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. Parents can demand the efforts by a school to turn their child away.

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 focuses 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 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, the 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 organization 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.
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**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  
**NCP** National Council of Provinces  
**NDRP** 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  
**NMNSF** National Norms and Standards for School Funding  
**NT** National Treasury  
**ONE** Outcomes-Based Education  
**OBI** Open Budget Index  
**OGOD** Organisatie vir Godsdienste-Onderwi in 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  
**RCC** Representative Council of Learners  
**RJWCD** 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  
**SADU** Suid-Afrikaanse Onderwysersweerline (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** Southern African Schools Assessment and Monitoring System  
**SAOU** South African Onderwysersakademie (The South African Teachers’ Union)  
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**SA-SAMS** Southern African Schools Assessment and Monitoring System  
**SCA** Supreme Court of Appeal  
**SCG** School Governing Body  
**SIAS** Screening, Identification, Assessment and Support Policy  
**SONA** State of the Nation Address  
**SPI** Studies in Poverty and Inequality Institute  
**TIMSS** The Trends in International Mathematics and Science Study  
**VAT** Value-Added Tax  
**Unawati** 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
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 as 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

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

Sisonke Msimang
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 heartbreakingly 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.

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 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 food, 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 education 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-bearing; 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, or are 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 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 of commodities: hope. We all know, on some days it seems our constitutional democracy is in a state of disarray. Similarly, 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 optimism.

Most importantly, the contributions in this manual are all written in the spirit of Mwalimu Julius Nyerere, who said ‘education is not a word for 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 a way forward. A luta continua, Siyakhe

Sisang 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 the constitutional right to a basic education, which requires active measures to improve education in the country.

The right to a basic education is found in Section 29(1)(a) of the Constitution. As we explain in greater detail below, this means that any person in South Africa possesses these rights, including non-citizens.

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 the state has a duty to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.

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 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. These include the right 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.

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 ‘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.

THE BILL OF RIGHTS

The Bill of Rights specifies the duties of the ‘state’. Section 21 of the Constitution tells us that the state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights.

In this chapter, we refer to every right in the Bill of Rights and the duties which are required to do something, or to avoid doing something.

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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’. The Constitution tells us that the state has a duty to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.

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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. These include the right 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

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’. 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 has a duty to provide learners with teachers and textbooks. It has a 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.

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.

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 consult on the progress of its constitutional rights (‘constitutional damages’). This is reserved for exceptional cases.
- Any combination of these remedies.

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.

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.
In January 2015, South Africa ratified the Optional Protocol to the International Covenant on Civil and Political Rights (OPCPR), which affirms the rights guaranteed in the Constitution. The OPCPR is the most helpful guides to the meaning of international law. 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 education are found in the body of soft international law. There is also a category of international law known as ‘soft’ law. This consists of guidelines, declarations and recommendations by international bodies. These are 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 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). These treaties become part of South African law. According to Section 39(1)(b) of the Constitution, all legislation must be interpreted to be consistent with international law. Section 233 of the Constitution, South African law. According to Section 39(1)(b) of the Constitution, all legislation must be interpreted to be consistent with international law. 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 Promotion and Protection 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.

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 institutions are the public institutions that have been 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 Promotion and Protection 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.

The most helpful guides to the meaning of international law are soft international law. These are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples’ Rights (AChPR), and the African Charter on the Rights and Welfare of the Child (ACRWC).
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?

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.

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.
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.

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 a basic education, for 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 Secretary of the Department of Education v Minister of Home Affairs and Others. In that judgment, Justice Bess Nicolaas explained that:

> ‘The significance of education, in particular basic education, for individual and societal development, is an inherent right in the right to human dignity. Basic education has the potential to promote human dignity, and the development of education rights law in South Africa 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.

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 unreasonably prevent learners from receiving a basic education.

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 processed. 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 these purposes in its important decision in Secretary of the Department of Education v Minister of Home Affairs and Others. In that judgment, Justice Bess Nicolaas explained that:

> ‘Basic education is an important socioeconomic right directed, among other things, at promoting and developing a child’s personality 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.’
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.

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 Madzimbo 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.
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’.

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.
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.

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.

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.

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.
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?
- Is this situation a limitation of their rights as children?
- Is this situation a limitation of the right to basic education?

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 their rights is enough to show 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.

IN THIS SECTION

- The right to equality and the prohibition of unfair discrimination.
- The right to human dignity.
- Freedom of religion and belief.
- Freedom of expression.
- The right to privacy.
- The right to freedom of conscience, religion, thought, opinion and belief.
- The right to physical and bodily integrity.
- The right to freedom and security of the person.

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.

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 child’s best interests.

In Juma Musjid 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.

In many cases, the constitutional court has 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.

Limpopo was held not only deprived them of a basic education, but also discriminated unfairly against these learners.

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, unreasoned freedom of expression can also become an obstacle to teaching and learning, requiring a balance to be struck between these rights.
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**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.

**CONSTITUTION AND LEGISLATION**


South African Schools Act 84 of 1996.

**INTERNATIONAL AND REGIONAL INSTRUMENTS**

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**SOURCE MATERIAL AND FURTHER READING**

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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 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’.

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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.

ECONOMIC

HUMAN RIGHTS

POLITICAL

ASPECTS OF THE BUDGETING PROCESS

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.

The budget process involves:

• The determination of each province’s equitable share

» The national equitable share of the provincial sphere’s share of revenue

- The national equitable share

- The provincial equitable share

- The determination of each province’s equitable share of the provincial sphere’s share of revenue

- The formula used to determine this share

In South Africa, the key principles, rules and responsibilities underlying budgeting budget process are set out in the Constitution. These include:

- Public participation
- Transparency
- Equity
- Accountability

The national equitable share is indeed equitable. The determination of the equitable share is not based on the revenue, but on the province’s share of the provincial sphere’s share of revenue, including whether the formula used to determine this share is indeed equitable.
The budget process is 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 governments 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 used or spent wisely. The public is 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 used or spent wisely.

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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 oversees 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 Departments of Education (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 education such as the remuneration 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).
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:

- 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 February and go to ‘Budget Tips’
- 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
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- 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
- At the school level, join the school governing body (SCGB) 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 misappropriated 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.
  - August
    - MTEC approves preliminary fiscal framework and division of revenue and sectoral budget priorities.
    - Formal functional MTECs meet to discuss expenditure priorities.
  - September
    - MTECs and 10x10s start. Treasury presents the new budget environment. All reflect on previous year’s performance (financial and non-financial) / DPMF input on NDP Outcome 1 Agreement for Basic Education / 10x10 for the Basic Education Sector established.
    - October
      - 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.
- September
  - 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
    - MTEC discussions and 10x10s start. Treasury presents the new budget environment. All reflect on previous year’s performance (financial and non-financial) / DPMF input on NDP Outcome 1 Agreement for Basic Education / 10x10 for the Basic Education Sector established.
    - December
      - 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
- January
  - Final allocation letters sent by NT to DBE and Provincial Treasuries.
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 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 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, governments 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 24(1) of the Constitution. Section 24(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, on 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

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<tr>
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<td>1048</td>
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Basic Education Rights Handbook – Education Rights in South Africa – Chapter 2: Funding Basic Education

Basic Education Rights Handbook – Education Rights in South Africa – Chapter 2: Funding Basic Education
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1. THE NATIONAL EQUITABLE SHARE, INCLUDING CONDITIONAL GRANTS

The national share pays for all the functions and activities of the national government. 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 undertaking specific programmes and activities.

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 equally between the provinces, based on criteria established by Section 214(2) of the Constitution:

(a) the need to ensure that the provinces are able to provide basic services and perform the functions allocated to them;
(b) developmental and other needs of the provinces;
(c) 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.

- Economic output component (weighted 1%) distributed regressively, based on regional GDP.
- Basic 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 progressively, 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 education was divided among the number of learners in each province.

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 undertaking specific programmes and activities.

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.

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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 underestimates 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.

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).

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

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. This means that schools in urban areas have a higher range of qualified teachers to choose from than rural areas. 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 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

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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 differentials 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.
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 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.

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

* ‘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.

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

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.
- Conditional grants are funded by the DBE:
  - Dinaledi Schools Grant
  - Technical Secondary School Recapitalisation Grant
  - Education Infrastructure Grant
  - HIV and AIDS Life Skills Programme Grant
  - National School Nutrition Programme Grant.
- Provincial equitable share expenditure is allocated 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.
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 former Department of Education (DBE) emerged in 2009 when the former Department of Education (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

<table>
<thead>
<tr>
<th>DBE Programme</th>
<th>Conditional Grant Transferred to Provinces</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Administration</td>
<td>7.5% Conditional Grants</td>
</tr>
<tr>
<td>2. Curriculum Policy, Support and Monitoring</td>
<td>89.7% Provincial Equitable Share Expenditure</td>
</tr>
<tr>
<td>3. Teacher Education, Human Resource and Institutional Development</td>
<td>No conditional grants</td>
</tr>
<tr>
<td>4. Planning Information and Assessment</td>
<td>National School Nutrition Programme Grant</td>
</tr>
<tr>
<td>5. Educational Enrichment Services</td>
<td>HIV and AIDS Life Skills Programme Grant</td>
</tr>
</tbody>
</table>

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.
and evaluation of all the conditional and conducting annual monitoring the DBE and PEDs on the grants, as well as facilitating interaction between that are sent to National Treasury, as grant frameworks and MTEF allocations provides inputs into the draft conditional is situated under this programme. It department’s Annual Report, which details 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: Dineledi Schools Conditional Grant The aim of the Dineledi Schools Conditional Grant is to increase participation in and improve the performance of learners taking Mathematics, Physical Science and Life Science subjects. Of the R1.11 million allocated to this grant in 2014/15, R86 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 level
• 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 new and existing education infrastructure. It has received between R5 billion and R9 billion in allocations per year since 2011/12, which are disbursed to all 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.

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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. In 2014/15, only 106 schools had been handed over to the communities, while a further 381 schools had been provided with improved water and sanitation and 293 schools provided with electricity. In 2015, National Treasury and the DBE agreed to merge the School Infrastructure Backlog Grant into the Education Infrastructure Grant in order to address the poor performance of ASDI. 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. 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 budgets come 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 learners, deficiencies in teacher post provisioning processes, and delays in the filling of vacant teacher posts.

The Employment of Educators Act (Act No. 76 of 1996) 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 Educators stipulated that each PED 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 school. PEDs therefore use personnel funding from their provincial equitable share to pay teachers directly. However, the Schools Act empower 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 1651 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, particularly in subject areas such as mathematics and sciences, take up a larger share 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 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 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 proportion 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.

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 provisioning 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 DRE commissioned a report in 2013 on provincial post provisioning and expenditure. This followed a big increase in personnel costs that led to overspending personnel budgets, which caused other education obligations, such as textbooks in Limpopo, to go unfunded. That report revealed
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:

- Pressure from interest groups, especially trade unions, has led 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 of the 48 124 temporary teachers in the system.

