

**CHAPTER 13**

# BASIC EDUCATION PROVISIONING

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# INTRODUCTION

Everyone in South Africa has the right to a basic education. This right is written in Section 29 of the Constitution. As confirmed by the Constitutional Court, the right to basic education is ‘immediately realisable’. This means it is not subject to the availability of the State’s resources.

## TERMINOLOGY

**CONDITIONAL GRANTS** refer to funds allocated from the national treasury for specified national programmes. These funds can only be used for the specific purposes set out in the national programmes. Examples of conditional grants in the basic education sector include grants for school infrastructure and the grant that funds school feeding schemes.

**EDUCATIONAL INPUTS** refer to the resources used to educate learners. These include, for example, various goods such as stationery and textbooks, school furniture, appropriate school infrastructure, scholar transport, school meals, and personnel such as teachers and other staff.

**EDUCATIONAL OUTCOMES** are the direct effects on learners in relation to the knowledge, skills, beliefs and attitudes they are acquiring. The most frequent measurements of outputs are examination results and test scores.

**PERKINS BRAILLE MACHINE** is essentially a braille typewriter. Its keys correspond to the different dots which form braille.

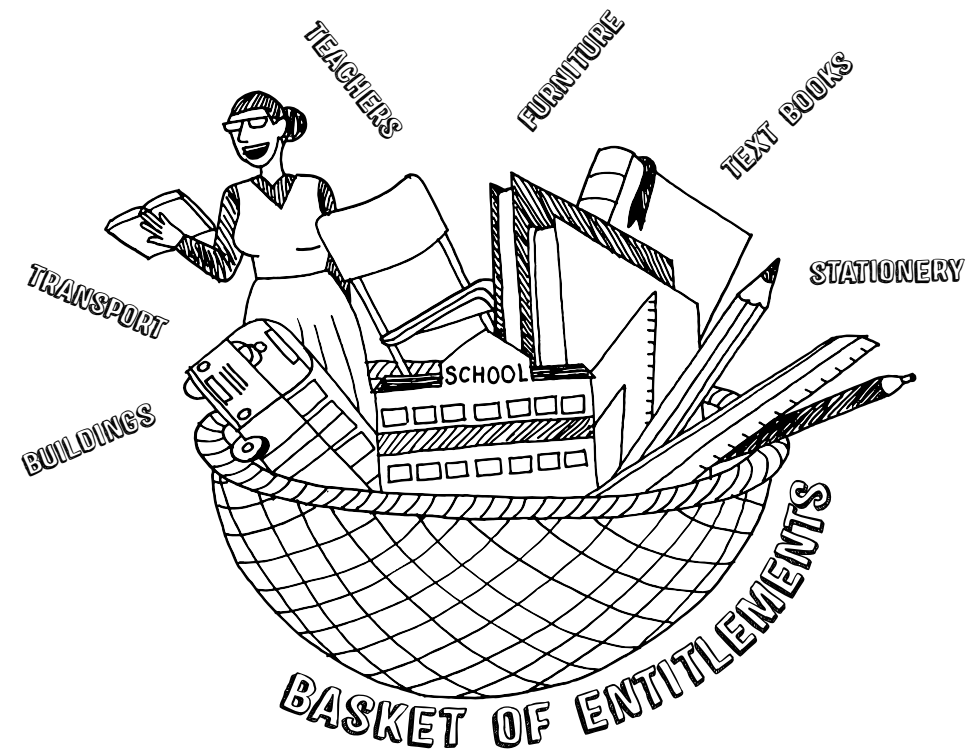
**UNIVERSAL DESIGN** is the design of products, environments, programmes and services to be usable by people of different abilities, including people who have physical impairments.

The Constitution does not define the right to basic education. It does not tell us what basic education means in practice. Rather, the content of basic education is developed by the courts through judgments, by parliament through legislation, and by the executive through policy and implementation. This process of giving content and practicality to the right to basic education continues through a social dialogue between civil society, the state and non-state actors participating in education provision. In this chapter, we focus on the ‘inputs’ that are necessary to provide learners in South Africa with a basic education.

Typically, these inputs comprise a ‘basket of entitlements’ that are necessary for a learner to enjoy their constitutional right to a basic education. The government in particular has the duty to provide this ‘basket of entitlements’, while the private sector must not interfere with learners’ access to education. That is because the Bill of Rights and Section 29 of the Constitution identify the State as the principal agent responsible for fulfilling the right to basic education.

