



EQUAL
EDUCATION
LAW CENTRE

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To: The High Level Panel on the Assessment of Key Legislation
Att: Ms Leanne Morrison
Committee 1: The Tripartite Challenges of Inequality, Poverty and Unemployment
Re: Key Focus Area 3: Quality Education
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EE & EELC SUBMISSIONS TO THE HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION, REGARDING QUALITY AND EQUALITY IN EDUCATION

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INTRODUCTION

The following seven (7) submissions are jointly made by Equal Education (EE) and the Equal Education Law Centre (EELC). EE is a membership-based, democratic movement of learners, parents, teachers and community members. Its core objective is to work towards achieving quality and equality in South African education.

In order to achieve its objectives, EE conducts a broad range of activities. These include campaigns grounded in detailed research and policy analysis and supported by public action and mobilisation. Where necessary, EE uses the courts and legal process to advance the values of, and to contribute to, a strong civil society that holds government, private interests and individuals accountable.

The movement is driven primarily by its learner members in high schools across five provinces: the Eastern Cape, Limpopo, KwaZulu Natal, the Western Cape and Gauteng.

The EELC is a public interest law centre specialising in education law. Its goal is to ensure the realisation of every learner's right to an equitable, safe and adequate basic education by employing the law and the Constitution. EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.

The submissions speak to a number of different facets of the government's attempts to transform basic education in South Africa and realise the right to education contained in section 29 of the Constitution. While admirable policy and legislative strides have been made to undo the legacy of Apartheid, it must be stressed that South Africa's education system remains deeply unequal, with the quality of education in historically black schools still frequently poor.

Nor is equity and redress simply a question of better implementation of policy. Rather, some laws are not redistributive or transformational enough; a number of failures and blind spots in legislation also limit its efficacy from the start. This relates to school funding, distribution of educators, and school infrastructure.

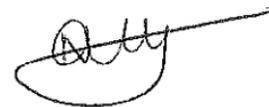
The ability of national and provincial education departments to implement changes in schools is also critiqued from the perspective of what they are legally empowered to do, regarding both their interaction with decentralised school governance structures, and their role in assisting underperforming schools. Finally, the failure to adequately protect learners from sexual violence in schools is highlighted as a matter in urgent need of reform.

It is hoped that the High Level Panel considers EE and EELC's recommendations in its own package of recommended reforms. EE and EELC would welcome the opportunity to make oral submissions to the Panel as well.

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SUBMISSION ON THE EQUITABLE SHARE AND SCHOOL FUNDING

Provinces allocate education budgets from their block of funds received from the National Treasury, the Equitable Share. But this leaves wealthier provinces with more to spend per learner; the Equitable Share should be updated to consider historic inequality, the differing costs of rural and urban education, and the proportion of a province's population which attends school.

South Africa was plagued with a political system that was not concerned with the meaningful education of Black people; this was therefore grossly underfunded, creating a highly inequitable and racially differentiated schooling system. Spending on a white learner at the end of Apartheid was four times that for an African learner (1994 figures).¹ The overarching quality problems in most schools serving African learners were: classes were large, teacher training was poor, and learning support materials were inadequate, both in terms of their quantity and their quality.

Policy

The South African Schools Act (SASA) places the primary responsibility for school funding on the State.²

- **The South African Schools Act (Act 84 of 1996)**
 - Section 34 states that the State must fund public schools...on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.
- **The Norms and Standards for School Funding (NNSF)**
 - Under section 35 of SASA, the Minister must determine and set out criteria for the distribution of state funding to all public schools in a fair and equitable manner.

Impact of legislation

The legislation sought to make the system equal, but realisation has been slow paced. Equity has been the main objective. It refers not only to "levelling the playing field" with no group being privileged, but also to fairness and justice. Equity recognises that people have different needs, and that it is sometimes necessary to take unequal measures in order to overcome historical disadvantage. Today, schools are still racialised; where former Model C schools are still located in predominantly White communities which translate to better resources, teacher quality and overall learning outcomes. Schools in less prominent areas are still marked by the same historic issues: overcrowded classrooms, inadequate school infrastructure and lack of basic service delivery to schools.

The Equitable Share formula³

Provinces receive funding to make their budgets using the Equitable Share (ES) formula. The current ES model takes into account various socio-economic variables⁴. But per learner expenditure is uneven across provinces, with wealthier provinces able to invest more in education than poorer, rural provinces, especially those worst affected by the 'homelands' policy of apartheid.

When provinces receive their block grant, they are then entitled to make their own decisions about how to spread their ES across all provincial social services (education, health, welfare, housing, community development). Wealthier provinces have less poor households to care for, therefore have more available funds to direct to the education sector.⁵ The formula does not recognise the unequal starting points of

¹ <http://www.statssa.gov.za/publications/EducationInSA/EducationInSA1996.pdf> Accessed on: 01 August 2016.

² Section 34 of the South African Schools Act 84 of 1996

³ Division of Revenue Bill, National Treasury, http://www.treasury.gov.za/legislation/bills/2016/bills2016_bill02-2016.pdf.

⁴ There is the basic service grant in the formula which takes into the account the need to supplement the cost of free provision of basic services to poor households; Electricity, Water, Sanitation, Refuse and Municipal Health.

⁵ <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130219formula.pdf> Accessed: 16 August 2016.

historically disadvantaged and under-funded schools which are in provinces that incorporated homelands and therefore inadequate schools. A rural province such as the Eastern Cape is more likely to have a higher number of schools that were under-resourced during apartheid and therefore require more funds for educational redress now. The ES formula does not efficiently take these unequal starting points into account. Poverty as a variable only makes up 3% of the total formula. This percentage is insufficient to reduce the inequality that exists due to the demographic, economic and geographical differences between the provinces. The ES formula does not result in equitable education spending by provinces.