- 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 a national level, and irregularities in respect of post provisioning are discussed in detail in Chapter 14 of this handbook.

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-SMASH) 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.

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.

Non-Personnel Funding
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 in schools serving poor communities, to compensate provinces they use for revenue they do not collect through school fees.

The quintile system
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.

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.

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 SCBs of those 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 System Act appear to have worked 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, 2014). Proportionally 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 attending schools that were not funded at 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 socioeconomic 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 school 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 School 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 DBE. 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 SCBs 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 fee reductions 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 obliging the MEC to provide education for learners with special education needs at 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. 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

**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.**

While 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 with disabilities. The Departments of Education and Training should take steps to ensure that schools are accommodating and supporting learners with disabilities, despite government claims that budgetary constraints prevent immediate universal implementation of inclusive educational policies.

Children with severe 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 with disabilities. The Departments of Education and Training should take steps to ensure that schools are accommodating and supporting learners with disabilities, despite government claims that budgetary constraints prevent immediate universal implementation of inclusive educational policies.

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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 than 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** shows independent school subsidies as a percentage of equitable share spending by PEDs, 2012/13 – 2016/17.

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

- 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.

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CASES


CONSTITUTION AND LEGISLATION


South African Schools Act 84 of 1996.


Employment of Educators Act 76 of 1998.


Division of Revenue Act (enacted each year).

Appropriation Act (enacted each year).

POLICY AND GUIDELINES


Department of Education ‘Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools’, 2006.


Department Education, ‘Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to The Educational Institutions of Such a Department’, 1998.

SOURCE MATERIAL AND FURTHER READING


S Franklin & D McLaren Realising the right to a basic education in South Africa: An analysis of the context, policy effort, resource allocation and enjoyment of the constitutional right to a basic education, 2015.


N Attchali No-fees school forcing parents to pay Oil News, 2013.


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.

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 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 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.
**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 by facilitating the fair implementation of school rules. SGBS are required to have policies that protect and promote the rights of children in schools by setting out clear school policies that are suitable for the school.

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 the rights of children 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 SGB must decide on and carry out school policies that are suitable for the school. Having fair policies about admissions to and exclusions by facilitating the fair implementation of school rules. SGBS are required to have policies that protect and promote the rights of children in schools by setting out clear school policies that are suitable for the school.

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 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. 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.

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.

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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 meaningful engagement as a process used to resolve issues or disagreements that the parties may have with each other.

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:

Co-operative governance is a transnational tenet of our constitutional order and has been incorporated into the Schools Act through the processes 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, Mmamalanga and Others (the Schoonbee 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.

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. 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 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 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)(b), on co-operative governance. This sets out how the various parties involved in governing schools should interact together:

- fostering friendly relations;
- assisting and supporting one another;
- fostering mutual trust and good faith, by –
- informing one another of, and;
- avoiding legal proceedings against one another.

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 v 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 standard 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 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.
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 on any of the rights in the Bill of Rights. When creating the code of conduct, schools should 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 enroll their children in schools within a 5km radius of their homes or place of work. FEDSAS argued that the provision precludes 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 fixed 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 religious and cultural heritage. 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.

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

**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.

In Pretoria Girls High School’s Code of Conduct, describes ‘uniforms’ and ‘equality and inclusivity’ in the school’s core values. These must be used to interpret the code. It then goes on to say that all hair must be brushable, 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’. In addition, a learner alleged that in two separate incidents, teachers had referred to her hair as ‘kaffir hair’.

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, receive, read and wear. The freedom of expression is extended to forms of outward expression, as in clothing selection and hairstyle.’ In A v Governing Body, the Settlers High School and Others the High Court indicated that the values enshrined 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 social diversity of the school populations they serve, and then develop rules – after proper consultation with those 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.
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 must have admitted 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 revised 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 unreasonably 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 its learners at the school. Counsel also emphasised, that it is the duty of the school to consider the broader needs of the community in which it operates. 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.

In the Welkom case, this concerned two pregnancy cases. 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 policies themselves. Therefore the policies were challenged. The court held that the policies were inconsistent with the Constitution. The Constitutional Court could not make a 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 policies were consistent with the Constitution.

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The conflict in the case centred on whether the policies themselves. Therefore the courts have recognised that 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 Pilis case, in which the learner’s wearing of a nose stud was seen as part of her religion. While wearing earrings and piercings were 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 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.

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An example of the clash between the SGB and the HOD when it comes to the pregnancy policy can be seen in the Uniform 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.

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**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.

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**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.

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**CASEx**

Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC); 2016 ZACC 14.

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.

Head of Department: Xhumalanga Department of Education and another v Hoënskool Ermelo and another 2010 (2) SA 415 (CC); 2009 ZACC 32.

MEC for Education, Gauteng and another v Governing Body of the Rivonia Primary School and Others (Equal Education and Centre for Child Law as Amici Curiae) 2013 (6) SA 582 (CC); 2013 ZACC 34.


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**CONSTITUTION AND LEGISLATION**


South African School’s Act 84 of 1996.


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**POLICY AND GUIDELINES**


Department of Basic Education ‘Admission Policy for Ordinary Public Schools’, 1998.


Department of Basic Education ‘Information for Parents and Guardians: SCBs’, 2016.

Department of Basic Education ‘Play Your Part on Your School Governing Bodies (SCBs)’ 2016.

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**SOURCE MATERIAL AND FURTHER READING**

Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN)

Understanding Learner Participation in School Governance, 2013.


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 Mhokwi Ermelo, the Constitutional Court described this system and its consequences (para 46):

...the apartheid government... it also true that they served and were supported by relatively affluent white communities. On the other hand, formerly black public schools have been, and try and large remain, scantily resourced. They were deliberately funded singly 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.

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.

OTHER LAWS, REGULATIONS AND POLICIES

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 Covenant 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)

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 131 on every white child
- R 771 on every Indian child
- R 498 on every coloured child
- R 146 on every black child

The government’s spending per learner.

One of the clearest indicators of the
forms of equality that we have in mind: education, there are at least three valuable
forms of equality. In particular, 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.

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
in schools will also have an impact on a learner’s ability to receive a basic education.

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**

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

### Direct and Indirect Discrimination

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

### Multiple and Intersectional Discrimination

Discrimination occurs when prohibited grounds are used as the criteria for different treatment. For example, the apartheid education system, which 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.

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.

### Unfairness

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:

1. **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 who 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 factors listed in the Equality Act apply to all cases of discrimination except a few narrow exceptions, such as the cases you want to challenge the Constitution 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-curricular 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 unlawful. 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.
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 falling pregnant. Policy will prevent learners from falling pregnant.

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

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, cater 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):

As 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 relegiate people to the margins of society because they do not or cannot conform to certain 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 paying to make sure that everyone has access to an education.

DISABILITY AND REASONABLE ACCOMMODATION

Reasonable accommodation has a particular importance 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 Board [1997] 1 SCR 241 at para 68:

Exclusion from the mainstream of society results from the combination 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.
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 would unfair discrimination to refuse to install a wheelchair ramp, unless there are strong reasons not to do so.

- Paying to allow people to participate in schools and in their communities.
- The 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 has a significant impact on wheelchair-bound learners. 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.

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

### 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:

1. First, it must be targeted at a group that has experienced unfair discrimination in the past, such as black learners or learners with disabilities.
2. 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.
3. 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.
CHAPTER 5
THE RIGHT TO BASIC EDUCATION FOR CHILDREN WITH DISABILITIES

Sitomo Khumalo and Tim Fish Hodgson
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 Education Needs Education White Paper 6, states 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.

Children with disabilities are entitled 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.

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.

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’.
Yoliswa developed an eye condition called glaucoma. This condition damaged her optic nerve, resulting in a total loss of her sight. According to the 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 his local school. His teacher says that he is a ‘slow learner’ and that he 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 a result of a pressing need 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 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 attempts to move away from the isolation of learners with disabilities in ‘special’ schools towards their inclusion in neighbourhood ‘ordinary’ or ‘mainstream’ schools.

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 schools’, 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 for those children whose educational needs might not effectively be catered for at this stage in full-service and mainstream schools.
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.

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.

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

<table>
<thead>
<tr>
<th>TYPE OF SCHOOL</th>
<th>WHAT IS IT?</th>
<th>SPECIFIC POLICIES AND GUIDELINES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mainstream/Ordinary School</td>
<td>• A mainstream school is an ordinary neighbourhood school that all children attend</td>
<td>• Equality Act</td>
</tr>
<tr>
<td></td>
<td>• Mainstream schools are required to ‘reasonably accommodate’ children with disabilities.</td>
<td>• Lettie Hazel Oortman v Thomas Aquinas Private School</td>
</tr>
<tr>
<td></td>
<td>• According to the SIAS policy, all children should attend their local neighbourhood school first, regardless of their disabilities.</td>
<td>• Schools Act Section 12(4)</td>
</tr>
<tr>
<td>Full-Service School</td>
<td>• 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.</td>
<td>• Guidelines for Full-Service/Inclusive Schools (2010)</td>
</tr>
<tr>
<td></td>
<td>• They may accommodate learners with ‘high’ learning needs, but most often accommodate learners with ‘moderate’ or ‘low’ needs according to the SIAS policy.</td>
<td>• Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Full-Service Schools (2005)</td>
</tr>
<tr>
<td>Special School</td>
<td>• 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.</td>
<td>• Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres (2014)</td>
</tr>
<tr>
<td></td>
<td>• 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.</td>
<td>• Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres (2007)</td>
</tr>
<tr>
<td>Special School as a Resource Centre</td>
<td>• 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.</td>
<td>• Guidelines to Ensure Quality Education and Support in Special Schools and Special-School Resource Centres (2014)</td>
</tr>
<tr>
<td></td>
<td>• Resource Centres have various important support roles in terms of the SIAS policy, and should work closely with District-Based Support Teams.</td>
<td>• Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Special Schools as Resource Centres (2005)</td>
</tr>
</tbody>
</table>
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 mainream schools throughout the country. The education system for children with disabilities is still very reliant on special schools. Children with disabilities are still required to leave their families and communities to attend faraway 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 ‘cruel’.

Some of the most significant problems noted in the DBE’s report include:

- No 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.

For the sake of these students, and the rights that they hold, the government must do more now to ensure that children with disabilities receive in many – if not most – schools the quality of education that children with disabilities receive in many – if not most – schools.

INTRODUCTION

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).

THE CONSTITUTION

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,自由 FROM ABUSE AND NEGLECT

The failure of the government to provide adequate 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 UNCRPD also emphasises that any ‘reasonable accommodation’ of an ‘individual’s requirement’ 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 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 it enshrines 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 be provided with 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 Right to Basic Education for Learners with Disabilities
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 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 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.’
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 affirming 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).