Many schools do not have enough materials, such as textbooks, transport, stationery, furniture, food, or a safe place for learners to study. This negatively impacts learning and teaching, and undermines the right to basic education. When courts enforce access to physical inputs necessary for education, the public – including civil society organisations – is better able to understand the state’s obligations towards learners in school. Therefore, school communities can use the courts to demand access to education inputs that were previously denied or inadequately provided.

Since 2008, the grassroots organisation Equal Education (EE) and public-interest law centres such as the Centre for Child Law (CCL), the Legal Resources Centre (LRC), the Equal Education Law Centre (EELC) and SECTION27 have adopted a range of strategies to hold the government accountable for its obligation to provide education to learners at disadvantaged public schools in rural areas and urban townships. Many of these efforts have combined mass



mobilisation, the media and litigation to compel the government to plan for and provide certain education inputs. Other cases have been driven by local school communities or by desktop academic research into the link between inputs and outcomes. In the early provisioning cases, courts addressed issues of poor school infrastructure in the Eastern Cape, teacher provisioning, provisioning of desks and chairs to the classroom, the delivery of textbooks in Limpopo, and scholar transport in the Eastern Cape and KwaZulu-Natal. More recent cases have continued to focus on infrastructure, sanitation, funding and school meals.

This chapter focuses on particular aspects of education provisioning. It provides an overview of other chapters

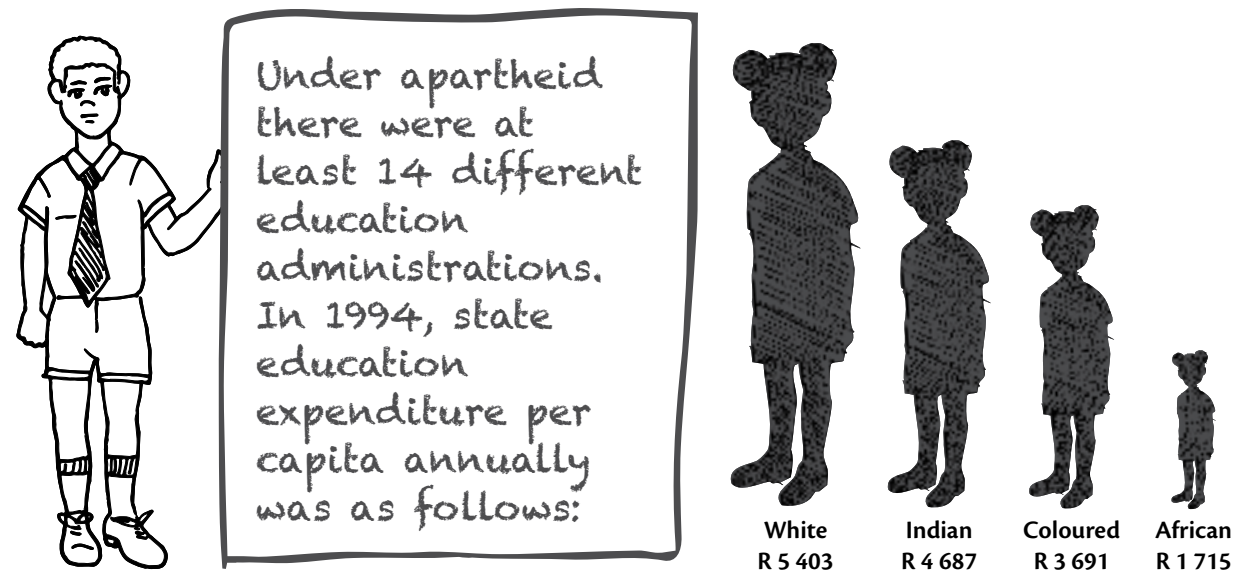
in this handbook covering textbooks, infrastructure, transport, and furniture. These other chapters on education provisioning cover a broad selection of education inputs, but do not reflect everything required for basic education. Rather, they reflect some of the entitlements that have been at the centre of civil society efforts aimed at improved education provisioning.