What needs to be reviewed?

The Constitution recognises historical imbalances and the need to eradicate systemic discrimination against certain groups. Practical equality requires that the state provide redress for past disadvantages so that everyone is in a position to equally enjoy all their rights, especially education. It is therefore inequitable to fund provinces the same or to not prioritise provinces like the Eastern Cape and KwaZulu Natal where there is a history of vast inequality and neglect. This historical conditioning meant very poor school infrastructure was prevalent in these provinces because of the make-up of the population and the lack of concern for black education pre-1994.

How schools should be funded

- The state must prioritise school funding as basic education is an immediately realisable public good.⁶
- A progressive funding model is required that lifts the standards of disadvantaged schools up to the levels of resource expenditure (inputs) and quality of learning (outputs) of historically advantaged schools.⁷

A new model would ensure that poorer and more rural provinces with historical backlogs in relation to trained teachers and school infrastructure, among others, have more education funds to spend per learner than richer and more urban provinces. This is necessary to address the legacies of apartheid and ensure that all schools have the resources necessary to provide a quality education.

Recommendations: A more Equitable Share formula⁸

We therefore recommend that:

- *First, the ES formula must be reviewed to more accurately take into account the proportion of each province's population that is enrolled in school. This would ensure that provinces with a higher share of their population in school receive relatively more education funding.*
- *Second, National Treasury and the Department of Basic Education (DBE), should analyse the cost differences of providing education in rural and urban settings, and adjust the formula accordingly.*
- *Third, 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.*

⁶ Section 29 of South African Constitution (1996)

⁷ N. Ally & D. McLaren, *Towards Equality In School Funding*, <http://www.dailymaverick.co.za/article/2016-07-28-groundup-op-ed-towards-equality-in-school-funding/#.V7Mf-ph97IU> Accessed: 4 August 2016.

⁸ Ibid,

SUBMISSION ON THE QUINTILE SYSTEM OF SCHOOL FUNDING

The quintile system of school funding established a nominally pro-poor funding model (not counting teacher funding). However, it fails to consider the needs of schools or learners in the funding calculus, leaving both the poorest schools, and ‘commuter schools’ in relatively affluent areas, underfunded.

The South African Schools Act (SASA) places the primary responsibility for school funding on the State.⁹ The State, using SASA and the National Norms and Standards for School Funding (“Funding Norms”),¹⁰ has used the quintile system as the model by which funding would be distributed on an equitable basis. Although the impact of this legislative intervention has largely been positive, several problems with the quintile system as a model for school funding have nevertheless been identified.

The quintile system places all of South Africa’s ordinary public schools (and all learners in those schools) into five categories, based on poverty indicators identified by the Department of Basic Education using the national census and other statistical data. These indicators include the physical conditions, facilities and crowding in the school, together with the relative poverty of the school’s catchment area: which considers factors such as literacy, unemployment, household incomes and the availability of piped water and electricity. Using these indicators, the quintile system ranks schools from 1 to 5, with quintile 1 schools being the poorest (requiring the most state support) and quintile 5 being the least poor (requiring the least state support).

This quintile system as a model has achieved some progress in introducing equity in public school funding, as the poorest schools now receive the highest amount of funding per learner.¹¹ Nevertheless problems still persist such as:¹²

1. The use of outdated census data;
2. The arbitrariness in the application of the indicators, where different schools in the same area are sometimes ranked differently;
3. The bureaucratic nature of the ranking system; and
4. The arbitrariness in determining the funding allocation per learner.

However, some of the problems that have had the most profound impact on school resources and learner outcomes have been:

1. The disproportionate emphasis on the socio-economic status of the school’s catchment area as the basis for funding.

The poverty indicators set out in the funding norms only focus on the school’s surrounding area and not on the learners attending the school.¹³ This means that schools in affluent or formerly affluent areas which serve learners from poorer areas, or even schools in the urban centres of townships which serve learners from yet poorer areas, are inadequately funded, as their quintile ranking entitles them to less state support, while they are unable to raise significant additional income through school fees. These schools exist in areas affected by rapid urban migration.

⁹ Section 34 of the South African Schools Act 84 of 1996

¹⁰ National Norms and Standards for School Funding Government Gazette Notice 2362 of 1998

¹¹ R. Mestry and R. Ndhlovu ‘The implications of the National Norms and Standards for School Funding policy on equity in South African public schools’ *South African Journal of Education* Vol. 34 No. 3 (August 2014) at 10 (‘Mestry and Ndlovu’)

¹² K. Hall and S. Giese ‘Addressing quality through school fees and school funding’ in UCT Children’s Institute *South African Child Gauge* 2008/2009 at 38

¹³ *ibid*

2. The failure to consider the actual needs of the school, and only focusing on learner numbers in funding allocation decisions.

Although in determining funding allocation the quintile system does consider factors such as the school's physical conditions, infrastructure and overcrowding, it nevertheless fails to account for the impact of the apartheid legacy on the school and the maintenance needs of the school. A focus on only the learner numbers alone is a crude way of allocating funding. Moreover, the use of the physical conditions of a school as an indicator can sometimes lead to perverse results, such as a newly built school in a poor area being ranked as quintile 4 or 5, and hence underfunded.

The cumulative impact of these problems, however, presents itself most starkly in schools ranked in the lower quintiles 1 - 3, which are also classified as 'no-fee' schools and thereby solely reliant on state funding. Inadequate funding for them means that they are unable to offer quality education to learners most in need. This is also further exacerbated by province's inability to fully meet these funding needs; they still fund way below the fee free threshold. This in effect replicates the very same inequities the legislative intervention is targeting, not disregarding the great impact this policy has made in enabling millions of learners access to schools.