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.)

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.

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

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THE POLICY FRAMEWORK

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

Because of the long distances between their homes and special schools, many children with disabilities who attended special schools had to stay in special-school hostels during term time.

Media reports late in 2015 about two different special schools in two different cities in KwaZulu-Natal revealed that children face abuse and neglect in the hostels they live in during term 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 “alarmingly”, and indicates that it is critical that a national policy for special schools is formulated. For more on sexual and physical abuse of learners, see the chapters in the manual on child abuse and neglect.

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 pleased 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 have completed high 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 more blind children, go to waste.

Children, parents, School Governing Bodies and active 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 catered to for the full range of learners’ needs. They 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, full-service 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 department of education and local district councils for 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 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, learners, 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 list 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 full-service schools in the rural Umkhanyakude District of northeastern KwaZulu-Natal reveals that are indicative of the situation in many schools across the country:

- Full-service schools regularly do not receive additional funding allocations for the number of students with disabilities. When they do receive funding, 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.

- Because of the long distances between learners with disabilities and full-service schools, many learners who should be provided with food, beds and hygienic conditions to live in special-school hostels, are provided with food, beds and hygienic conditions to live in special-school hostels.

- The 2010 guidelines for full-service schools are not yet fully implemented.

- Inappropriate infrastructure.

- Inadequate teaching and support staff.

- Lengthy waiting lists to even get into special schools.

- 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.

- Teachers who have children with disabilities, or high levels of support that mainstream and full-service schools cannot currently provide.
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

These 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 woodworking, 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 her 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 be 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/carer, why your child is being referred to the school in question; what type of school it is (full-service or special school); and how the school 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 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.

Mobility 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, SCGs 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.

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 judge encouraged the principal to ‘renovate the building’ in order to do so.

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 ‘remove 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 request 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
Children with severe [...] and profound intellectual disabilities [...] were explicitly excluded from admission to special schools in terms of Department of Education policy.

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 below) and the private schools (for example Thomas Aquinas, as seen in Oortman).

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 reasonably accommodating ones. Schools must make as many accommodations as are reasonable and necessary for children with disabilities to enjoy the right to education.

Western Cape Forum for Intellectual Disability

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 was that 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 100.

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 WIPO, 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 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.

The Court granted an order in favour of the Forum that provides extensive protection for the rights of children with intellectual disabilities.

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 the court 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 community activism, to contribute to the improvement of access to quality inclusive education for children with disabilities.
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 WPs – 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 WPs 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 2), 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 SCBs 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.

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 rights appropriately accommodated.

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.

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CONSTITUTION AND LEGISLATION


South African Schools Act 84 of 1996.

POLICY AND GUIDELINES


Department of Basic Education ‘Screening, Identification, Assessment and Support Policy’, 2014.

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

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Department of Basic Education ‘Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Special Schools as Resource Centres’, 2005.


CASES

Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another 2016 (4) SA 546 (CC), 2016 ZACC 14.

De Vos N.O and Others v Minister of Justice And constitutional Development and Others 2015 (2) SACR 217 (CC), 2015 ZACC 21.


FURTHER READING


POLICY AND GUIDELINES


Department of Basic Education ‘Screening, Identification, Assessment and Support Policy’, 2014.

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

Department of Basic Education ‘Guidelines for Full Service/Inclusive Schools’, 2010.


Department of Basic Education ‘Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Special Schools as Resource Centres’, 2005.


SOUTH AFRICAN JUDICIAL DECISIONS


The Dark: Failure to provide access to quality education to blind and partially sighted learners in South Africa, 2015.


The Dark: Failure to provide access to quality education to blind and partially sighted learners in South Africa, 2015.


FURTHER READING


CHAPTER 6

THE RIGHTS OF REFUGEES AND MIGRANT WORKERS

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.
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 to escape poverty or to find better educational opportunities
- **Political migration** moving to escape political persecution or war
- **Environmental migration** moving to escape natural disasters such as drought and flooding

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.

PULL AND PUSH 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 pull and push factors.

Pull factors are the reasons 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.

Push factors are the reasons why


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 1994, and it became operational in 2000.

WHY DO PEOPLE MIGRATE?

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Pull factors are the reasons 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.
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 refugees are protected by international law: refugees’ and asylum seekers’ rights to 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 where they risk persecution. These are persons for whom a final decision has been made to refuse origin. These are persons for whom a final decision has been made to refuse 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.

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 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-to-urban, in-country migration, or the crossing of international borders. A migrant may be either documented or undocumented.
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 Refugee Act limits the definition of “dependent” to include only unaccompanied minor children who are younger than 18 years old, as well as children legally adopted in the asylum seeker/dependent’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 Mukula, 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 a 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.

**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 cannot. There are plans to include an assessment of an applicant’s ability to sustain themselves and their dependents, although 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 position 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 by the Supreme Court of SA in Minister of Home Affairs v Mailickvinka and Others. The case concerns the prohibition on the rights of asylum seekers to work and study while they are being 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 powers 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 study of freedom as 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 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.

**ACCESS TO EDUCATION FOR REFUGEES, ASYLUM SEEKERS AND MIGRANTS IN SOUTH AFRICA**


There are many other international instruments that expressly prohibit discrimination on the grounds of race and require positive measures to promote equality. These include:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- 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) 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 law;
- (c) is entitled to apply for an asylum 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 passport in terms of the Nationalities Act, 1998.

The education system is further regulated by the South African Schools Act and regulations.

**THE RIGHT TO EDUCATION**

Section 5(3) 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(3) 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.

- [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’. 

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 to legalise their stay in the country in terms of the relevant legislation (Immigration Act or Refugees Act, as applicable).

**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.

Schools 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.

**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.

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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.

FAILRE 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 vs 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 to be: i. Treated in a manner, and kept in conditions, that take into account the child's age; "

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.

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
- SECTION 27
- Lawyers for Human Rights
- SA Human Rights Commission
- Centre for Child Law

POLICY AND GUIDELINES

- Department of Basic Education ‘Admission Policy for Ordinary Public Schools’, 1996.

CASES

- Minister of Home Affairs v Watchenoka 2004 1 All SA 21 (SCA), 2002 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 1996 South African High Court case no 73/342 (2012)

CONSTITUTION AND LEGISLATION

- Refugees Act 130 of 1998
- National Education Policy Act 27 of 1996
- South African Schools Act No 84 of 1996

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.

SOURCE MATERIAL AND FURTHER READING

CHAPTER 7

SCHOOL FEES

Sherylle Dass and Amanda Rinquest
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. These quintiles are 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.

Although apartheid policies have long been abolished, South Africa’s public education system is still unequal. Not enough has been 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.

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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 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.
- There are circumstances in which a school can be incorrectly classified as either quintile 4 or 5, which means it may be incorrectly subsidised.
- There are circumstances in which a school can be incorrectly classified as fee-charging (quintiles 1 to 3), partially subsidised (quintiles 4 and 5), or fee-paying (quintiles 4 and 5).
- The factors that they consider include the level of poverty in surrounding areas, and whether the school is fee-charging.
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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 Mopanes District, every Friday is ‘Civies 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.

GOVERNING BODY RESPONSIBILITIES
The Schools Act, in Section 46(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.

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.

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FEE-PAYING SCHOOLS
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 5 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 SCB 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 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.

SCHOOL-fee EXEMPTIONS
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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 they earn. 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.

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:

\[ E = \frac{100 \times F + A}{C} \]

\[ E = \frac{100 \times 1000 + 400}{2400} \]

\[ E = 5.83\% \] (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 – R70 = R230

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.

HOW FEE EXEMPTION APPLICATIONS ARE MADE

1. Fill in Form B and Supporting Documents
2. Submit the form to the school/Apply for exemption
3. The governing body must consider the application and make a decision in 30 days
4. if you are unhappy with the decision, appeal to HOD within 30 days
5. The HOD must instruct the governing body not to proceed with debt collection until the final decision is made
6. The HOD must make a decision within 14 days
7. Within 7 days the HOD must give the parent and the school written notification of the outcome of the appeal
8. If the appeal is dismissed, the parent can apply for Judicial Review to the High Court within 180 days, in terms of the Promotion of Administrative Justice Act.
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 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.’

This inequality can have serious implications in the allocation of funding that is meant to ensure equal access to education. 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 predominantly 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’s admission into Fish Hoek Primary School but the council 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 to pay the full school fees, and I had to sign the undertaking to pay the full school fees. – Parent applying at Fish Hoek Primary 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 Visa have to be up to date.” – Letter received by a refugee from Tableview Primary School when he applied for a fee exemption.

- 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-exemption 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 School Act when recovering outstanding school fees. They hand parents over to debt collectors or debt collection attorneys, who most often win a judgment against...
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-FEES 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 the 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 any 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.
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 non-custodian 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. 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 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 Rustenburg v Leerderskool Sentral, Kittakam v Serantse v 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 Meeding v Hoër Tegniese Skool Snuitzurg, 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 the 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 so, she 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, if any. The school fees are not capable of entering expensive court processes. The amount of maintenance that the custodian parent gets may be limited, and it could be therefore that the school fees exceed the amount of maintenance. 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 could therefore only sue a parent for half of the school fees. This would negate the discriminatory effect on single and divorced parents.

The insincerity in 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 denying applications for fee exemptions that do not include the financial information of a non-custodian parent. 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.

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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.
Currently, laws and policies should be developed to protect pregnant learners.

Obligations rest on schools and the state in addressing this situation, and how to address learner pregnancy, what the rights of pregnant learners are, what they 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 get quality education that is free of prejudice and stigmatisation.

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.

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 childcare.

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.
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 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 unfairly 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 FAILING 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.

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 states 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(1) prohibits discrimination on the basis of pregnancy and 8(8) 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 28(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 goes further by 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...
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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 right to equality 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 Constitution (see section 9(1) and (9)(4) of the Constitution).

The National Education Policy Act (NEPA) provides for the making and applying of national education policy regarding schools. Section 3(4)(a) 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 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. SCBs 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 SCBs 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 SCBs refused, and took the HOD to court to stop him from interfering with their policies.

In the judgment, the Constitutional Court stated that the policy was unlawful. The Welkom judgment highlighted the importance of SCBs and educators drafting policies that do not discriminate and do comply with the law. The Welkom judgment also showed 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 acted when drafting their policies is against the law and the Constitution.

The Constitutional Court also stressed the importance of co-operative governance between HODs and SCBs, meaning they should work together to make sure that all learners can enjoy a quality education. The Welkom judgment highlighted the importance of SCBs and educators drafting policies that do not discriminate and do comply with the law. The Welkom judgment 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 acted when drafting their policies is against the law and the Constitution.

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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:

- if a school refuses to provide you with homework or tasks while you are away
- not being allowed to write exams
- 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
- 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

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

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Chandré Stuurman is an attorney at the EELC.