Other education inputs may include those relating to educators (such as teacher training and conditions of service), curriculum, school management (such as district support for schools and governance training) and education inputs concerning households (such as extramural activities and poverty relief). These other education inputs are

not discussed in this chapter because they have not yet been taken up by civil society. We mention them to illustrate the potential for more content and advocacy on the right to basic education.

As far as possible, this chapter will also discuss basic education provisioning for learners with disabilities.

We structure this chapter in three parts. First, we discuss inequality in education through describing the historical background and highlighting some of the successes achieved since the dawn of democracy, and the significant challenges that lie ahead. Second, we outline the law and policy framework for basic education provisioning. Finally, we discuss the core legal developments in respect of basic education provisioning.



## CONTEXT AND HISTORICAL BACKGROUND

Colonialism and apartheid have had a profound impact on education. In the early 1990s, South Africa moved away from a deeply fragmented education system in which black African learners were deliberately under-supported and purposefully taught to serve a racial capitalist system established to benefit white people at the expense and exploitation of African, coloured and Indian people.

The challenges today are inextricably linked to this history of oppression. HF Verwoerd, then Minister of Native Affairs (he later became Prime Minister of South Africa)

said on the eve of the passing of the Bantu Education Act of 1953:

Racial relations cannot improve if the wrong type of education is given to Natives. They cannot improve if

the result of Native education is the creation of frustrated people who, as a result of the education they received, have expectations in life which circumstances in South Africa do not allow to be fulfilled immediately.

## ADVANCES IN ACCESS TO EDUCATION

### SCHOOL ATTENDANCE

South Africa's democratic government has made laudable strides in achieving universal access to primary education. The 2017 General Household Survey data demonstrates that in 2002, approximately 40 percent of five-year old children were attending school; but that 15 years later, 90 percent of children aged five were attending school.

Participation rates of learners with disabilities is also high within the compulsory school going age range. The 2017 General Household Survey recorded participation rates between 85 and 95 percent for learners with disabilities. Unfortunately we cannot assess whether there has been any further progress since 2017 because the 2019 General Household Survey did not expressly record the participation rates of children with disabilities. Despite this, the statistical evidence shows that democratic South Africa has made significant advances in access to education, because nearly all children between the ages of seven and 15 are in school.

In addition to increasing the number of children attending school, the government has also achieved in other aspects of access to education. For example, the Department of Basic Education has employed thousands more teachers with qualifications, and taken over responsibility for all public schools in South Africa. Currently there are approximately 410 000 teachers working across approximately 25 000 schools, providing education and sustaining learner attendance for 14.5 million children.

According to the Department of Basic Education, the number of newly qualified teachers entering the system tripled between 2012 and 2016; and promisingly, researchers note that the younger generation of teachers are performing better than their older counterparts.

However, there is expected to be a 'retirement wave' of teachers, peaking in 2030 and lasting until 2040. Further, spending on education personnel is expected to decrease over the medium term, which Treasury acknowledges will 'result in fewer teachers and increased class sizes in some provinces'. This threatens to undermine the gains made regarding the right to basic education.

### PROGRESSIVE PUBLIC FUNDING FOR SCHOOLS

Another notable structural intervention since the advent of democracy is the introduction of the National Norms and Standards for School Funding Regulations.

These regulations determine target amounts that provinces should spend on non-personnel requirements for schools (such as education materials and maintenance), with poorer schools set to receive the highest allocation of funding.

In addition, all learners who benefit from a social grant, live in a youth care facility or in a child-headed household are exempt from paying fees. A further pro-poor measure concerns exemptions from school fees if the amount exceeds ten percent of the combined annual income of the household (before tax). The Supreme Court of Appeal has since clarified that

in households with single, divorced or separated parents, the custodial parent (with whom the child lives) need only provide their own financial information.

Wealthier schools are expected to make up the shortfall in receiving lower funding from the government through fees from parents. School-fee policies are determined by the governing body, responsible for the overall governance of a school. School governing bodies are an innovation introduced under the South African Schools Act as a mechanism to ensure parental involvement in the governance of schools. These important structures are organs of state composed of learners, parents, teachers, and the provincial education departments. Typically, fee-paying schools are able to generate a lot more income, enabling them to hire additional teachers, add to the infrastructure of the school, and hire additional non-teaching staff, which cumulatively can result in better schooling.