Schools in quintiles 4 and 5 are able to escape some of the harshest effects of low government funding by supplementing their income through the charging of school fees. This enables them to rely less on state funding for their operations and maintenance, with some schools being able to hire more educators.¹⁴ This then widens the gap between the 2 systems (fees versus no-fee schools), and can also exclude learners solely on the inability of their parents to pay such fees. Separation and inaccessibility are prevalent challenges still.

Although there have been murmurs over the years of a move away from the quintile system,¹⁵ very little progress has been made in that regard.¹⁶ There have been reports of the Department of Basic Education simplifying the allocation of school funding from the quintile system with five categories to a system of fee-paying and no fee-paying school,¹⁷ the status of that policy shift also seems unclear.¹⁸

Recommendations

We therefore recommend:

A complete overhaul of the funding model. A needs-based model - that responds better to issues such as rural-urban migration and the impact of the apartheid legacy on schools - would go some way towards achieving the aspirations that the original legislation was intended to achieve.

¹⁴ Mestry and Ndlovu at 10

¹⁵ <http://www.corruptionwatch.org.za/schools-quintile-system-to-change/> .

¹⁶ The DBE is developing new ways of applying the quintile system which will progressively do away with it. See: National Assembly Written Reply by Minister of Basic Education to Question 3825 (H Boschhoff – DA) (23 October 2015) <http://www.education.gov.za/Newsroom/ParliamentaryQuestions/2015ParliamentaryQuestions/tabid/954/ctl/Details/mid/3960/ItemID/3502/Default.aspx>

¹⁷ <http://www.sanews.gov.za/south-africa/motshekga-moots-scrapping-quintile-system> .

¹⁸ See Note 7 above.

SUBMISSION ON THE REGULATIONS FOR THE CREATION OF EDUCATOR POSTS IN A PROVINCIAL DEPARTMENT OF EDUCATION AND THE DISTRIBUTION OF SUCH POSTS TO THE EDUCATIONAL INSTITUTIONS OF SUCH A DEPARTMENT

While the policy to distribute teachers equally between schools is a major step forward, the policy does not differentiate between rich and poor schools, or well qualified and poorly qualified teachers, struggles to promote diverse curricula in poor schools, and leaves special needs schools vulnerable.

In terms of the *Employment of Educators Act 76 of 1998*, section 5, the Minister of Education issued the *Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions of such a Department* in 1998, and amended the regulations in 2002.¹⁹

These regulations provide the model for ‘post-provisioning’: allocating educators to state schools based on the number of students per school, adjusted by ideal class size for a learning area, the size of the school and the need to redistribute resources. Other factors that are taken into consideration include the number of subjects taught at, and the poverty level, of a school.

One of the most enduring legacies of Apartheid and Bantu Education has been the inequitable sharing of human resources, such as educators. Post-provisioning has been an important policy move towards equalising educator allocations between former white schools, which were historically well-resourced, and former black schools, which suffered extreme under-resourcing. One indicator of this is that by 2005 figures, learner-educator ratios at former black schools had improved from 63:1 to 40:1.²⁰ By 2013, the national ratio across all state schools were 32,4 learners to 1 state-paid educator, although with substantial variance across provinces.²¹

While this indicates an improvement in the quality of education provided, equity, transformation and redress have proved elusive, in ways outlined below. While implementation of post-provisioning norms is extremely inconsistent across the country, and must be improved, the regulations as they stand will not achieve equity and adequate redress, as (1) schools that raise money with fees are weighed evenly against schools that cannot charge fees (2) the regulations are blind to distribution of *qualified* educators, (3) the regulations struggle to promote diverse curricula in poor schools, and (4) Learners with Special Educational Needs (LSEN) are rendered dependent on fluctuations in the ordinary school sector.

The impact of school fees

While in theory, two schools with the same number of learners (who hypothetically take the same subjects) will receive an equal post establishment, parity has never been achieved because wealthier schools are able to employ additional educators through charging school fees. The impact of this can be seen in learner-educator ratios (LER).

Across all public schools, privately paid educators lower the LER by around two learners.²² However, the impact of this falls disproportionately on richer schools. Schools in quintile 5, the richest category, are

¹⁹ *Government Notice 1451 in Government Gazette 24077, dated 15 November 2002.*

²⁰ Ntuli, M. *The Effects of the Educator Post-Provisioning Model in the Management of Public Schools in Ilembe District*, dated 2012. At page 17. Accessible at http://researchspace.ukzn.ac.za/bitstream/handle/10413/11156/Ntuli_Mbuyiseni_Goodlife_2012.pdf?sequence=1&isAllowed=y.

²¹ Gustafsson, M. *Teacher supply and the quality of schooling in South Africa*, Stellenbosch Economic Working Papers, dated March 2016. At page 41. Accessible at www.ekon.sun.ac.za/wpapers/2016/wp032016/wp-03-2016.pdf

²² Gustafsson, at page 41.

able to improve their LER by over seven learners through privately paid educators. Schools in quintiles 1-3, by comparison, all improve their LER by less than one learner.²³

While the regulations allow for educator allocations on the grounds of redress, they only provide for a maximum of 5% of posts to be allocated on a poverty basis.²⁴ In the context of a bifurcated schooling system existing alongside a Constitutional promise of substantive equality, pro-poor allocations should be greater.

Educator qualifications

The post-provisioning model focuses on learners for its formulae: it states that “the model is based on the principle that available posts are distributed among schools, proportionally to their number of weighted learners.”²⁵ The allocation of posts only deals with absolute numbers, and has nothing to say about the distribution of *qualified* educators.²⁶ Even if this policy was fully implemented, it would treat educators as interchangeable, which they are not.

