contribute towards the draft Budget Review and Recommendation Report (BRRR). This submission is better known as EE's Shadow Report. Contributing to the BRRR had been one of the tactics used by EE for several years, and had in some instances resulted in EE's recommendations being included in the final BRRR. Although there had been some traction in the previous years with MPs, and the chairperson in particular, on engaging with the report, this changed in 2014. EE did not receive an acknowledgement of receipt from the committee after the submission was made; neither did the committee engage with the report during the meeting on the BRRR. It was briefly mentioned by an opposition MP; but overall, it was not recognised.

It is important to remember, as Ben-Zeev and Waterhouse have warned, 'Organisations should maintain awareness of and be responsive to the political landscape and the power struggles at play.'

Once it was clear that EE's contribution towards the BRRR process was not going to work, EE had to re-strategise.

In November 2014, the Standing Committee on Appropriations put out a call for submissions, inviting stakeholders to comment on the Minister of Finance's Mid-term Budget Policy Statement. Because the Shadow Report dealt with the DBE's overall performance for that particular financial year, as well as the manner in which their budget had been utilised, EE could use the report originally intended for the Basic Education Committee – with slight amendments – for this particular case. Another direction EE took was collaboration. The Public Service Accountability Monitor (PSAM) came on board, and made an extensive contribution to the amended Shadow Report.

After the amended Shadow Report was submitted to the Standing Committee, EE and PSAM were invited to make an oral presentation. In its report to National Treasury, the Appropriations Committee included two of the recommendations highlighted in the submission, one of which was the need to establish a conditional grant specific to scholar transport.

Through this process EE has built a strong relationship with the Standing Committee on Appropriations, and regularly makes submissions on matters relating to budget allocations for the basic education sector. However, this is a precarious relationship dependent on a number of factors, including the political climate. The recommendation of a conditional grant for scholar transport was a step forward, as this is an important plank of EE's campaign on scholar transport. However, it should also be noted that to date, this recommendation has not been taken up by National Treasury.

MEDIA

The media is an important tool for education activism. As you work in this field, you can use the media to:

- Document the daily struggles of your members, and share them with a wider audience
- Shape the narrative on your issue of choice: your media input can determine how people think about and understand the issue, and in fact the language that is used to describe it. This is the first step to winning a campaign
- Publicise the action you are taking, and mobilise greater support
- Criticise and put pressure on those in power.

As with MPs, it is useful to build relationships with journalists who cover education. Keeping in contact with journalists will increase coverage for your action, and add to the pressure you create. You can also write opinion pieces for publication in newspapers.

When you engage with the media, think about who you are targeting with your communication. This should shape the kind of media you emphasise. For example, radio is a good medium for reaching rural areas, as many people in these areas don't have televisions. Different newspapers and radio stations also appeal to different audiences.

Mainstream media often does not cover community protests well – even if the reporter is sympathetic to the issue. Often, reporting tends to focus on the dramatic aspects of the protest, or the inconvenience caused (such as traffic disruptions) rather than looking at the underlying causes, and the frustrations of protesters. There are often limited or no interviews with protesters, and police repression is often underplayed. You need to bear in mind that this is the climate in which you operate, and strategise about ways to promote a strong image of your movement in the media. One simple point is making sure that when there is a protest, or other action, all members know your demands, and are prepared to speak on the issue if questioned by reporters. Also, sending journalists an official statement can make it less likely that you will be misrepresented.

Social media has allowed activists, and movements, to connect more directly with supporters and the public. You can create and share your own content, such as photos, videos, articles and infographics, independently of traditional media, and quickly document police brutality or government's empty promises. Social media is also a space for members and supporters to share their own experiences and commentary. This can help to mobilise large numbers of people in a short amount of time, as has been seen by the use of social media in uprisings such as the Arab Spring. However, while it makes lines of communication broader, and raises awareness, it is no substitute for organising on the ground. While social media helps to create some form of shared identity and online community, this should feed into real action.

NORMS AND STANDARDS FOR SCHOOL INFRASTRUCTURE

The Norms and Standards campaign is a textbook example of Equal Education's methods. EE was concerned about the unacceptable state of school infrastructure in many of the country's schools, and initiated a sustained campaign to force the Minister of Basic Education to issue legally binding regulations concerning norms and standards for school infrastructure. This would describe the basic infrastructure every school needs in order to function.