While the principle of giving more to those who have less is constitutionally mandated, the uneven distribution of learners across provinces, the differences in the socio-economic profiles of the provinces, and the additional income that some schools derive through fees all deepen the inequality found across provinces and schools. Nevertheless, we positively acknowledge the titanic leap that has been made, from a government that spent 11 times more on white children as it did on black children in 1960 to today's public-spending culture that is targeted (at least in principle) at giving more to people living in poor communities.



# ONGOING CHALLENGES IN ACCESS TO EDUCATION AND ADEQUATE FUNDING FOR SCHOOLS

## HIGH DROPOUT RATES

The gains in education access are at risk of being reversed because of high dropout rates, which has been exacerbated by the COVID-19 pandemic.

The statistical evidence shows that after age 16, when school attendance is no longer compulsory, there is a sharp decline as a significant number of children drop out, resulting in only about 50 per cent of those who started school completing secondary school.

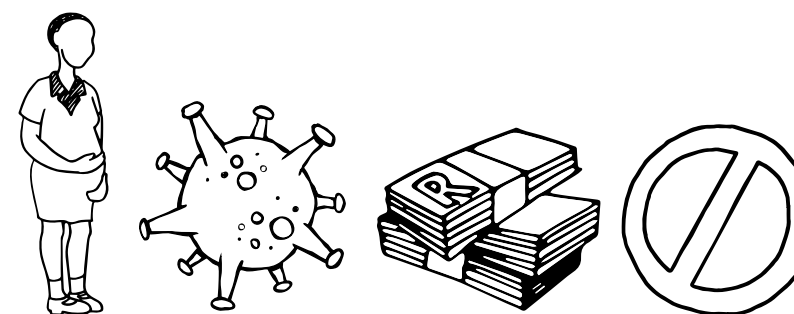
The reasons for half of all children leaving school after age 16 include: high rates of grade repetition, pressure on schools to improve pass rates, and unplanned pregnancies that impact female learners but can also lead to young fathers leaving school prematurely. Socio-economic barriers also contribute to high dropout rates; these include lack of social protection, lack of transport, lack of food and money in the home, lack of community safety and poverty.

The circumstances that lead to learners dropping out of school have been made worse by the COVID-19

pandemic. Early indications from the National Income Dynamics Study – Coronavirus Rapid Mobile Survey (NIDS-CRAM) indicate that an alarming number of children have lost out on essential teaching and learning time. Some have lost an entire year. Rotational timetables deployed to limit the number of people in school at one time mean that many learners continue to have only intermittent access to teaching and learning, depriving many of their right to basic education because they cannot access school.

## INADEQUATE FUNDING

South Africa's success story in achieving universal access to primary school education and developing a pro-poor funding model has not adequately improved education outcomes. The chapter on school funding explains expenditure trends in schools. It demonstrates the regressive consequences of decreased public finance on the ability of provincial education departments and schools to meet the needs of learners.



High rates of unemployment and a weakening social protection system means that parents and caregivers do not have the ability to co-finance their children's education. No-fees schools are not allowed to charge school fees; but chronic underfunding means that many of them put pressure on parents and caregivers to make 'voluntary contributions' to top up the school's income.

## POOR-QUALITY EDUCATION

Looking at learner outcomes, such as reading ability, is a useful way to check the overall health of the system. International surveys measuring trends in reading, mathematics and science show South Africa faces huge challenges in teaching and learning. For example, the 2016 Progress in International Reading Literacy Study (PIRLS) assessment, which measures reading achievement in the fourth year of schooling, found that 78 percent of children in South Africa cannot read for meaning in any language. That is, they do not have "the ability to understand and use those written language forms required by society and/or valued by the individual" required by the PIRLS Reading Framework.

The low levels of reading in the young ages measured in the PIRLS study are reflected in poor-quality matric pass rates. For example, in 2020, just over half of those who wrote mathematics achieved the required 30 percent pass mark. In Limpopo Province, only 29 percent of the learners who wrote matric examinations achieved a standard that could enable access to higher education. Nationally, only 36 percent of learners passed at a sufficient level to access higher education.

These results are cause for great concern, and they reflect the inadequacies found in education provisioning. For example, in the context of school infrastructure, the 2020 National Infrastructure Management Report recorded that 63 percent of schools in the country do not have a computer room, 74 percent of schools do not have a library, and 80 percent do not have a laboratory. Having the right equipment and physical spaces improves the quality of education. Yet securing these basic conditions will be more difficult to achieve in the face of spending policies that do not prioritise spending on the needs of the poor.