Fee-charging schools are not just able to employ additional educators. The potential of higher salaries, working in more affluent areas, and favourable LER allows them to attract the best, most highly qualified educators to both their state and private posts.

There is thus inequality of both absolute supply, and of quality. This is problematic in itself, but also in its results. Learners experience the curriculum differently in these unequal classroom environments, but must compete in the same labour market.²⁷ Further, learners in poor and rural areas already face significant challenges in their school experience, relating to school infrastructure, LTSM and scholar transport, and are in many cases most in need of well-qualified teachers to help remedy their other disadvantages.

Curriculum

Learner weightings (and hence, post allocations) are, to a great extent, determined by the subjects they take. Specific subjects are weighted more heavily as they require smaller class sizes. For instance, technical and agricultural subjects have an ‘ideal maximum class size’ in the regulations of 16, and Art has an ideal of 12.²⁸

While these requirements may be valid, reallocation of educators on these grounds inadvertently favors schools with a diverse curriculum; if a school offers a greater number of subjects, and particularly ones which are more heavily weighted, they benefit from greater educator resources than a comparable school with narrower curriculum.²⁹

In the Western Cape, for example, richer schools performed better in the key subject of mathematics, while in schools that charged low or no fees, few learners even took mathematics.³⁰

This system punishes poor schools, and does not assist them to develop a more diverse curriculum.

²³ Gustafsson, at page 50.

²⁴ *Government Notice 1451 in Government Gazette 24077, dated 15 November 2002.* At Annexure 1, section 5(a).

²⁵ *Government Notice 1451*, at Annexure 1, section 1.

²⁶ Ntuli, at page 29.

²⁷ Ntuli, at page 29.

²⁸ *Government Notice 1451*, at Annexure 1, section 4(b).

²⁹ Naicker, Inbanathan. *A Critical Appraisal of Policy on Educator Post Provisioning in Public Schools with Particular Reference to Secondary Schools in KwaZulu-Natal*, dated November 2005. At page 205. Accessible at http://researchspace.ukzn.ac.za/bitstream/handle/10413/1258/Naicker_I_2005.pdf?sequence=1&isAllowed=y.

³⁰ Same, at page 34.

Learners with Special Education Needs

No norms for the provision of LSEN educator posts exist. Rather, they are allocated as part of a single provincial post basket. Learners are weighted more heavily depending on the severity of their need/disability.³¹

However, this approach of combining the two sectors renders LSEN posts vulnerable to fluctuations in ordinary schools. The Public Ordinary sector is much larger than the LSEN sector, so that even a small percentage increase in learners at ordinary schools, or a small percentage decrease in the global number of posts available, has large knock-on effects in terms of loss of posts at LSEN schools.³²

Allocating posts out of the general provincial bundle also allows that any educator can be placed there, not necessarily ones qualified to teach learners with special needs.

Recommendations

We therefore recommend the regulations be amended in the following ways, in order to achieve substantive equality:

- *Post distribution should consider the real posts at a school: privately paid educators should be counterweighed by a lower public post allocation.*
- *Equitable distribution must speak to the question of qualified educators, possibly combined with the introduction of incentives for well qualified teachers to fill posts at poor and rural schools.*
- *Allowance (in terms of educator posts) be made for poorer schools to expand the subjects they offer, not punished for lacking them.*
- *LSEN schools' educator posts be established and allocated separately to Public Ordinary School posts, and according to their own norms.*

³¹ *Government Gazette no. 39684 at Annexure A1, page 21.*

³² UNICEF, *National Implementation of Post Provisioning: National Report*, dated 2013. At page 51. Accessible at http://www.education.gov.za/Portals/0/Documents/Publications/National%20Report_10%20September%202013%20Finalised.pdf?ver=2013-09-11-214854-000.

SUBMISSION ON THE REGULATIONS RELATING TO MINIMUM UNIFORM NORMS AND STANDARDS FOR SCHOOL INFRASTRUCTURE

On 29 November 2013, the Minister of Basic Education adopted the Regulations relating to Minimum Uniform Norms And Standards for School Infrastructure ('the Regulations'). The Regulations set the basic infrastructure standards that all schools must be brought into compliance with. Infrastructure provisioning includes water, electricity, sanitation and libraries. After a comprehensive analysis of the Regulations, Equal Education (EE) has identified certain deficits which may adversely affect the successful implementation of this law. Further delays in ensuring that thousands of poor and majority black schools receive essential infrastructure would be devastating. Affected learners' rights to receive education in a safe and dignified manner will continue to be denied.

Factual Context

The inequalities in school facilities across the country are the most tangible trait of apartheid education. The Department of Basic Education's (DBE's) statistics, released in 2015, depict the magnitude of the school infrastructure crisis.³³ Of the 23 589 public schools in the country, 77% have no stocked libraries and 86% no laboratories. 5 225 schools have either an unreliable water supply or none. When the numbers are closely examined a pattern emerges where schools worst off are in Bantustan areas. For instance, 94% of Limpopo schools have no library, much greater than the average nationally. A failure to address poor school facilities therefore further entrenches and perpetuates inequality.