Demichelle Petherbridge is an attorney at the EELC.

CASES

Head of Department, Department of Education, Free State Province v Welkom High School and Another 2013 (9) SA22A(CC) [2013] ZACC 25.

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


Children's Act 38 of 2005.


South African Schools Act 84 of 1996.


POLICY AND GUIDELINES

Department of Basic Education 'Draft Department of Basic Education National Policy on HIV, STIS and TB', 2015.


INTERNATIONAL AND REGIONAL INSTRUMENTS


SOURCE MATERIAL AND FURTHER READING


CHAPTER 9

SEXUAL ORIENTATION AND GENDER IDENTITY IN SCHOOLS

Nurina Ally and Tshego Phala
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.
The Constitutional Court has also held that the right of children to dignity has special importance in our society. (Dignity 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 deep 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 right 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.

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 speech to childhood development. In 5 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 that they are capable of things 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]

Every learner has the right to be treated equally and with dignity. No person is allowed to call you names or to deny your choice of identity. You have a right to access education and no person can prevent your access to education.
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 definition of 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:

- 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
- International Covenant on Civil and Political Rights

These treaties and protocols protect the rights of 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. The Constitution and the rights of 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

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. For example, the policies and code of conduct must comply with the Constitution. The Department of Basic Education has also published a guide on combating homophobia and bullying in schools, which provides important guidelines on the steps that all stakeholders can take in developing inclusive policies and a safe environment for all learners.

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.

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 a school curriculum that promotes understanding and respect of all learners.

WHAT CAN SCHOOLS AND EDUCATORS DO TO ENSURE A MORE INCLUSIVE AND SAFE ENVIRONMENT FOR LGBTI LEARNERS?

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- Developing a school curriculum that promotes 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 fulfill 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.
CHAPTER 10

RELIGION AND CULTURE IN PUBLIC EDUCATION IN SOUTH AFRICA

Tim Fish Hodgson
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’.

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

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 betrothal, 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 Christians.

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 CONSTITUTIONAL COURT ON CULTURAL IDENTITY

‘While cultures are associational, 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

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’.

The table below shows the religious affiliation in South Africa:

<table>
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<tr>
<th>Religion</th>
<th>Province</th>
<th>WC</th>
<th>EC</th>
<th>NC</th>
<th>FS</th>
<th>ZN</th>
<th>NM</th>
<th>CF</th>
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<td>85.7</td>
<td>88.4</td>
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<tr>
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<td>0.4</td>
<td>3.2</td>
<td>2.6</td>
<td>7.7</td>
<td>1.8</td>
</tr>
<tr>
<td>Traditional African</td>
<td>WC</td>
<td>5.1</td>
<td>1.5</td>
<td>5.9</td>
<td>0.4</td>
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<td>11.1</td>
<td>2.4</td>
<td>3.1</td>
<td>3.7</td>
</tr>
<tr>
<td>Hindu</td>
<td>WC</td>
<td>2.2</td>
<td>0.4</td>
<td>0.2</td>
<td>0.0</td>
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<td>3.9</td>
<td>0.1</td>
<td>0.4</td>
<td>0.1</td>
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<tr>
<td>Hindu</td>
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<tr>
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<td>0.4</td>
<td>0.0</td>
<td>0.4</td>
<td>0.1</td>
</tr>
</tbody>
</table>

*Ancestral, indigenous or other traditional religions.
(Source: PEW Research & Stats SA)
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 these two: religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum—rarely are they confined to only one particular religious practice or belief.

The Constitutional Court has since indicated that 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.

THE CONSTITUTIONAL COURT ON RELIGIOUS & CULTURAL RIGHTS

The right to freedom of religion, belief and opinion (Section 15) and the right to cultural, religious and linguistic communities also protect the rights of 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’.

Before we try to answer these and other questions about religion in school, 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 to practicetheir 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 (1)): These 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.

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 ‘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. Religious rights of parents and communities are considered of lesser importance than the rights of learners themselves.
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.

**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] 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 2005, the National Policy on Religion in Education. This policy is contextualised and detailed below in the section on 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**

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.
- **Religious instruction** explains 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 Policycontemplates 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 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.
- Selection of 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.
In the words of the Policy:

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. Accordinly, 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 discrimination between the religions. 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, this 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.

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, this 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 philosophisers from 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 equally 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 protect 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

The Religion in Education Policy describes ‘dress’ as a religious observance and the National Guidelines on School Uniform protect learners’ rights to religious and cultural dress and hairstyles. An important issue is the clash between the requirement of “dress” and the School Uniform Policy, as well as the Code of Conduct.

A news report indicated that a child had a gold earing 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 case, 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.

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.
Leseding Technical School and Others
Radebe and Others v Principal of

He found that Lerato had a right to be in class. He also found that the school had discriminated against her in the form of clothing and jewellery, 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 symbols to religious expression should not be underestimated. It is currently relatively common for schools to have visibly placed religious symbols.

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 2011, 16-year old Sakeenah Dramat and her 13-year-old brother Bilaal were kicked out of Kraafoen 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 High School 8 at Paul Trauma 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 DA's Islamic Service Centre, who wrote a letter to the school explaining that girls were required to cover their bodies from head to toe, in order to be 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 pressure, Rauhah continued to wear her hijab to school. In 2014, a private German school was a law that required the posting of a cross or crucifix on the wall of each public school classroom. The German Constitutional Court held that the 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.

HAIRSTYLES: BEARDS AND DREADLOCKS

Schools commonly attempt to regulate the hairstyles of learners through the use of their uniform policies, which should follow the Board 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 religious beliefs.

This problem – which was raised as early as 2001 in schools in the Western Cape – continues, with media reporting indicating that a school in Khayelitsha was preventing Grade 8 Rastafarian learner Azaana Stoffel from attending the school wearing dreadlocks, on the grounds of its uniform policy. A teacher at his school, Bulukmo Secondary, displayed a lack of understanding and respect for the Rastafarian religion, claiming that 'if he is not smoking ganja (drugs), 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 Sitya 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 the 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.

RELIGIOUS SYMBOLS: CROSSES, STARS OF DAVID AND SIGNS

Religious symbols are important to many people of 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 symbols to religious expression should not be underestimated. It is currently relatively common for schools to have visibly placed religious symbols.

In the 'Cruel 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 held that the 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.
A concerned group of parents from schools around the country formed a non-profit organisation called ‘Organisasie vir Godsdienste-Onderwys 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 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 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 equity in some manner.

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.

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.

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.

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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.
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 ENDOREMENT 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 OECD 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 Constitutions, 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.

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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.

INTRODUCTION

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’s 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**

Arriving 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, 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(1) 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 practised in implementing policy determined under this section.

4. A recognised Sign Language has the status of an official language for purposes of learning at a public school.

This section therefore deals with language policy 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 the 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 5(1) of the Schools Act and Section 3 of the National Education Policy Act, the Minister published in the Government Gazette, after consultation with the Council of Education Ministers, 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 1, 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 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 36 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 the 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 normal 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 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 for every learner in every grade. This would also require that the necessary learning materials are available in all African languages, and that appropriately qualified teachers are available to teach these languages.

For reasons of practicability, 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.

• 15 learners in Grade 7 if eight or more medium instruction may not be entitled to receive it, because it would not be reasonably practicable for such a small group.

• 46 learners in Grade 12 seeking French-medium instruction will be entitled to this, because the IOLT must be one of our official languages.

• 60 learners in Grade 12 seeking Venda-medium instruction will be entitled to this, because it is deemed to be reasonably practicable.
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 interaction 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 department can override these policies.

In the case of Matakane and Others v Human Rights Commission and Minister of Education and Training, the court held that the language policy of the 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:

- If the language policy of the provincial education department is discriminatory on the grounds of apartheid, and the court found that this was inconsistent with the school governing body’s power to determine the language of instruction, it is up to the state to take 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 and feasible and the need to remedy the results of past racially discriminatory laws and practices.

**HEAD OF DEPARTMENT, MUPAMALANGA DEPARTMENT OF EDUCATION AND ANOTHER v HOERSKOLE 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 Court ruled that 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 Court held that 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.

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.
These learners were black, and the majority of these cases, however, the majority of English-medium instruction. On the facts policies that exclude learners seeking the grounds of their race or ethnicity. Not permitted to exercise that power in a school’s language policy, it is the school governing body the power to determine a school’s language policy, it is important to be aware of this, to ensure that no indirect unfair discrimination occurs.

While 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.

The cases 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.

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.
• The Gauteng Department of Education promised to ensure the availability of education in a particular medium at a school.

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.

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 to be granted the subject matter in their other learning areas, or their parents’ ability to participate in their 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.

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. Nonetheless, this enables 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.

In dealing with language policy, RACE DISCRIMINATION AS A SUBSTITUTE FOR THE DANGERS OF LANGUAGE POLICY AND A MEANINGFUL RIGHT OF ACCESS TO EDUCATION
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.

**POLICY AND GUIDELINES**

**SOURCE MATERIAL AND FURTHER READING**

**CONSTITUTION AND LEGISLATION**
South African Schools Act 84 of 1996.

**CASES**
Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC); [2009] ZACC 32.

**HEAD OF DEPARTMENT V HoERSKOOL ERMELO**
Minister of Education, Western Cape, and Others v Governing Body, Mikho Primary School and Another 2006 (1) SA 1 (SCA); 2005 ZASCA 66.

**MINISTER OF EDUCATION, WESTERN CAPE, AND OTHERS V GOVERNING BODY, MIKHO PRIMARY SCHOOL AND ANOTHER**
Laerskool Middelburg v Departmentshoof, Mpumalanga Department van Onderwys 2003 (4) SA 160 (T).

**LAERSKOOL MIDDELBURG V DEPARTMENTSHOOF, MPUMALANGA DEPARTMENT VAN ONDERWYS**
Matukane and Others v Laerskool Polokwane 1996 (3) SA 223 (T).

**MATUKANE AND OTHERS V LAERSKOOL POLOKWANE**

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**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 provincial 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 50 children learning in isiXhosa, 35 children learning in Tshivenda and two children learning in Africanans. 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 without ensuring that there were sufficient teachers who could communicate in South African Sign Language.

The policy and the norms and standards of offering education in different languages, including offering education in the correct language to schools, are designed to ensure that there are sufficient teachers who could communicate in a particular language. The provincial education department cannot refuse, on the basis that it is reasonably practicable, to offer education in another language if the learners have not been offered the education they are entitled to, as stated in the Language in Education Policy and the norms and standards of the department.
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.
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 inequity 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 segregated 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’s 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 dysfunctions. 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 Masjid Primary School & Another v Ahmed Aungoff Essay NO and Others (Juma Masjid), 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 in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are observable 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

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 2.1: A sample of the research which illustrates the degree of under-performance in historically disadvantaged schools in South Africa.