While children in South Africa have access to schools, most do not have access to appropriate or adequate education. This does not bode well for the country's children in a world that is increasingly reliant on text and technology, and where reading is an instrument through which individuals make sense of the world around them.

Of course, there is a multiplicity of factors that contribute to learning but which are outside the bounds of the school; for instance, community safety, toxic stress in the home, gender-based violence, lack of transport, lack of post-school opportunities, and the deprivation of poverty. These aspects tend to be worse in rural settings. They can affect education attainment as much as having a school without all the necessary resources to deliver a quality education.

However, an important and necessary starting point is for the government to ensure that children learn in safe physical environments with the right materials. Without essential education inputs such as infrastructure, textbooks, furniture, stationery and transport, it is not possible to learn properly.

## CIVIL SOCIETY TAKE UP ACCESS TO EDUCATION

An open letter from SECTION27, EELC and EE has called for a national dropout-prevention plan to deal with alarming dropout rates due to school closures during the early stages of the pandemic, and a failure by provincial education departments to resume normal timetabling. Current learner attendance remains low, notwithstanding that teachers were prioritised for COVID-19 vaccinations and that schools have not been sites of high rates of infection as it was initially feared they would. Moreover, many schools in quintiles 4 and 5 had resumed normal teaching and learning, while poorer schools have had to continue to provide education on a rotational basis.



# 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 the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to education is recognised in Articles 13 and 14 of the ICESCR. The

Committee on Economic, Social and Cultural Rights, the body responsible for overseeing the implementation of the ICESCR, has issued a number of General Comments that discuss the meaning of the rights in the ICESCR.

The 'Four-A' scheme as set out in General Comment 13 is a guide that interprets and gives content to the right to basic education. It states that

while the exact standard secured by the right to education may vary according to conditions within a particular state, education must exhibit certain features. This is potentially helpful in assisting parents, learners or organisations working in education rights, when assessing whether an action or inaction on the part of a departmental official or school may be a violation of the right to basic education.

Table 12.2: The 'Four-A' scheme as set out in General Comment 13 of the Committee on Economic, Social and Cultural Rights.

Availability	This requires the government to create functioning educational institutions in sufficient quantity within the jurisdiction of the state. For example, all programmes and institutions are to require buildings, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, and teaching materials. Some will also require facilities such as libraries, computers or laboratories.
Accessibility	<p>This requires the government to ensure that educational institutions are accessible to everyone, without discrimination. Accessibility has three overlapping dimensions:</p> <ul style="list-style-type: none"><li>• 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;</li><li>• Physical accessibility: education must be provided within safe physical reach, either by schools being in a reasonably convenient geographic location (such as in the neighbourhood, or through the provision of transport) or through education being provided by modern technology (such as learners having access to distance-learning programmes). Schools must comply with the requirements of universal design, to be accessible to learners with disabilities.</li><li>• Economic accessibility: education must be affordable to all.</li></ul>
Acceptability	This requires the government to ensure that the form and substance of education, including curricula and teaching methods, are acceptable (in other words, they must be relevant, culturally appropriate and of good quality) to learners, and in appropriate cases to parents.
Adaptability	This requires the government to develop policies and programmes that it can adapt to the needs of changing societies and communities and to respond to the needs of students within their diverse social and cultural settings, including those learners who have disabilities.

Articles 13(2)(a) and 14 of the ICESCR say the government must provide free and compulsory primary education. However, when the government ratified the ICESCR, it only committed to achieving universal access to free primary education within its available resources.

In 2017, the government submitted its State Party Report to the United Nations Committee on Economic Social and Cultural Rights ('UN Committee'). The purpose of this report was to give a self-assessment of the government's compliance with the obligations in the ICESCR.

In 2018, civil society organisations made submissions to the UN Committee on South Africa's State Party Report. Together, they informed the UN Committee that South Africa's qualification of Article 13(2) (a) and 14 of the ICESCR was inconsistent with Section 29 of the Constitution of South Africa. They explained that Section 29 of the Constitution places an immediate obligation on the state to realise everyone's right to basic education. Consequently, South Africa's qualification did not comply with the Constitution, and South Africa could not legally argue that access to free compulsory primary education would be achieved within available resources.