EE members marched and picketed, petitioned, wrote countless letters to the Minister, went door-to-door in communities to garner support for the campaign, and even spent nights fasting and sleeping outside parliament. EE lobbied parliament and politicians, and on Human Rights Day in March 2011, it led 20 000 learners and supporters in a march to parliament to demand that the Minister and the DBE keep their promise and adopt legally-binding Minimum Norms and Standards to ensure that all learners in South Africa, regardless of race or wealth, are able to learn in schools with adequate infrastructure.

EE also used the media – both traditional, and social – to raise awareness and support for the campaign. Learners wrote newspaper articles about their struggles, and journalists covered the campaign.

EE parent members wrote to Basic Education Minister Angie Motshekga as one group of parents to another. The letter appeared in newspapers. EE also led a Solidarity Visit of eminent South Africans – activists, educationists, academics, moral leaders and public figures – to several Eastern Cape schools. The visit found terrible conditions of overcrowding, and collapsing, inadequate infrastructure. This was well publicised: journalists and members of the group of eminent persons wrote about their experiences, and used their authority to support EE's campaign. The visit was also filmed, and generated a short video, which was shared on social media.

EE also produced a series of animated videos, explaining the campaign – and the dire state of school infrastructure – in an accessible way. The organisation used twitter hashtags such as #FixOurSchools and #BuildTheFuture as a way of spreading the campaign. It was also able to confront government officials more directly, and in the public domain, via their Twitter accounts.

EE's approach was to win gains politically rather than through the courts. However, in 2012, with the Minister remaining stubborn in the face of mass mobilisation, it became increasingly clear that resorting to the courts to achieve norms would be necessary. Section 29(1)(a) of the Constitution provides that 'everyone has the right to a basic education'. Unlike other socio-economic rights, this right is unqualified and immediately realisable. So on 2 March 2012, the Legal Resources Centre (LRC), on behalf of EE and the infrastructure committees of two applicant schools in the Eastern Cape, filed an application in the Bhisho High Court against the Minister, all nine MECs for Education, and the Minister of Finance, to secure national minimum uniform norms and standards for school infrastructure. This was done while simultaneously applying political pressure. In fact, EE members were planning to camp outside the Bhisho High Court, where the case was going to be heard.

Before the case was heard, the Minister settled out of court and agreed to adopt norms and standards. She then delayed releasing them, and eventually published very weak 'guidelines' for school infrastructure. EE returned to the courts to secure an order for her to keep to her agreement. Finally, on 29 November 2013, binding Norms and Standards for School Infrastructure were released for the first time. The first deadline in the Norms is 29 November 2016. The campaign has shifted to monitoring the government's implementation of these laws.

Daniel Sher studied African History at Wits University and is a researcher at Equal Education.

Hopolang Selebalo studied Politics and Drama at Rhodes University, and was Deputy Head of Policy, Communications and Research at Equal Education. She is now Head of Research at Ndifuna Ukwazi.

CONSTITUTION AND LEGISLATION

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K Ben-Zeev & S Waterhouse 'Not Waiting for an Invitation: Lessons from South African Civil Society Engagement with National parliament in 2011', 2012.

South African Human Rights Commission 'Charter of Children's Basic Education Rights', 2012.

ORGANISATIONS LIST

GENERAL EDUCATION QUERIES

EQUAL EDUCATION
Isivivana Centre, 2nd Floor, 8 Mzala Street, Khayelitsha, Cape Town, 7784
E-mail info@equaleducation.org.za
Telephone 021 361 0127
Equal Education has offices in Cape Town, King Williams Town and Johannesburg, and nationwide membership.

BASIC EDUCATION FOR ALL
Email: sephakgamela78@gmail.com or malebane.charles@gmail.com
Telephone: 079 606 5646 or 079 226 7862
Basic Education for All has a membership throughout Limpopo.