Shortcomings of the Regulations

Regulation 4(5)(a) subjects the implementation of the Regulations to the resources and co-operation of other government agencies and entities involved in the school infrastructure delivery process. Regulation 4(5)(a) absolves the DBE from responsibility if other departments or agencies are unwilling, or unable, to deliver. Consequently, the public cannot effectively hold the State to account for its obligations under the Regulations. This is contrary to the purpose of the Regulations which is intended to enhance accountable governance. Regulation 4(5)(a) also violates affected learners right to a basic education, and undermines the Constitutional requirement that all spheres of government co-operate to ensure the implementation of a law they all have a common interest in. ***For the regulations to be rendered constitutional this provision must be removed.***

Regulation 4(3)(a) and (b) read with regulation 4(1)(b)(i) indicate that schools built entirely of materials like mud, metal, wood and asbestos and schools with no sanitation, power or water supply must be "prioritised" by 29 November 2016. It is unclear if "prioritisation" includes complete eradication of these structures, or if a plan is merely required on how this will be done within deadlines. ***Greater clarity is needed on the precise nature of the obligations imposed by these sub-regulations.***

Regulation 4(3)(a) refers only to schools built "entirely" from materials such as mud, asbestos, metal, and wood. No provision is made for schools composed substantially of inappropriate structures. A danger exists that these latter structures will be used for excessively long periods posing a hazardous threat to learners and teachers. ***EE submits that provision also be made for these schools within regulation 4(3)(a).***

Regulation 4(2) indicates that new schools, and additions, alterations, and improvements to schools planned and prioritised for within the 2013-2014, 2014-2015, and 2015-2016 Medium Term Expenditure

³³ The DBE National Education Infrastructure Management System Report (NEIMS) dated 12 May 2015. Accessible at: <http://www.education.gov.za/Portals/0/Documents/Publications/NEIMS%20STANDARD%20REPORTS%20AS%20AT%2012%20MAY%202015.pdf?ver=2015-06-03-114948-520>

Framework cycle, fall outside the scope of the Regulations. This implies that these schools may never comply with the norms and standards. ***EE therefore submits that these schools be covered by the Regulations.***

Regulations 4(6)(a) refers to the provision of annual detailed plans by MECs to the Minister indicating how the norms and standards will be implemented, while Regulation 4(7) refers to reports on progress achieved. However, the Regulations fail to ensure that these documents are made publicly available. Without these the public cannot adequately engage with and monitor the State's implementation of the Regulations. ***EE recommends that the Regulations be amended to include public access to these plans and reports.***

Recommendations

While the Regulations provide a minimum standard of public school infrastructure it also contains provisions which hinder its effectiveness, potentially exclude a variety of schools in need of adequate infrastructure, and frustrate the public's ability to monitor and engage with the infrastructure delivery process. We therefore recommend:

- ***Regulation 4(5)(a) be deleted.***
- ***Greater clarity is provided on the precise nature of the obligations imposed by the regulations 4(3)(a) and (b) read with regulation 4(1)(b)(i).***
- ***Schools made with substantially inappropriate structures be covered by 4(3)(a)***
- ***Schools referred to in regulation 4(2) be covered by the Regulations.***
- ***The Regulations be amended to include public access to these plans and reports.***

SUBMISSION ON THE POWERS OF SCHOOL GOVERNING BODIES & THE STATE IN THE PUBLIC EDUCATION SYSTEM

The South African Schools Act sets up a three-tiered relationship in which the national and provincial government and school governing bodies (SGBs) are responsible for ensuring a well-functioning public education system.³⁴ The Act, however, fails to provide sufficient clarity on the ways in which these different role players are to interact with each other in fulfilling their obligations. In particular, the Act lacks sufficient clarity as to the relationship between the powers of SGBs on one hand, and the executive powers of Provincial Departments of Education with regard to the application of school admission and language policies. This has led to much confusion and contestation to the detriment of both the learners involved in these disputes and the entire education system.

SGBs are required to act in the interest of the learners at their school and also in the broader interests of the school community.³⁵ However, the State's obligations go much further. The State must ensure that all children are able to realise their right to a basic education and that they are not subjected to unconstitutional conduct in the process. There exists an inherent tension between these two roles, as the State's focus must also be on the quality and equitability of education provisioning as a whole.

The Constitutional Court has issued a string of judgments on matters implicating the powers of SGBs and the State in the context of resolving disputes on school policies.³⁶ However, there is still no clear legal provision on the ways in which affected learners' interest will be safeguarded when a dispute between government and a SGB unfolds.

Legislative Framework:

The South African Schools Act 84 of 1996 vests "governance" of a public school with the SGB.³⁷ The SGB exercises limited authority over the affairs of the school. In this regard the SGB is empowered to determine a school's admissions³⁸ and language³⁹ policy. A principal is responsible for the "professional management" of a public school acting under the authority of the HOD.⁴⁰ The interplay between 'governing' a school and 'professionally managing' one is not fully vetted. Neither term is defined in the Act although certain functions of SGBs⁴¹ and principles are stipulated.⁴²

Section 22 of the Act provides a framework for when and how a HOD can withdraw functions from a governing body. The HOD must have reasonable grounds to do so. He/she must first alert a school of his/her intention and provide the SGB with a proper opportunity to make representations. Provision is

³⁴ Head of Department : Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 56.

³⁵ Ermelo, above at para 57.

³⁶ MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC); Ermelo, above.

³⁷ Section 16 of the Act:

16. (1) *Subject to this Act, the governance of every public school is vested in its governing body.*
(2) *A governing body stands in a position of trust towards the school.*

³⁸ Section 5(5) of the Act.

³⁹ Section 6(1) of the Act.

⁴⁰ Section 16(3) of the Act:

Subject to this Act and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the Head of Department.

⁴¹ Section 22(1) of the Act.

⁴² Section 6A of the Act.

also made for urgent situations where the HOD can immediately act provided a SGB is given reasons therefor and is provided an after the fact chance to make submissions on this action.⁴³

Incidents of HODs clashing with SGBs and the relevance of section 22 can be observed when examining constitutional case law. The Harmony/Welkom case concerned the unlawful exclusion of pregnant learners from their school and a HOD who instructed that they be allowed back in.⁴⁴ The Ermelo case determined whether a HOD could compel a school to alter its language policy from Afrikaans-only to dual medium where surrounding English schools lacked space to absorb learners seeking to be taught in English. In both cases the Court ruled that the HODs could have used section 22 but had followed improper procedure.