Civil society organisations drew attention to the government's failure to properly implement its pro-poor policies. For instance, notwithstanding the Department of Basic Education's no-fee policy, some schools were routinely found to be seeking 'compulsory contributions' from parents despite being prohibited from charging fees.

Further, most provinces cannot meet the funding target set by the Norms and Standards for School Funding. Even in provinces where the national funding target is met, such as the Western Cape and Gauteng, the financial resources are not sufficient to meet the needs of schools. Government also failed to ensure that all schools have access to water and sanitation by 29 November 2016, as required under the National Regulations Relating to Minimum Norms and Standards for School Infrastructure.

In its concluding observations on South Africa's first State Party Report under the ICESCR, the UN Committee acknowledged the "significant progress" achieved since the ratification of the Covenant. The UN Committee also took the opportunity to make wide-ranging declarations and recommendations, including its recommendation that South Africa withdraw its qualification to its ratification of the ICESCR. These recommendations empower civil society organisations to hold the State accountable for its duty to implement the right to basic education.

## THE UN COMMITTEE ALSO RECOMMENDED THAT THE GOVERNMENT INTENSIFY ITS EFFORTS TO:

- a. Improve school infrastructure and ensure that all schools have access to water, sanitation facilities and electricity, by allocating and effectively managing a sufficient level of funding;
- b. Reduce the school dropout rate by improving the acquisition of foundational numeracy and literacy;

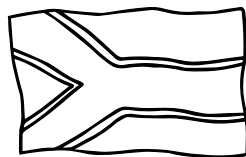
- c. Ensure that no-fee schools stop charging parents fees and review the requirements for fee exemption in fee-paying schools, with a view to ensuring that disadvantaged and marginalised children are not discriminated against or stigmatised;
- d. Improve the regulatory framework to define the roles and responsibilities of private-sector actors, and monitor the education provided by such actors;
- e. Guarantee high-quality early education for all children, especially those from disadvantaged families.

## THE UN COMMITTEE'S RECOMMENDATIONS FOR CHILDREN WITH DISABILITIES:

The UN Committee acknowledged South Africa's indication that schools for children with disabilities would become no-fee schools, noting that the number of disabled children not in school was significant; and accordingly, it recommended that South Africa:

- a. immediately roll out the no-fee schools programme in state-run schools for children with disabilities who cannot be accommodated in mainstream schools; and
  - b. ensure that inclusive education is a guiding principle in all education plans and programmes, including by providing reasonable accommodation for children with disabilities.
- South Africa's next report must be delivered by 31 October 2023.





# THE DOMESTIC LEGAL FRAMEWORK FOR EDUCATION PROVISIONING

## 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 detail in Chapter 1 of this book, ‘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.

Before discussing the legal framework of specific inputs for basic education provisioning, some of the more general provisions are worth noting.

The National Education Policy Act provides for the Minister to determine national policy for the planning, provision, financing, staffing, coordination, management, governance, programmes, monitoring, evaluation and well-being of the education system. Policies that the Minister has published under this section include the National Policy on an Equitable Provision of an Enabling School Physical Teaching and Learning Environment.

Section 3 of the Schools Act makes schooling compulsory for learners from

the age of seven to 15, or grades 1 to 9, 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 their province. In other words, government must ensure that all learners who fall within the compulsory phase of school have access to a school. Where reasonably practicable, the MEC should provide education for learners with special education needs at ordinary public school, as well as additional support services for those learners.

In *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC), the Constitutional Court said that the right to basic education encompasses access to the final exams needed to fully complete schooling (the National Senior Certificate examinations), written when one is in matric. This is notwithstanding that attending school up until the matric year is not compulsory under the Schools Act.

In 2007, the Schools Act was amended to provide a framework for establishing minimum standards to improve the quality of basic education. Section 5A provides that the Minister of Basic Education may make norms and standards for:

- school infrastructure,
- capacity of a school in respect of the number of learners the school can admit; and
- the provision of learning and teaching support materials. This would include textbooks and other learning materials such as workbooks.

Section 58C(3) then requires that provincial Members of the Executive Council (MECs) responsible for basic education report annually to the national Minister on measures taken to comply with the various norms. These sections are aimed at ensuring that 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; and that
- provinces are held accountable for reporting and for complying with the benchmarks established in these norms and standards for basic education provision.