EQUAL EDUCATION LAW CENTRE
3rd Floor, Isivivana Centre, 8 Mzala Street, Khayelitsha, Cape Town, 7784
Email: info@eelawcentre.org.za
Telephone: 021 461 1421 or 086 572 4675

SECTION27
First Floor, Heerengracht Building, 87 De Korte Street, Braamfontein, Johannesburg, 2017
Email info@section27.org.za
Telephone 011 356 4100

LEGAL RESOURCES CENTRE
National Office, 16th Floor, Bram Fischer Towers, 20 Albert Street, Marshalltown, Johannesburg, 2001
Email: info@lrc.org.za
Telephone: 011 836 9831 (national office), 046 622 9230 (Grahamstown office) 031 301 7572 (Durban office) 021 481 3000 (Cape Town office)
Legal Resources Centre has offices in Johannesburg, Cape Town, Durban and Grahamstown. The Grahmstown office has a specialisation in education rights.

CENTRE FOR CHILD LAW
Faculty of Law, Law Building (Room 4-31), University of Pretoria, Pretoria, 0002
Email: centreforchildlaw@up.ac.za
Telephone: 012 420 4502

CHILDREN'S RIGHTS CENTRE
36 Essex Terrace, Westville, Durban, 3629
Email: info@childrensrights.org.za
Telephone: 031 266 2384

QUERIES ABOUT VIOLENCE AND SEXUAL VIOLENCE IN SCHOOLS AND HOSTELS

LAWYERS AGAINST ABUSE
Buffalo Street, Ext. 2, Diepsloot, Johannesburg, 2189
Email: info@lva.org.za
Telephone: 087 150 7235

TEDDY BEAR CLINIC
2nd Floor, Children's Memorial Institute, 13 Joubert Street Extension, Parktown, Johannesburg, 2193
Email: natashar@ttbc.org.za
Telephone: 011 484 4554

CENTRE FOR APPLIED LEGAL STUDIES
First Floor, DJ du Plessis Building, West Campus, University of the Witwatersrand, Braamfontein, Johannesburg
Private Bag 3, Wits University, Johannesburg, 2050
Email: Duduzile.Mlambo@wits.ac.za
Telephone: 011 717 8600

COUNSELLING SERVICES

LIFELINE
28 Melle Street, 10th Floor, North City House, Braamfontein, Johannesburg, 2001
Email: kgonem@lifeline.org.za
Telephone: 011 715 2000 or 082 231 0805

SOUTH AFRICAN DEPRESSION AND ANXIETY GROUP
Email: zane1@medport.co.za
Counselling: 011 234 4837
Suicidal Emergency: 0800 567 567
24-hour Helpline: 0800 12 13 14
SMS 31393 (and we will call you back)

CHILDLINE
24 Stephen Dlamini Road, Musgrave, Durban, 4000
PO Box 51418, Musgrave, 4062
Email: admin@childlinesa.org.za
Telephone: 08000 55 555

SA NATIONAL COUNCIL FOR CHILD WELFARE
247 Monument Road, Glen Marais, Kempton Park, 1619
Email: info@childwelfaresa.org.za
Telephone: 011 452 4110

QUERIES RELATING TO EDUCATION FOR CHILDREN WITH DISABILITIES AND BARRIERS TO LEARNING

INCLUSIVE EDUCATION SOUTH AFRICA
1st Floor, 134 Main Road, Wynberg, Cape Town, 7800
PO Box 18093, Wynberg, Cape Town, 7824
Email: www.included.org.za
Telephone: 021 762 6664

CREATE
P O Box 100275, Scottsville, KwaZulu-Natal, 3209
Email: info@create-cbr.co.za
Telephone: 033 345 5088

SOUTH AFRICAN NATIONAL COUNCIL FOR THE BLIND
514 White Street, Bailey's Muckleneuk, Pretoria, 0181
Email: admin@sancb.org.za
Telephone: 012 452 3811

DEAFSA
20 Napier Road, Richmond, Johannesburg, 2092
Private Bag X4, Westhoven, Johannesburg, 2142
Email: brunobruchen@deafsa.co.za
Telephone: 011 482 1610 or 082 333 4442

WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY
ASAT HOUSE, Alexandra Hospital, Annex Road, Maitland, Cape Town, 7405
PO Box 142, Maitland, Cape Town, 7404
Email: info@wcfid.co.za
Telephone: 021 510 4686

QUERIES RELATING TO RIGHTS OF MIGRANT CHILDREN TO EDUCATION

SOUTH AFRICAN LITIGATION CENTRE
President Place, 1 Hood Avenue or 148 Jan Smuts Avenue, Rosebank, Johannesburg, 2196
PO Box 122, Parklands, 2121
Email: enquiries@salc.org.za
Telephone: 010 596 8538

LAWYERS FOR HUMAN RIGHTS
4th Floor Heerengracht Building, 87 De Korte Street, corner Melle Street, Braamfontein, Johannesburg
Telephone: 011 339 1960.

CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA
5th floor, Braamfontein Centre, 23 Jorissen Street, Braamfontein, Johannesburg, 2001
Email: communications@cormsa.org.za
Telephone: 011 403 7560

QUERIES RELATING TO PROTEST-RELATED RIGHTS

RIGHT TO KNOW
107 Community House, 41 Salt River Rd, Salt River, Cape Town, 7925
Email: mark@r2k.org.za
Telephone: 021 447 1000

RIGHT2PROTEST (HOSTED AT CENTRE FOR APPLIED LEGAL STUDIES)
First Floor, DJ du Plessis Building, West Campus, University of the Witwatersrand, Braamfontein, Johannesburg
Email: Duduzile.Mlambo@wits.ac.za
Telephone: 011 717 8600

QUERIES ABOUT HUMAN-RIGHTS EDUCATION IN SCHOOLS

THE CONSTITUTIONAL LITERACY AND SERVICE INITIATIVE
85 Main Road, Muizenberg, Cape Town
Email: mjain.sa@gmail.com
Telephone: 079 103 4456

STATE INSTITUTIONS REQUIRED TO PROTECT YOUR RIGHTS

THE PUBLIC PROTECTOR
Office of the Public Protector, Private Bag X677, Pretoria, 0001
175 Lunnon Street, Hillcrest Office Park, Pretoria, 0083
Email: registration2@pprotect.org
Toll free number: 0800 11 20 40
Telephone: 012 366 7000
The Public Protector has offices in each province.

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
Braampark Forum 3, 33 Hoofd Street, Braamfontein, Johannesburg
Email: nlubelwana@sahrc.org.za
Telephone: 011 877 3600
The Human Rights Commission has offices in each province.

SOUTH AFRICAN COUNCIL FOR EDUCATORS
Crossway Office Park, Block 1, 240 Lenchen Avenue, Centurion, 0183
Private Bag X127, Centurion, Pretoria, 0046
Telephone: 086 100 7223

DEPARTMENT OF BASIC EDUCATION

NATIONAL
Sol Plaatje House, 222 Struben Street, Pretoria, 0001
Telephone: 012 357 3000
Hotline: 0800 202 933

EASTERN CAPE
Steve Vukile Tshwete Education Complex, Zone 6, Zwelitsha
Telephone: 040 608 4200

FREE STATE
55 Elizabeth Street, Free State Provincial Government Building, Bloemfontein
Telephone: 051 404 8000

GAUTENG
111 Commissioner Street, Johannesburg
Telephone: 011 355 0000

KWAZULU-NATAL
247 Burger Street, Pietermaritzburg
Telephone: 033 846 5000

LIMPOPO
Corner 113 Biccard & 24 Excelsior Street, Polokwane
Telephone: 015 290 7611

MPUMALANGA
Building No. 5, Government Boulevard, Riverside Park, Nelspruit
Telephone: 013 766 5000

NORTH WEST
2nd Floor Executive Block, Garona Building, Mmabatho
Telephone: 018 388 2562/2564

NORTHERN CAPE
IK Nkoane Education House, 156 Barkly Road, Homestead, Kimberley
Telephone: 053 839 6500

WESTERN CAPE
Grand Central Towers, Cnr Darling and Lower Plein Streets, Cape Town
Telephone: 021 467 2000

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CREDITS

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Executive Director, SECTION27: Mark Heywood

Head of Litigation, SECTION27: Adila Hassim

Editors: Faranaaz Veriava with Anso Thom & Tim Fish Hodgson

Plain language editor: Karin Schimke

Proofreaders: Dave Buchanan and Kate Whittaker

Art direction & layout: Karien van der Westhuizen, the earth is round

Illustrations: Gerald Bedeker

Printer: Paarl Media KZN, Durban

To order copies of this book, please email Anso Thom on thom@section27.org.za.

PARTNERS

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NOTES

CENTRE FOR **CHILD LAW**

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EELC EQUAL EDUCATION LAW CENTRE

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