The Constitutional Court has, through its judgments set out the legal position on the powers of the SGB and the State as follows:

- (1) If the Act empowers SGBs to determine a policy, government cannot simply override or ignore it even if the official views the policy as contrary to the Act and/or the Constitution.
- (2) Government may intervene only where empowered to do so under the Act or other law.
- (3) Where government is entitled to intervene it must act reasonably and procedurally fairly.
- (4) Government and the school must engage in good faith to further learners' interest.

The Court has also stressed that SGBs and the State co-operate in mutual understanding and good faith by supporting and assisting each other.

Impact assessment:

Disputes between SGBs and the State on the application of an alleged unconstitutional school policy often occur in a context where learners have been denied access to or unlawfully excluded from schools. These learners are often left in limbo while the dispute plays itself out. This situation is untenable and results in the violations of the affected learner(s) immediately realisable right to a basic education.

Discriminatory practices we have encountered include pregnant learners increasingly being asked to provide money to a school or a school insisting that learners are accompanied by a guardian at all times. These arbitrary practices highlight the need for quick intervention by a HOD to ensure that learners' rights are not trampled upon. We have also assisted, amongst others, refugee learners who have been

⁴³ 22. (1) *The Head of Department may, on reasonable grounds, Withdraw a function of a governing body.*

(2) *The Head of Department may not take action under subsection (1) unless he or she has*
(a) *informed the governing body of his or her intention so to act and the reasons therefor;*

(b) *granted the governing body a reasonable opportunity to make representations to him or her relating to such intention; and*

(c) *given due consideration to any such representations received.*

(3) *In cases of urgency, the Head of Department may act in terms of subsection (1) without prior communication to such governing body, if the Head of Department thereafter-*

(a) *furnishes the governing body with reasons for his or her actions;*

(b) *gives the governing body a reasonable opportunity to make representations relating to such actions; and*

(c) *duly considers any such representations received.*

(4) *The Head of Department may for sufficient reasons reverse or suspend his or her action in terms of subsection (3).*

5. *Any person aggrieved by a decision of the Head of Department in terms of this section may appeal against the decision to a member of the executive council.*

⁴⁴ 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 [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC).

denied school fee exemptions on the basis that they are foreigners and others excluded because their parents' cannot afford fees.

Recommendations:

We therefore recommend that:

- *The South African Schools Act be reviewed with a focus on ensuring that learners' interests are protected where SGBs and government attempt to resolve a dispute. It is important that too much power not be concentrated in the hands of SGBs or the State. Ultimately a more balanced solution must be found.*
- *Any statutory framework for resolving disputes between HODs and SGBs must specify a clear procedure and acceptable timeframes at every step in the process. Currently section 22 does not stipulate any timeframe.*

SUBMISSION ON SECTION 58B OF SASA: UNDERPERFORMING SCHOOLS

The current legislation around Underperforming Schools is interpreted narrowly and underutilised. However, the law places too great a burden on school principals to develop improvement plans. This should be amended to share the load between school management and district.

By enacting section 58B of the South African Schools Act 84 of 1996 (SASA), Parliament provided for a relationship whereby an Underperforming School (UPS) and the Head of Department (HoD) of a Provincial Education Department work together towards school improvement. Section 58B is a valuable accountability mechanism, however, education departments and schools require the capacity to be able to monitor school improvement plans. Consequently, more resources should be allocated towards this function of underperforming schools. The mechanism as set-out is very promising, but has been underutilised in most provinces and their constituent districts.

In identifying underperforming schools, the HoD must rely on information obtained from reports compiled by a school's principal in accordance with section 16A (1)(b) of SASA. This report contains only information on "the academic performance of that school in relation to minimum outcomes and standards and procedures for assessment determined by the Minister in terms of section 6A" and "the effective use of available resources;...". The principal may also draw from "other relevant reports," which may be relevant to the endeavor.⁴⁵ Based on this information, the HoD may designate a school as underperforming if it meets one or more of three criteria: "(a) the standard of performance of learners is below the standards prescribed by the National Curriculum Statement and is likely to remain so unless the Head of Department exercises his or her power in terms of this Act; (b) there has been a serious breakdown in the way the school is managed or governed which is prejudicing, or likely to prejudice, the standards of performance; (c) or the safety of learners or staff is threatened."⁴⁶

After identifying a school as underperforming the HoD must write a notice informing such schools that they must "respond to the notice" and "provide the Head of Department with a plan for correcting the situation."⁴⁷ The plan must be presented to the HoD and tabled at a School Governing Body (SGB) meeting but ultimately only the HoD need "approve the academic performance improvement plan or return it to the principal with such recommendations as may be necessary."⁴⁸

Both the principal and the HoD then work towards school improvement. The principal must "report to the Head of Department and the governing body on progress made in implementing that plan" during the school year. Meanwhile, the HoD "must take all reasonable steps to assist a school . . . in addressing the underperformance," and must consider transferring or dismissing staff,⁴⁹ "withdrawing the functions of the governing body" or appointing someone to take over the functions,⁵⁰ or appointing a mentor to counsel or temporarily replace the principal.⁵¹

At its core one of the fundamental flaws in section 58B is the reliance on school principals to come up with the School Improvement Plan (SIP). When a school is underperforming and needs drastic intervention, the formulation of the SIP must be incumbent on the district in consultation with the school management team to ensure its efficacy. It cannot rely solely on the principal to identify things that are wrong when in some instances the Principal may be part of the problem.