The memorandum handed over to government at the 2011 march read: *Once norms and standards are in place, every school and community will be able to use them to hold circuits, districts and provinces accountable to deliver. Minister Motshekga has said that communities must be the ‘eyes and ears’ of education delivery; these norms and standards will be a powerful tool for that activism.*

## CASE STUDY

### EQUAL EDUCATION’S CAMPAIGN FOR NORMS AND STANDARDS

In 2010, Equal Education launched its campaign for regulations describing the minimum infrastructure requirements for all schools in South Africa. At that time, there was no law to inform what schools should look like and no plan to guide by when the state should fix thousands of dilapidated schools, some of which were made from inappropriate materials such as zinc, mud bricks, cinder blocks and asbestos. In the early stages of the campaign, EE members picketed, marched, petitioned, slept outside Parliament, wrote many letters to the Minister and went door to door in their communities to highlight the issues of poor school infrastructure. On Human Rights Day in 2011, EE lead 20 000 learners and supporters to Parliament to demand that the Minister of Basic Education adopt minimum norms and standards for school infrastructure.

By 2012, it had become clear that the Minister was not going to promulgate the norms and standards. As a last resort, after its intense work on the ground to build awareness and support for its campaign, EE (represented by the Legal Resources Centre) launched a case against the Minister of Basic Education to immediately fix two schools that needed to be upgraded urgently, and to compel the Minister to promulgate norms and standards for school infrastructure. EE and the LRC argued that although Section 5A of the Schools Act provides that the Minister ‘may’ make

norms and standards for school infrastructure, interpreted in light of the constitutional right to a basic education, in fact the Minister had a legal duty to make such norms and standards.

The Department of Basic Education agreed to address the infrastructural needs of the two schools, but opposed the finalisation of norms; and instead, published non-binding infrastructural guidelines.

Under increasing pressure from EE’s relentless advocacy campaign for norms and standards and in the shadow of the pending litigation, in November 2012 – a few days before the matter was to be heard – an out-of-court-settlement was reached between EE and the Department. The Minister agreed to publish draft regulations and to finalise the norms by 15 May 2013. In January 2013 draft regulations were published, but civil society was concerned with the content of the draft, leading to public outcry. The norms were thus not finalised by the 15 May deadline.

In July 2013, under the threat of a new round of litigation, the Minister agreed to a new set of norms, which were finally published at the end of November 2013. However, the norms still included problematic provisions that allowed the Department to delay delivery and evade responsibility.

In 2018, following a third round of litigation, the Bhisho High Court made an order setting aside the following problematic aspects of the norms and standards:

- making the Department of Basic Education’s duty to implement the norms and standards contingent on other departments,
- allowing the Department of Basic Education to overlook schools that were

partially built from mud, metal, wood or asbestos because they were not ‘entirely’ built from inappropriate materials,

- allowing provincial MECs for Education to hide their implementation reports through no proactive duty to disclose them in the public domain, and
- allowing the Department of Basic Education to prioritise schools for infrastructure upgrades rather than placing a clear duty to fix these schools.

The High Court found all of these regulations to be unconstitutional and struck them down. Unfortunately, more than three years later the revised norms and standards have not yet been released for public comment. These changes would improve the norms and standards and would provide a useful basis to enforce infrastructure delivery through advocacy and litigation, if necessary.

Moreover, we expect an increase in advocacy drawing attention to the worrying trend of deprioritising basic education in the public budget. As the chapter on infrastructure explains, challenges in public finance are a critical area of concern if the state is to be able to organise the resources necessary to overcome decades of inadequate infrastructure in our schools.

Alongside decreasing public finance for education, EE’s 2018 report ‘Implementing Agents: The middlemen in charge of building schools’ shone a spotlight on the issue of how the poor management of infrastructure projects and implementing agents in the Eastern Cape province – one of South Africa’s poorest provinces, and in dire need – prevents the improvement of infrastructure in schools.