<table>
<thead>
<tr>
<th>Cross-National Study</th>
<th>Learner Performance</th>
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<td><strong>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 6 learners.</strong></td>
<td>• 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.</td>
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<td><strong>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. Math scores were lower than reading scores. The results found that 27% of South African Grade 6 learners were illiterate.</strong></td>
<td>• 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.</td>
</tr>
<tr>
<td><strong>In the 2006 PIRLS study, South Africa achieved the lowest score of all the participating countries.</strong></td>
<td>• Only 13% of Grade 4 and 22% of Grade 5s reached the Low International Benchmark of 400 points. • According to the principal investigator 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.</td>
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</table>
In relation to personnel, such as physiotherapists who are trained in Braille or sign language, or specialised teachers, such as teachers who help learners with disabilities, the national and provincial departments are required to ensure that the personnel have the necessary skills and knowledge to effectively support learners with disabilities. 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, thereby 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 Spaul — 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 Spaul, a more appropriate measure would thus indicate a pass rate (for example) of 36% in 2014.

The TOXIC MIX

We need better laws, policies and programmes, adequate budgeting, and improved management.

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 70%, 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 the DBE must be asked to re-assess 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, thereby 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.

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.

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.

LAW AND POLICY

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 ‘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 the 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.

<table>
<thead>
<tr>
<th>Availability</th>
<th>Accessibility</th>
<th>Acceptability</th>
<th>Adaptability</th>
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<td>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.</td>
<td>This requires that the government 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.</td>
<td>This requires that the government 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.</td>
<td>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.</td>
</tr>
</tbody>
</table>
In March 2012, Equal Education launched an intervention to pressure the Department 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 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 about the length of the process, which led to a public outcry; and the norms were not finalised by the 15 May deadline.

In July 2013, with Equal Education renewing their threats of litigation, the Minister agreed to a new set of norms. The finalised Regulations were introduced into the public domain.

The finalised Regulations were opposed by Equal Education and the Department. The case was referred to a court order compelling the Minister of Basic Education to finalise the norms and standards for basic 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 REQUIRE PIECING TOGETHER ASPECTS OF THE SCHOOLS ACT AND ITS SUBSIDARY LEGISLATION. PROVISIONING MAY BE DIVIDED INTO THREE MAIN CATEGORIES: (1) INFRASTRUCTURAL PROVISIONING, WHICH INCLUDES THE BUILDING OF SCHOOLS, CLASSROOMS AND THE PROVISIONING OF WATER, SANITATION AND SERVICES; (2) PERSONNEL EXPENDITURE, WHICH INCLUDES EDUCATOR SALARIES; AND (3) NON-PERSONNEL RECURRENT EXPENDITURE, WHICH INCLUDES CAPITAL EQUIPMENT AND CONSUMABLES USED INSIDE SCHOOLS FOR TEACHING PURPOSES.

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 5C(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
• Provisions 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: (1) infrastructural provisioning, which includes the building of schools, classrooms and the provisioning of water, sanitation and services; (2) personnel expenditure, which includes educator salaries; and (3) non-personnel recurrent expenditure, which includes capital equipment and consumables used inside schools for teaching purposes, 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 other 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 infrastructural provisioning, 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 example, the relevant laws and policies in respect of the different line items are each discussed in turn below.
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 money 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 Minimum Norms and Standards for School Funding’ (i.e. Infrastructure Regulations) on post provisioning that follows. The impact that this has on education provisioning is elaborated below. The draft policy therefore 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, 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.

**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: 94:16
- Limpopo: 93:07
- Mpumulanga: 87:15
- Northern Cape: 87:13
- North West: 86:14
- Western Cape: 83:17

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.

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**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 2003, 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 wealthier a school, the more likely 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:

- learners 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.

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 Muisiud Case**

In Governing Body of the Juma Muisiud Primary School & Another v Ahmed Arief Essay NO and Others (Juma Muisiud), 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. The court rejected arguments by describing these obligations, the court said:

It is important, for the purpose of this judgement, 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 need for a statutory guarantee enshrining it in the Constitution or other legislation. The Court found that the right to basic education is one of the most fundamental rights, and the ability to access it is not dependent on any other right.

In December 2015, the South African Supreme Court of Appeal (SCA) in the case of Minister of Basic Education and Others v Basic Education All for and Others (the BEFA case) gave judgment in an appeal relating to the incomplete delivery of textbooks to learners at certain schools in the Limpopo Province. The SCA confirmed that the right to basic education was ‘immediately realisable’. The BEFA judgment was the culmination of a sustained campaign of litigation brought by public interest organisations SECTION27 for free and adequate education. The BEFA judgment held that the right to 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 provision of 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 SCA held in the case of Madzodzo & 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 textbooks on time in the school term. 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. The court also made a resources-allocation argument, and rejected government’s budget constraints argument, but noted that the court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary constraints.

In 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’), the Western Cape Forum for Intellectual Disability was brought by a coalition of non-governmental organisations that provide for learners with disabilities. The case of Madzodzo & Others v Minister of Basic Education & Others in 2012, the court implied that both teacher and other administrative non-teacher posts were essential to the smooth functioning of a school.

**The Madzodzo Case**

In the case of Madzodzo & 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 textbooks on time in the school term. 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. The court also made a resources-allocation argument, and rejected government’s budget constraints argument, but noted that the court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary constraints.

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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 vacancies 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 multi-pronged strategy to fix 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 braille 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 braille 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 braille outside of their Braille lessons as well.

In addition, each of the 23 teachers at the school requires a brailer to be able to teach properly. At the moment, the school has only three braille machines 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 braille. The Department of Education undertook to provide 25 braille, 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.

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CASES


City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC), 2011 ZACC 33.

Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA), 2015 ZASCA 196.

Tripartite Steering Committee and another v Minister of Basic Education and Others 2015 (5) SA 107 (ECC) [2015] ZAECCH 67.

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CONSTITUTION AND LEGISLATION


Employment of Educators Act 76 of 1998.

National Education Act 64 of 1998.


POLICY AND GUIDELINES

Department of Basic Education & Department of Transport ‘National Learner Transport Policy’, 2015.

Department of Basic Education ‘Screening, Identification, Assessment and Support Policy’, 2014.


Department of Basic Education ‘Regulations Relating to Minimum Norms and Standards for Public School Infrastructure’, 2013.


Department of Education ‘Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools’, 2006.


INTERNATIONAL AND REGIONAL INSTRUMENTS


SOURCE MATERIAL AND FURTHER READING

G Bloch ‘The Toxic Mix: What’s Wrong With South Africa’s Schools and How To Fix It’ (2009).


CHAPTER 13
INFRASTRUCTURE AND EQUIPMENT
Lisa Draga
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 or non-existent electricity supply. 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 publishes 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 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

Figure 13.1: Conditions in ordinary schools in South Africa.

BACKGROUND

Every day, thousands of South African children attend schools that have appalling infrastructure. Many learn in hazardous and life-threatening conditions.

cruel links between the age and condition of classrooms and the educational outcomes of 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.

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) was introduced in 1997 and has been revised several times since then. NPEP seeks to ensure that all schools meet certain minimum standards in terms of physical teaching and learning conditions.

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While this campaign continues to unfold, the non-governmental legal organisation SECTION27 has
brought a damages claim on behalf of the Komape family. The claim is against the Ministry, 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 is traumatic 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 (among other information) details of the 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.

As the publication of these plans proceeded, few 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.

The historical injustice of the inequalities in school facilities is also mentioned in NPER, a policy introduced by the Minister through the National Education Policy Act. The first of NPER’s policy statements refers to the publication of national norms and standards for school infrastructure, to address these inequalities. As discussed, these norms and standards were introduced in November 2013.

The Constitutional Court, in Governing Body of the Jama Masjid 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:

‘All other norms’ e.g. sports and recreation facilities

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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.

By 29 November 2020, all schools with 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, the Eastern Cape High Court, Mthatha, 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 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 is ongoing.

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.

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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.

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### CONSTITUTION AND LEGISLATION
- The South African Schools Act 84 of 1996.
- Department of Basic Education ‘Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure’, 2013.

### CASES
- Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC); 2011 ZACC 13.
- Madzodzo v Minister of Basic Education 2014 (3) SA 441 (ECM); [2014] ZAECMHC 5.
- The South African Schools Act 84 of 1996.

### SOURCE MATERIAL AND FURTHER READING
- Department of Basic Education ‘National Education Infrastructure Management System Report (NEIMS)’, 2015.
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.
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.

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 can offer more subjects and who 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.

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’ Organization 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 in 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 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 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. 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.

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 appointment, they must be considered by the department. If this happens, the department (which must also consider the recommendations by the SGB) 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).

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. These include:

1. The democratic values and principles referred to in section 7(1) (equality, equity and the other democratic values and principles in the Constitution of South Africa).
2. A procedure whereby it is established whether the SGB has identified as being in excess of what is required within a province.
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.
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 would begin 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.

The LRC decided 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 Grahams-town 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, state assets could be attached to enforce reimbursement of the orders. 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 case, where 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 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. The courts wanted representation to approach the LRC with details of their problems. This avoided the problem that was faced in the Centre for Child Law case, where 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 2013 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 case, where the LRC had structured the court order, this debt could be recovered through the State Liability Act. In response, the LRC applied for certification of an opt-in class action, which was granted by the court. This will be explained below.
RISKS 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 in 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 and special 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 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 wealthiest 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 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.

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**

- The Employment of Educators Act 76 of 1998.
- The South African Schools Act 84 of 1996.

* See also subsequent unreported litigation dealing with the enforcement of this order and the payment of teachers.
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 to assist learners with their prescribed textbooks, the Department of Education must deliver 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.

- **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 reinforce 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 and are able to apply it.

- **Additional LTSM for mathematics and physical science**: In addition to textbooks and workbooks provided to learners, the Department of Education provides additional learning material 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.

- **Additional LTSM for learners in Grade 1**: 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.

**KEYWORDS**

- 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 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 reinforce 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 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.

**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 effects 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 costs 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.

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 and a novel 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.

At the time of writing this chapter, the policy had not yet been finalised.
It emerged that, for various reasons, not provided with any CAPS textbooks. In 2012, however, learners in Limpopo were period of three years; it was introduced to:

at the same time, the department
conditions, including overcrowding.

to rely less on teachers in circumstances
textbooks, so that they would be able
to aim at increasing learners’ use of
textbooks, which covered the new curriculum.

In addition, the CAPS curriculum required to provide new textbooks,
which covered the new curriculum.

Because the curriculum changed, the Department of Education (DOE) was

needed to provide new textbooks,

where it replaced the

In 2012, the Department of Education introduced the CAPS curriculum.

The CAPS curriculum stood for Curriculum and Assessment Policy Statements. It replaced

the previous Revised National Curriculum Statements (RNCS).

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Because the curriculum changed, the Department of Education (DOE) was required to provide new textbooks, which covered the new curriculum.