⁴⁵ SASA 58B(1), SASA 16A(1)(b).

⁴⁶ SASA 58B(2).

⁴⁷ SASA § 58B(3).

⁴⁸ SASA § 16A(c).

⁴⁹ SASA § 58B(5)(a), EEA § 16(8).

⁵⁰ SASA §§ 58B(5)(b-c).

⁵¹ SASA § 58B(6).

SIPs must be seen as forming a vital part of a coherent accountability mechanism. These plans can focus remediation efforts in underperforming schools and allocate jobs for the constituent stakeholders. The SIPs also allow school governance structures to share ownership over their improvement, and to work with other stakeholders to improve the outcomes of the school. Further, if there are clearer lines of communication between districts, they will know which schools are successful. This will make it easier to identify model schools that can then be used to guide practices in other schools in the district.

Research on school effectiveness has provided insight into what schools need to work well and what is necessary to improve an underperforming school. However, in the South African context, this has not provided a panacea for transforming underperforming schools into effective ones. No single strategy will improve these schools but rather, a combination of approaches with a simultaneous focus on management and curriculum matters has the potential to improve them in the long run.

Economist Nic Spaull argues that there needs to be a paradigm shift, on the part of all stakeholders within the community, from focusing on illustrating improvement in the short term to improving sustainably in the long run⁵². Thus, change needs to be substantive, and grounded in empirical evidence. An emphasis also needs to be placed on implementing multi-disciplinary interventions.

The improvement of underperforming schools is not just a question of the amount of resources injected into the schools. Quick technocratic fixes will not result in the level of sustained and systemic change required to improve the state of the education sector in South Africa⁵³. In order to improve a underperforming school, we need to be cognisant of the causes of underperformance. A study by education researchers Crouch and Mabogoane shows that it is difficult to fight the negative impact of poverty with ‘mere’ resources unless they are well managed and more attention is paid to the qualitative nature of resources⁵⁴. The problem is systemic, and compartmentalizing issues of underperformance will not result in sustainable change on the scale that is being hoped for.

Section 58B is not a panacea but it can be invoked to bring about greater transparency and accountability in addressing and remediate the worst performing schools. It provides a clear mechanism for public accountability in the way in which schools and the state plan and take action towards improving the educational experience of the country’s most vulnerable learners. However, in its current form, and compounded by a lack of implementation, section 58B remains underutilised. It has never been used to assist a school apart from focusing on improving its academic performance, despite the fact that the section contains two alternative criteria as mentioned above. Many schools, especially on the Cape Flats in the Western Cape, are unsafe and learners’ safety is threatened due to violence in and around the school. However, there has been no recorded use of section 58B to help these schools.

With the passing of this amendment to SASA, parliament envisaged its use to be for the improvement of the educational experience of learners at underperforming schools. Its effect however, has been little more than a bureaucratic exercise that ticks the box of compliance.

Recommendations

We therefore recommend that:

Section 58B be amended to shift the responsibility for developing a School Improvement Plan onto the district in conjunction with the School Management Team. This should serve as a foundation for more frequent use of the legislation to effect robust, sustainable improvements in underperforming schools, conceived in broader terms than simply academic results.

⁵² Spaull, N. (2014). Accountability in South African Education. Ch4 in “Transformation Audit 2013: Confronting Exclusion” p. 51-65 Institute for Justice and Reconciliation. Cape Town.

⁵³ UNESCO. (2012). EFA Global Monitoring Report: Youth and Skills - Putting Education to Work. Paris: UNESCO Publishing.

⁵⁴ Crouch, L., Mabogoane, T. (2001) “No Magic bullets, just tracer bullets: The role of learning resources, social advantage, and education management in improving the performance of South African schools”. Social Dynamics, 27(1): 60-78

SUBMISSION ON LEGISLATION REGARDING SEXUAL VIOLENCE IN SCHOOLS

No clear, complete guidance is given to schools on whether, and which, sexual offences registers they must consult before appointing a teacher. Different legislation provides conflicting guidance on the employment of sexual offenders, and provides for a number of parallel disciplinary procedures for sexual offenders, which can delay necessary action, reach differing judgements and risk re-traumatising victims.

Legislation requires registers to be updated and contain correct and adequate information. However, available evidence suggests that the National Child Protection Register (*the NCPR*) and National Register of Sex Offenders (*the NRSO*) are substantially incomplete. In late 2013, the South African Human Rights Commission found that the status of the updating and maintenance of the NCPR was insufficient to comply with the act establishing the register.⁵⁵ The NRSO is more complete than the NCPR,⁵⁶ but in late 2013 about 39 000 cases still needed to be reviewed by data capturers before the NRSO is up to date.⁵⁷

Additionally, none of the guidelines promulgated by the national or provincial governments contain complete information about the registers schools are required to check before they employ an educator, and only the Western Cape guidelines cover reporting requirements for child sexual abuse with reasonable clarity. While it is hard to measure compliance rates, it is likely that at least some schools have hired or were already employing educators whose status in the NCPR has not been confirmed according to the number of inquiries the Department of Social Development received in 2014/2015 compared to the previous year. Given the lack of easily available information about the legal requirements to and processes for checking the various registers, it is very plausible that many schools are unaware of their obligations or unsure of how to comply with them.