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 delivery of all outstanding textbooks for 2013 (in which year the CAPS curriculum would be introduced to Grades 4, 5, 6 and 11).

At 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
The Court held that ‘books are the realisation of the right to education, must be available to all the learners on always, means that all the textbooks provided with her or her own textbooks, this would create a standard of perfection that would be impossible for them to meet.

The effect of this judgment is that as long every learner to all of his or her original textbooks. 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.

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 useless. 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.

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 27(1)(a) confers the right of a basic education to everyone. If there is one learner who is not timely provided with his textbooks, her right has been infringed. It doesn’t matter as this is the right of every student that 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.

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 contents of the relevant part of the textbook? Why should poverty-stricken schools and learners have to put to the expense of having to copy 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 these without textbooks are being unfairly 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.

Notes

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 ITC resources, 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.
- There is an accessibility barrier that electronic resources cannot overcome.
- Even with technological advances, electronic resources are also often more reliant on their readership of the material. The problem of this nature is that the right to basic education is not subject to available resources.

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 the textbooks unless exceptional circumstances exist.

The Supreme Court of Appeal confirmed 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 several 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. It 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 justly unfairly discriminate 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 use the blackboard. In addition, given the lack of braille-readers – 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 breach of the right to basic education, as well as unfairly discriminating against this vulnerable group.
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 systems allow 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 report textbook 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.

HOW TO REPORT TEXTBOOK SHORTAGES

If you have textbook shortages at your school, SMS ‘textbooks’ to 44094 to report them.

CASES

Basic Education for All & Others v Minister of Basic Education & Others 2014 (4) SA 274 (GP); 2014 ZAGPHC 351.

Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA); 2015 ZASC 196.

SECTION27 and Others v Minister of Basic Education and Another 2013 (2) SA 40 (GNP); [2012] ZAGPHC 114.

SECTION27 and Others v Minister of Basic Education and Another, Case No 24565/12, 4 October 2012.

CONSTITUTION AND LEGISLATION


South African Schools Act 84 of 1996.

POLICY AND GUIDELINES


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.


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.


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How to report textbook shortages

If you have textbook shortages at your school, SMS ‘textbooks’ to 44094 to report them.

Basic Education Rights Handbook – Education Rights in South Africa – Chapter 15: Textbooks

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Basic Education Rights Handbook – Education Rights in South Africa – Chapter 15: Textbooks
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.

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.
**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.

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**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.

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Basic Education Rights Handbook – Education Rights in South Africa – Chapter 16: Scholar Transport
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 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 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 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.
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.

**TRANSPORT FOR LEARNERS WITH DISABILITIES**

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. The NIDC will be responsible for ensuring that the transport policies are implemented effectively.

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.

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 choices are not available, or the 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 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.

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 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 choices are not available, or the 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.

**KEY DEFICIENCIES IN THE NATIONAL POLICY**

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.

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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 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 be 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 insufficient 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 timetables 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.

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 allows 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.
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.

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.

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).

INTERNATIONAL LAW RELEVANT TO DISTANCE, SAFETY AND INEQUALITY
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 violence 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 consider 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 the education’. Furthermore, Article 11(3) states that:

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

(a) take measures to encourage regular attendance at schools and the reduction of dropout rates;
(b) 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.

And:

(1) [in instances where scholars’ access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of Section 24(1) of the Constitution, to promote and fulfill the right to basic education.]

Like most provinces, the Eastern Cape’s policy contains an arbitrary distance requirement of a minimum number of kilometers that learners must have to walk to qualify for scholar transport. 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.

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CASES

- Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC); 2011 ZACC 13.
- Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECC); 2015 ZAECCHC 67.

CONSTITUTION AND LEGISLATION


POLICY AND GUIDELINES

- Department of Basic Education ‘National Learner Transport Policy’, 2015.
- Department of Basic Education ‘Guidelines for Full Service/Inclusive Schools’ 2010.

INTERNATIONAL AND REGIONAL INSTRUMENTS

- The Universal Declaration of Human Rights (UDHR), 1948.

FURTHER MATERIALS AND READING

CHAPTER II

SCHOOL VIOLENCE

Tina Power
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:

- Lay 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.
- 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 Suzanne Lesschat, 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.

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.

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 overview chapter discusses some of the factors that contribute 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.

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 17.1: Satirical cartoon commenting on the lack of safety and security at many South African Schools. (Zapiro, July 2007, http://mg.co.za/zapiro/fullcartoon/243)
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.

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.

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.

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**EXAMPLE 1:**

Nsombi is a learner at Phumelale 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.

Nsombi’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.
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.

### TYPES OF SCHOOL VIOLENCE

<table>
<thead>
<tr>
<th>ABUSE</th>
<th>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.</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASSAULT</td>
<td>Unlawfully and intentionally: • Applying force to a learner • Creating a belief that force is going to be applied to the learner.</td>
</tr>
<tr>
<td>BULLYING</td>
<td>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.</td>
</tr>
<tr>
<td>CORPORAL PUNISHMENT</td>
<td>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.</td>
</tr>
<tr>
<td>GANGS</td>
<td>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.</td>
</tr>
<tr>
<td>GENDER-BASED VIOLENCE</td>
<td>Discrimination and gendered or sex-based harassment and violence, rape, femicide, sexual harassment and homophobia.</td>
</tr>
</tbody>
</table>

### 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

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 into or beyond the genital organs, anus, or mouth of 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 a 13-year-old Sipho Mvela on her right hand with a hosepipe for not finishing her homework. The beating damaged the nerves in Sipho’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 cares for learners with disabilities in KwaZulu-Natal was reported for allegations of abuse. City Press reported that ‘[s]chools have been physically and sexually abused in the hostel, and one pupil became pregnant as a result. As a result of failing pregnant, this learner did not return to school. (This handbook deals with learner pregnancy in Chapter 8.)’

’natal helpt for disabled children’ City Press, 20 September 2015
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.
- Report the bullying to someone they 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 counseling 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.

**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 Organization (WHO) explains that children with disabilities are more vulnerable to abuse and neglect than 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.

**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!?’ ‘Uyisidom! 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 to 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.
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 and absenteeism. It reported that during the year, 94 complaints of sexual abuse and harassment were received. SACE received 161 complaints of unprofessional conduct, alcohol abuse and victimisation. It reported that of these complaints, 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, has reported that children with disabilities are also more likely to be exposed to violence, 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 children are subjected to violence at school, according to Save the Children, an independent organisation which advocates for children. The organisation has reported that children with disabilities are also more likely to be exposed to violence, including physical, emotional, and sexual abuse, as well as neglect.

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- One in every five boys is a victim to bullying.

The National Education 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.
The Constitution of South Africa and its附件human rights, as embodied in international law, states that every child has the right to a safe, carefree environment. In the 2002 draft Regulations to the Children’s Act, the Minister stated that ‘[e]ducators have a duty to care for and protect learners from violence because of their in loco parentis status’. In ‘locus parentis’ means ‘in the place of the parent’. Educators have a general duty to acknowledge, uphold and promote the values set out in the Constitution of South Africa. While educators have a duty to care for and protect learners from violence because of their in loco parentis status, in their 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. 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 law places a legal duty on certain categories of people to take steps to make sure that other people are not harmed. In Ruscio v The Jesus Fathers, a case about a learner who lost vision in one eye after playing a game using grass shoots as arrows, it was acknowledged that this obligation exists between schooling authorities and learners. Section 26(1)(b) of the Constitution states that every child has the right to appropriate care and removed from the family environment. In Hluleka 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 the Prohibit Initiation Practices in Schools, the Minister 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.

Duty of Care

South African law places a legal duty on certain categories of people to take steps to make sure that other people are not harmed. In Ruscio v The Jesus Fathers, a case about a learner who lost vision in one eye after playing a game using grass shoots as arrows, it was acknowledged that this obligation exists between schooling authorities and learners. Section 26(1)(b) of the Constitution states that every child has the right to appropriate care and removed from the family environment. In Hluleka 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 the Prohibit Initiation Practices in Schools, the Minister 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.

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 Related Matters Act 2 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:
• 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/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
• 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.

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’. The KZN Department of Education issued a circular 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 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.

**REPORTING SCHOOL VIOLENCE**

**Department of Basic Education (DBE) or Department of Social Development (DSD)**
- The matter should be reported via the principal, provided the principal is not implicated.
- The matter should then be reported to the Head of DSD and the District Manager of the DBE.

**South African Council for Educators (SACE)**
- A complaint must be lodged with SACE.
- This can be done by calling the SACE complaints hotline, or faxing, emailing or posting the complaint.

**South African Police Service (SAPS)**
- Report incidences of abuse, assault, harassment or other forms of violence at your local police station.

If the learner is under 18, a parent, educator or social worker must report the matter to the police.

If the learner is over 18, they have a choice in whether or not to lay a charge.

Tel: 012 663 9517
Fax: 012 663 3331
Email: info@sace.org.za
Post: Private Bag X127, Centurion, 0046

**Figure 17.2: The three avenues of reporting incidents of violence in schools.**

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.
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 LL.M 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 Wynkort NO (2004) (3) SA 577 (C); 2004 ZAWCHC 1.

S v Williams and Others 1995 (3) SA 632 (CC); 1995 ZACC 6.

Rusore v The Jesuit Fathers 1970 (4) SA 537 (R).

LEGISLATION


Protection from Harassment Act 17 of 2011.

Children’s Act 35 of 2005.

Employment of Educators Act 76 of 1998.


South African Schools Act 84 of 1996.

POLICY AND GUIDELINES


Department of Basic Education & Centre for Justice and Crime Prevention ‘Addressing Bullying in Schools’, 2012


Department of Basic Education ‘Draft Regulations to Prohibit Initiation Practices In Schools’, 2002.


INTERNATIONAL LAW


FURTHER READING


**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 immediately 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.

Sexual violence is committed because of a sexual nature, the violation is of a sexual nature, the rape or sexual assault of the victim. 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 for them to function properly in day-to-day life. If the person is of a school-going age, then it may be difficult for them to function properly in day-to-day life.

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 sexual violence cases that occurred in schools, 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.

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 National Department of Basic Education in South Africa’s Basic Education Rights Handbook – Education Rights in South Africa – Chapter 18: Sexual violence in schools has the following recommendations to prevent sexual violence in schools:

1. Learners in poor schools are more likely to be victims of sexual violence.
2. 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.
3. Poor learners are more vulnerable to sexual advances by teachers, because teachers have status and money. In many cases, teachers were sometimes negotiate payment from the teacher who sexually abused the girl in exchange for not reporting the teacher to the authorities.

The Handbook states:

"By raising awareness, promoting respect, and creating a safe learning environment, schools can help prevent sexual violence and provide a support system for learners who have experienced it. This approach involves training educators and learners on gender equality, consent, and healthy relationships, as well as establishing reporting mechanisms and offering support services. Through these efforts, schools can contribute to creating a culture of respect and safety for all learners, thereby reducing the incidence of sexual violence and fostering a healthy and inclusive learning environment."
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 8, which 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 16. 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 still be considered ‘statutory rape’ if it is a person over the age of 18. If a teacher engages in consensual sex with 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 14-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 Sexual Offences Act, 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, and may still be protected by these Acts because they are learners. The SACE Act is discussed on page 322.

- An offence in terms of the Child’s Act can only be committed against a person who is under the age of 18. The Child’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 touch your body in any circumstances. including your hands and mouth.
- For any person to force you to have sex with someone else.

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 offences 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 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 a 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 parents 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.

**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..."
Teachers have the right to appeal a dismissal to the Education Labour Relations Council for dispute resolution. If, after an investigation into the incident, 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 dismissable 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 SACE Act sets out that a teacher must not be employed unless they are registered with SACE. The SACE register should be maintained to know how things are supposed to be defined. 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.

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 was sufficiently serious, the teacher can request a formal appeal, which could take up to 45 days to resolve. 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 SACF 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 the Children’s Act, also lists (in Part B of the Register) the names of people unsuitable 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 help you through the process. 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

1. 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.

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. If you have been raped, you still have the right to an abortion up to 20 weeks. If you have been physically hurt by a person who you can be honest with, 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.
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 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 investigator can motivate for an intermediary if the victim is too traumatised to give evidence in court.

1. 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 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 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.

**POLICY AND GUIDELINES**

- South African Council for Educators ‘Code of Professional Ethics’.

**INTERNATIONAL AND REGIONAL INSTRUMENTS**

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984.
- The International Covenant on Civil and Political Rights (ICCPR), 1966.

**LEGISLATION**

- Children’s Act 38 of 2005.
- Employment of Educators Act 76 of 1998.
- Criminal Procedure Act 51 of 1977.

**SOURCE MATERIALS AND FURTHER READING**

- Reports and Studies
  - Department of Justice and Constitutional Development ‘Service Charter for Victims of Crime in South Africa’.

- News articles
  - D Skelton ‘Sex Offender register loophole for new teachers’ Times Live, 6 June 2015.
  - N Wan押ham-Jele ‘Justice Department on target with establishment of sexual offences courts’ De Rebus, 25 August 2015.

- Journal articles

- International
  - United Nations Committee on the Elimination of Discrimination Against Women ‘Concluding observations on the fourth periodic report of South Africa – Addendum Information provided by South Africa on the follow-up to the concluding observations of the Committee’, 2015.
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 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.
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, ‘corporal 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 more participative forms of learning and the values attached to it became deeply ingrained into the South African school system and society in general

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’.

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.

**Basic Education Rights Handbook – Education Rights in South Africa – Chapter 19: 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. Cherhoff 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. Manus 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 cruelty. For example, while corporal punishment was 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 bled.
5. In Gauteng, a learner was verbally abused and harassed by an educator for wearing a string in accordance with the child’s religion.
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 guilty, 2011-2014.

<table>
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<tr>
<th>PROVINCE</th>
<th>2011/2012</th>
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<th>2013/2014</th>
<th>TOTAL</th>
<th>NUMBER FOUND GUILTY</th>
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<td>4</td>
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<tr>
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<td>31</td>
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<td>21</td>
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<td>20</td>
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<td>4</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
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<td>-</td>
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<td>2</td>
<td>-</td>
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### SOUTHERN 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.

<table>
<thead>
<tr>
<th>PROVINCE</th>
<th>COMPLAINTS OF CORPORAL PUNISHMENT AND ASSAULT</th>
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<td>Western Cape</td>
<td>165</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>253</strong></td>
</tr>
</tbody>
</table>

### Figure 19.1: Percentage of learners who experienced corporal punishment 2011 and 2014

Figure 19.1: Percentage of learners who experienced corporal punishment 2011 and 2014.
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 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.

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 parents (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(4) 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, including the rights:

- Not 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.

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.

In the Constitutional 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 practice their religion freely. The Court held that education is a constitutional and international obligation 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 and following their conscience. They do not have to choose between the duty to follow 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 and following their conscience. They do not have to choose between the duty to follow 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 the 1995 S v Williams judgment, the Constitutional Court said that prohibiting corporal punishment was an important part of moving away from our violent past. 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 all schools, and states that:

[1] No person may administer corporal punishment as a school to a learner

The case indicated that the Constitution is respectful and accommodating of people’s values and beliefs, but when actions stemming from those beliefs do not coincide with the protection of our children from cruel and degrading treatment, those actions won’t be allowed.
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 parties require one. 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
- Suspension (no pay) not exceeding three months
- Demotion
- Dismissal
- A fine not exceeding three months
- 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.

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 administered by other educators.

Section 7(1)(h) of the Children’s Act provides that a child is of paramount importance in all matters concerning the child.

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.

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.

MEC for Education Department of Limpopo v. Mokadi Sebatha

An educator applied before 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 the educator 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 such cases is clearly 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 condemned.
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.

**WHAT TO DO WHEN A LEARNER HAS BEEN CORPORALLY PUNISHED**

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.

1. **Report to a trusted person**
   - Identify a trusted person who can help you report the incident.
   - Consider a parent, a teacher, or a school counselor.

2. **Report to the authorities**
   - You can report to the Department of Basic Education or the Department of Social Services.
   - You can also report to the South African Police Service (SAPS).

3. **Seek legal advice**
   - Consider seeking legal advice from an attorney or a legal aid organization.
   - You may need to file a complaint or a report to the relevant authorities.

**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 following 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 occurrence, and
- If there has been any intervention.
**STEP 3: SAPS**

- Report the matter to SAPS directly.
- Complete a complaint form.
  - Include dates and details as possible.
- Case involving violence/harassment.
- Provide information for investigation.
- A case of assault can be triggered.
- Police officer and social worker.

**STEP 2: SAPS**

- All incidents of corporal punishment must be reported.
- You must lodge a complaint with SAPS.
- Report the matter via the principal.
- Educators are legally required to report.
- Educators are required to report.
- Must follow the same steps.

**STEP 1: DEPARTMENT OF ∙ SOCIAL SERVICE & DEPARTMENT OF EDUCATION**

- You must lodge a complaint with SACE.
- All incidents of corporal punishment are triggered.
- Must be reported to SAPS so it can be investigated.

**HOTLINES AND NGOS**

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<td>CHILDLINE SOUTH AFRICA</td>
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**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 motivates young children to abide by clear guidelines. This section aims to highlight alternative methods of discipline that can and must be used in place of corporal punishment.

On the next page is a table that lists key words to explain the difference between positive discipline and corporal punishment.

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**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.
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’.

### Table 19.3: Helpful keywords explaining the difference between positive discipline and corporal punishment.

<table>
<thead>
<tr>
<th>Positive Discipline</th>
<th>Corporal Punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corrective</td>
<td>Authoritarian</td>
</tr>
<tr>
<td>Nurturing</td>
<td>Controlling</td>
</tr>
<tr>
<td>Learning</td>
<td>Fear</td>
</tr>
<tr>
<td>Tolerance, respect, dignity</td>
<td>Punitive</td>
</tr>
<tr>
<td>Development</td>
<td>Humiliating</td>
</tr>
<tr>
<td>Non-violent</td>
<td>Threats</td>
</tr>
<tr>
<td>Inclusivity</td>
<td>Isolation</td>
</tr>
<tr>
<td>Safety</td>
<td>-</td>
</tr>
<tr>
<td>Conflict resolution</td>
<td>-</td>
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<td></td>
<td>Pain &amp; suffering</td>
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</tbody>
</table>

### Useful Phrases for Positive Discipline

- ‘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.

### Useful Actions for Positive Discipline

- 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.

### Bad Statements

- 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.’

### Bad Actions

- 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.

### Table 19.3: Helpful keywords explaining the difference between positive discipline and corporal punishment.
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 instills 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

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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

ISC for Education Department Limpopo v Seleletha 2008 ZALAC 20.

Standen v Education Labour Relations Council (2011) 32 ILJ 979 (LC) 2010 ZALC 164.


Constitution and Legislation


The South African Schools Act 84 of 1996.

International and Regional Instruments


FURTHER READING


Western Cape Education Department ‘Learner Discipline and School Management: A practical guide to understanding and managing learner behaviour within the school context’, 2007.


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.

<table>
<thead>
<tr>
<th>LEVEL 1 MISCONDUCT</th>
<th>LEVEL 2 MISCONDUCT</th>
<th>LEVEL 3 MISCONDUCT</th>
<th>LEVEL 4 MISCONDUCT</th>
<th>LEVEL 5 MISCONDUCT</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Being late for class</td>
<td>• Using abusive language</td>
<td>• Hurting another learner</td>
<td>• Selling drugs</td>
<td>• Sexual abuse and rape</td>
</tr>
<tr>
<td>• Failing to do homework</td>
<td>• Being very disruptive in class</td>
<td>• Being very disruptive in class</td>
<td>• Threatening a person with a weapon</td>
<td>• Breaking and entering</td>
</tr>
<tr>
<td>• Talking in class</td>
<td>• Racism and sexist remarks</td>
<td>• Engaging in sexual activities</td>
<td>• Breaking and entering</td>
<td>• Murder</td>
</tr>
</tbody>
</table>

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.
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 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 implications of a growing independent-school industry in South Africa? What are the legal and philosophical issues by reviewing the legal and regulatory framework concerning independent schools, including laws and regulations governing:

1. The right to establish and operate an independent school
2. The rights of learners who apply to and attend independent schools
3. Limitations on the ability of independent schools to exclude learners, and the rights of learners not to be discriminated against for unfair reasons
4. 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
5. The rights of independent schools to apply for and receive state subsidies.

While the bell rung around 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:

1. The right to establish and operate an independent school
2. The rights of learners who apply to and attend independent schools
3. Limitations on the ability of independent schools to exclude learners, and the rights of learners not to be discriminated against for unfair reasons
4. 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
5. The rights of independent schools to apply for and receive state subsidies.

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, rip 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 do not collect or collect very little in school fees. South Africa’s public education system therefore features largely unequal public schools in that 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.

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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, the 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 have paid 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 or 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 1 780 ordinary independent schools during the 2015 school year. These figures account for approximately 4.5% of the 32.8 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 rather than public schools differs dramatically between provinces. In 2015, approximately 11.7% of Gauteng learners in ordinary schools attended independent schools, while as low 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.

Low-fee independent schools often charge fees that are less than 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.

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.

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.

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.
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 educational 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 Jama 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, the court found that the school was put in a situation where it could not continue to operate, and this was contrary to the Constitution. This decision highlights the importance of ensuring that independent schools have the resources they need to provide a basic education to their learners.