Even for those schools that are familiar with the legal processes involved in screening through the registers, these processes are far from simple, particularly for remote schools or those with strained finances. In order to obtain verification from both registers, a school must require its applicants to furnish personal information, present a certificate from the South African Council for Educators (SACE), and obtain a set of fingerprints from a police station – or, until the NRSO becomes fully operational, a police certificate and affidavit – while a school official must obtain a certified copy of his or her own identity document and check the SACE online system to ensure that an educator’s certification has not been revoked after the issuance of a certificate. If followed correctly, these requirements are likely to lead to delays in hiring as well as costs for transportation and document production. Obtaining a police certificate, for example, costs R96 and requires a 14-day processing period.⁵⁸

The suite of laws and rules regulating sanctions for sexual misconduct contains notable inconsistencies. For example, the Employment of Educators Act provides that an educator may – **but not must** – be dismissed for rape, presumably including rape of a child who is not a learner at the school where the educator is employed, as such an assault does not fall into the category of “serious misconduct.” The Children’s Act and the Sexual Offences Act, however, forbid employment with access to children to

⁵⁵ SAHRC Makes Finding in the National Child Protection Register Complaint, SOUTH AFRICAN HUMAN RIGHTS COMMISSION (Oct. 16, 2013), <http://www.sahrc.org.za/home/index.php?ipkArticleID=245>.

⁵⁶ Aarti Narsee, *Court Hears Case Made on Behalf of Child Sex Offenders*, BDLIVE (Feb. 7, 2014, 5:55 AM), <http://www.bdlive.co.za/national/2014/02/07/court-hears-case-made-on-behalf-of-child-sex-offenders>.

⁵⁷ CTR. FOR APPLIED LEGAL STUDIES, UNIV. OF THE WITWATERSRAND SCH. OF LAW & CORNELL LAW SCH.’S AVON GLOB. CTR. FOR WOMEN AND JUSTICE AND INT’L HUMAN RIGHTS CLINIC, *SEXUAL VIOLENCE BY EDUCATORS IN SOUTH AFRICAN SCHOOLS: GAPS IN ACCOUNTABILITY* 35 (2014), available at http://ww3.lawschool.cornell.edu/AvonResources/Report_on_Sexual_Violence_by_Educators_in_South_African_Schools_FINAL.pdf.

⁵⁸ *Police Clearance Certificates: Applying for a Police Clearance Certificate*, SOUTH AFRICAN POLICE SERVICE, http://www.saps.gov.za/services/applying_clearance_certificate.php (last visited June 30, 2015).

anyone who has raped or committed indecent assault against a child.⁵⁹ School officials acting in line with the Employment of Educators Act, then, might be directly violating other legal requirements.

Even different sanctioning bodies guided by consistent rules might produce different results, which could lead to a patchwork of punishments, such as an alleged offender being dismissed but not removed from the SACE register. Such a result could also occur if reporting procedures are not followed correctly so that the alleged offense does not come to the attention of all sanctioning bodies at the same time. Indeed, School Governing Body officials have expressed concern about educators found guilty by the Department of Basic Education applying for teaching jobs in another province or district because SACE did not strike them from the register,⁶⁰ while SACE officials have complained that they often learn about cases of educators abusing learners through the media rather than through the DBE⁶¹.

A further problem exists in that the systems of discipline for educators accused of sexual misconduct are highly duplicative: the incident must be examined at a disciplinary hearing at the school, by the SACE disciplinary committee, and likely by a criminal court, and each of these hearings might involve further appeals. Not only is this a significant use of resources, but repetitive hearings risk continually re-traumatizing a learner victim who must repeat his or her story in multiple formal settings, potentially under multiple cross-examinations. Officials involved in these processes have expressed concern about this repetition and suggested combining various hearings or recording a learner's testimony for use in multiple hearings,⁶² but no changes have been made as yet.

Without a strong system of investigation, disciplinary proceedings and registration, offenders end up receiving light if any sanctions. And in a context in which reporting an offense is likely to lead to little meaningful action, victims and their caretakers have little incentive to come forward. Evidence suggests that many are not – according to one study, recipients of reports of sexual assault in schools took any form of action in only 63.8% of cases.⁶³ Of those report recipients who did take action, only 8.4% informed the police and 3.4% reported the matter to the school,⁶⁴ meaning that even if all of those report recipients who informed the police or school were school employees, a significant number of school employees still failed to further report what they knew. These figures represent a direct violation of the Sexual Offenses Act and, to the extent that it is teachers who are failing to report, of the Children's Act.

The current effect of the legislation is that it is ineffective in protecting learners at school from sexual violence. It has further, failed to close the gaps in employing people unsuited to work with children.

Recommendations

We therefore recommend that:

- ***Guidelines for schools be amended to give clear, complete direction on the registers schools are required to check before appointing an educator.***
- ***The wording of all legislation that deals with sexual violence in schools (including the Employment of Educators' Act, the Children's Act and the Sexual Offenses Act) be harmonised.***
- ***The multiple disciplinary processes around sexual violence in schools be streamlined.***

⁵⁹ See CTR. FOR APPLIED LEGAL STUDIES, UNIV. OF THE WITWATERSRAND SCH. OF LAW & CORNELL LAW SCH.'S AVON GLOB. CTR. FOR WOMEN AND JUSTICE AND INT'L HUMAN RIGHTS CLINIC, *supra* note 29, at 26–27.

⁶⁰ *Id.* at 24.

⁶¹ *Id.* at 22.

⁶² *Id.*

⁶³ PATRICK BURTON & LEZANNE LEOSCHUT, SCHOOL VIOLENCE IN SOUTH AFRICA: RESULTS OF THE 2012 NATIONAL SCHOOL STUDY 15–16 (2013). This figure covers all report recipients, not just educators, but does not include reports of non-violent sexual offenses. *Id.*

⁶⁴ PATRICK BURTON & LEZANNE LEOSCHUT, SCHOOL VIOLENCE IN SOUTH AFRICA: RESULTS OF THE 2012 NATIONAL SCHOOL STUDY 15–16 (2013).at 46.