ACTIONS

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 admissions 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 Unfair 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 main 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 deliver. These rights may not be limited 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 which are known to be demographically comprised of populations that fall within a certain race.
The rise of independent schools in South Africa has brought concerns that have been voiced over the racial composition of the classrooms. The findings at the Curro school highlight that white parents removed their children from the school due to the racial composition of the classrooms. According to the school, white parents acted in a discriminatory way, by claiming that it had segregated the classrooms by race, and according to the GDE, acted quickly to address the concerns.

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 as a basis for classroom placement – a form of discrimination reminiscent of the harmful apartheid policies that mandated racial segregation in schools. Finally, the school’s practices of separating 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 the complaint by reallocating learners of minority groups throughout the school’s three English classrooms.

The school initially denied that it had segregated the classrooms by race, stating that it had ‘never’ done so. However, this denial was found to be false, and the school was ordered to prevent a repeat of the ‘white flight’ order. The GDE threatened to close the school if it did not remove the principles that had occurred two years before, when the school’s three English classrooms were found to be considered unfair discrimination on the basis of religion, conscience or belief.

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, whether 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.

The Equality Act prohibits unfair discrimination in respect of any aspect of life on the grounds prohibited by PEPUDA, which are race, gender, pregnancy, marital status, sexual orientation, age, marital status, pregnancy, culture, religion, conscience, belief, language and birth.

What are the Prohibited Grounds for Discrimination?

Section 19(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, marital status, pregnancy, culture, religion, conscience, belief, language and birth.

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 right to act upon such religious beliefs. The right to discrimination against learners who do not wish to participate, due to their personal religious beliefs. A High Court judgment in Wittmann v Deutscher Schulveren, Priestics and Others, provides an example of what can happen when 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 classes fairly and unlawfully discriminate against the learner on the basis of religion, conscience, or belief? The school’s policy to mandatorily 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 right to act upon such religious beliefs. The right to discrimination against learners who do not wish to participate, due to their personal religious beliefs.

CASE STUDY

CURRO HOLDINGS SCHOOL

The findings at the Curro school highlight that white parents removed their children from the school due to the racial composition of the classrooms. According to the school, white parents acted in a discriminatory way, by claiming that it had segregated the classrooms by race, and according to the GDE, acted quickly to address the concerns.

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 as a basis for classroom placement – a form of discrimination reminiscent of the harmful apartheid policies that mandated racial segregation in schools. Finally, the school’s practices of separating 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 the complaint by reallocating learners of minority groups throughout the school’s three English classrooms.

The school initially denied that it had segregated the classrooms by race, stating that it had ‘never’ done so. However, this denial was found to be false, and the school was ordered to prevent a repeat of the ‘white flight’ order. The GDE threatened to close the school if it did not remove the principles that had occurred two years before, when the school’s three English classrooms were found to be considered unfair discrimination on the basis of religion, conscience or belief.
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 practice? Could the school have taken narrower means to achieve its purpose of fostering a religiously motivated school, and furthering its religious beliefs, for instance by mandating participation in classes about religion, but making prayer and other religious 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 may not opt out by enrolling in a public school or a different private school.

The commercial relationship between independent schools and the learners they provide education to is important for the rights and responsibilities of the learner. The Schools Act prohibits all schools, including independent schools, from involving 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 a fine

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 act 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 fail 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 made on time. Some schools even go so far as withholding learner reports if tuition payments are not made, so that learners are prevented 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 about withholding learner reports, emphasises that the regulation does not prevent schools from taking other measures, 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 4(17) 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 school 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 to pay. 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 – is religiously motivated. In reaching its finding, the Court emphasised the delicate balancing act 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.

**STATE REGULATION OF INDEPENDENT SCHOOLS**

The Schools Act and the South African Schools Act mandate the state's 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.

**INDEPENDENT SCHOOLS MAY NOT:**

1. Discriminate against learners or applicants on the basis of race or other unfair reasons as defined under the Promotion of Equality and Prevention of Unfair Discrimination Act (PDEA);
2. Withhold learner reports because of unpaid school fees; or
3. Administer corporal punishment against learners.

**INDEPENDENT SCHOOLS HAVE THE RIGHT TO:**

1. Advise, prescribe and develop learning materials used in schools;
2. Advise, prescribe and develop learning materials used in schools; and
3. Advise, prescribe and develop learning materials used in schools.
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.

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.

The state has a duty to close illegally operating unregistered schools. 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 recognize attendance that occurs at unregistered independent schools as formal education.

Rights and Responsibilities Relating to Registration of Independent Schools

- The state has a duty to close illegally operating independent schools, and to report offenses 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 independent 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 enroll their children are properly registered and operating legally, by ensuring that these 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 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.

Subsidy for School Funding (NNSF), 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 emphasizes 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 barriers to the provision of public education, the state has limited independent school subsidies to those schools that serve explicit social purposes. The NNSF 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 NNSF, provincial education departments award subsidies to qualifying independent schools on a progressive five-point sliding scale. These amounts are payable at levels of 40%, 45%, 30%, 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 NNSF 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 of each year.

How the information provided to schools must include the provincial average estimate per learner expenditure 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 NNSF for ‘only on good cause shown’ to the Department of Basic Education.

The NNSF 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.

Registration certificate must be displayed on the school 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.
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 subsidies 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 province sent independent schools qualifying for subsidies letters informing them of the amounts 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 non-public independent schools 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 non-public independent schools that they would receive less than promised. 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 by saying that the subsidies were communicated on the basis that the subsidies were communicated on the basis that the subsidies were communicated without regard to the accuracy of the amounts owed to them.

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.

The 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. On the one hand, the state has a legitimate expectation that schools will rely on the funding when they prepare their budgets for the following school year. On the other hand, learners and their parents take a number of factors into consideration when deciding whether to attend a public or an independent school. For example, KwaZulu-Natal requires independent schools to show that teachers are qualified. For instance, learners must take the Annual National Assessments (ANAs) for Grades 11 and 12 learners be repeaters from the previous year. Other state-aided institutions, subsidised independent schools from mandating that all learners participate in religious observances on an equitable basis by the appropriate public authorities.

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:

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 the funding it eventually provides 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 poverty-stricken 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 prioritize 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.

This case also concerns the need for the state to prioritize 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.

Constitutional limitations placed on subsidised independent schools

Subsidised independent schools are also limited in the way 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.

Case study: Reduced subsidies to independent schools in KZN

KwaZulu-Natal subsidised independent schools receive school subsidies required to comply with a number of conditions. The subsidy is:

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, overcrowded 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.

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 officer lawfully promised to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for payment has passed.

By giving rise to the right for the schools to not as exact amounts owed to them.
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 privatisation 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 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 corrupive 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 society, 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 humanitarian 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 Africa 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 opportunities for 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 only a few receive 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 efficacy of the public education system in South Africa through competition, when most learners are too poor to afford even low-cost independent academic benefit?
- Do low-income 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 teaching materials and resources?
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.

**CASES**

- Wittmann v Deutscher Schulverein, Pretoria and Others 1998 (4) SA 423 (T).

**CONSTITUTION AND LEGISLATION**

- South African Schools Act 84 of 1996.

**POLICY AND GUIDELINES**

- Department of Basic Education ‘Rights and Responsibilities of Independent Schools’.

**FURTHER READING**


**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.
CHAPTER 21
TAKING RIGHTS FORWARD: MOBILISATION, ORGANISATION AND PUBLIC PARTICIPATION

Daniel Sher and Hopolang Setebalo
IN SOUTH AFRICA

THE STATE OF EDUCATION

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-

INTRODUCTION

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 Mathematics and Science Study (TIMSS) of 2003 the average score for South African [learners] was the lowest of the 46 participating countries in both mathematics and science at the grade 4 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).

• 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:

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.

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 and learners who support the issue you are concerned about to stand for election
- Drafting a school’s code of conduct, and deciding religious and language policy for the school.

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. However, if 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.

The leading organisation ought to constantly be engaging their members on strategy and tactics. The leaders of the campaign ought to make strategic partners who will be in support of every step of the way.

In building a strong campaign it is always worthwhile to note the following:
- The body (public or private) must be open, even in the midst of the dispute.
- Communications ought to be constantly kept; and most importantly, channels of thorough engagement on the demands, as expressed in the memorandum of demands, in public.
- Those intended to participate ought to be on the ground communicating clear demands to the media; also, members ought to be sensitive to what your supporters think about the strategies used.
- The issue that is being raised ought to find resonance with the people.
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In building a strong campaign it is always worthwhile to note the following:
- The body (public or private) must be open, even in the midst of the dispute.
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. 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 many people’s moral instincts and politicised supporters. Mobilisation occurs because the process of social audit and the power of youth is a factor that improves greater mobilisation, such as political support – it is a factor that inspires greater mobilisation, such as political support. While EE had members in Tembisa, they are mostly organised in urban schools, and the campaign still needs to extend the reach of the movement. EE met with government officials who ignored requests to develop a plan to solve this sanitation crisis. Finally, in September 2016, 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 not conduct the audit, people had to learn about sanitation, the process of audit and the power of youth. 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 their community, and who is active in it. 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? • 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 organisation, 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.

**Equal Education**

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**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 where community 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 2016, 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 is not the reach to monitor the upgrades across the entire province. To do this, EE built a coalition of partner organisations, including church organisations such as the South African Council of Churches, civic organisations such as the Alexandra Civic Organisation, the Gauteng Civic Association and the South African National Civic Organisation (SANCO), and community organisations such as Sidinga Umtlanga and Baa 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 50% 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. Participation occurs because through the process, people see and express how political inequities affect them directly.

**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.

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- Do they share some/all of your goals?
- Will working together be strategic?
- How can they help your campaign?

COALITION-BUILDING

By organising, you are acting as an enabler, bringing people into knowledge, and structures, that will help them to demand change.

- 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 organisation, 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 18 protects your right to assemble, packet, demonstrate and present petitions, so long as you behave peacefully and are unarmed.
• Section 19 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.

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 confrontation. 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.

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 convener to discuss the notice and try to negotiate a safe gathering
• Give a letter to the convener 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

Planning a protest is not just about thinking about how to manage (and possibly transport) a large group of people. The organisers should clearly decide 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.

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.

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 decide 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.

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During April 2015, Equal Education held sleep-in protests in three cities - Cape Town, Pretoria, and King Williams 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 given was that the sidewalk is for the use of pedestrians, and no person is allowed to carry signs while walking. This refusal to issue an unconditional permit. 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 stated that the ‘permits’ 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 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 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, gaining access into 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 sitings 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.
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 those 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, 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.

It is important to remember, as Ben-Zeck 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 in 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 this submission, one of which was the need to establish a conditional grant specific to school 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 school transport was a step forward, as this is an important plank of EE’s campaign on school transport. However, it should also be noted that to date, this recommendation has not been taken up by National Treasury.

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 fraticious. 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.
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, educators, artists, 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 realizable. 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.
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