## TARGET DATES IN THE INFRASTRUCTURE REGULATIONS

- The eradication of mud and asbestos schools, and the provision of services to schools without any water, power or sanitation, must be prioritised within three years of the passing of the Infrastructure Regulation. **(November 2016).**
- The norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security must be phased in over a seven-year period. **(November 2020).**
- The norms and standards relating to libraries and laboratories must be provided within ten years. **(November 2023).**
- All other norms and standards are to be phased in before the end of **November 2030.** (An example of this is compliance with the principles of Universal Design to make schooling accessible for learners with special needs. Thus, for instance, schools must contain ramps, clear floor passages and walkways for wheelchairs, parking for people with disabilities, and visual aids for communication between educators and learners who are deaf and hearing impaired. The time frames for the implementation for these provisions appear to be unduly long.)

While norms and standards were developed in respect of school infrastructure, as evidenced in the case study, norms and standards are yet to be made in respect of the other areas covered in Section 5A, such as school capacity and learner support materials.

Returning to a discussion of certain specific items, provisioning for basic education requires piecing together aspects of the Schools Act and its subsidiary legislation. As such, provisioning may be divided into three main categories. These are:

- Infrastructural provisioning that includes the building of schools, classrooms and the provisioning of water, sanitation and services;
- Personnel expenditure that includes educator salaries; and
- Non-personnel recurrent expenditure that includes capital equipment and consumables used inside schools for schools to function properly, such as furniture, 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 occur in the specific education provisioning chapters that follow.

Once state funds are allocated to schools for either personnel or non-personnel expenditure, shortages in school budgets are made up through the charging of school fees or fund raising. School fees and other

privately raised funds enable schools to supplement resources such as 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.

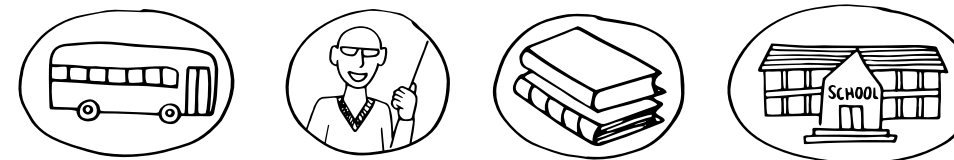
In 2016, the no-free threshold was R1 177. In 2017, it was R1 242. In 2021, the no-fee threshold was R1 466. This is set to increase to R1 536 in 2022 and to R1 610 in 2023.

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.

Each of the relevant laws and policies in respect of the different items is discussed in turn below.

### (i) Infrastructure

The National Policy for and Equitable Provision of an Enabling School Physical and Teaching and Learning Environment (the National Policy) was finalised in 2010. It acknowledges the clear link between poor infrastructural conditions and poor learner outcomes, and it aimed to develop new criteria for infrastructural



planning. As noted above, the National Minimum Norms and Standards for School Infrastructure Regulations (Infrastructure Regulations) were not finalised until the end of November 2013, and some aspects of the final norms and standards were then struck down by the High Court. These two documents together were intended to provide the blueprint to guide future infrastructural development in public schools in South Africa.

These Regulations establish benchmarks in respect of provisioning for things such as classrooms, electricity, water, sanitation, libraries, laboratories, electronic connectivity and perimeter security. They set incremental target dates for meeting specified goals. Provincial Education Departments were also required to develop school infrastructure plans within a year of the publication of the Regulations, and to report annually to the Minister of Basic Education on progress in implementing the Regulations.

In April 2021, the Department of Basic Education reported in the National Education Infrastructure Management System Standard Report that all schools have some form of sanitation facility and that the bucket ablution system had successfully been eradicated from all schools, although pit toilets remain in high numbers across rural provinces. In the same report, the Department noted that 5 836 schools were still without a reliable water supply, the majority of these schools being in the Eastern Cape and KwaZulu-Natal.

As the chapter on infrastructure and equipment points out, schools in rural provinces continue to experience the

highest rates of unreliable water supply and poor sanitation, with little prospect of significant improvement in the future, due to capacity and financial constraints.

The most painful illustration of this was in the senseless death of Michael Komape in Limpopo. After the trial and an appeal to the Supreme Court of Appeal, the family were eventually awarded appropriate damages. However, very little structural relief has been implemented at provincial level to eradicate pit toilets and build proper sanitation facilities.

For an overview summary on school infrastructure across all nine provinces up until April 2021, see the 'National Education Infrastructure Management System Report', published in that same year.

### (ii) Non-personnel provisioning

State provisioning for non-personnel expenditure for schools, such as for textbooks and stationery, is guided by the principles set out in the Norms and Standards for School Funding. Every year each school will receive an allocation from government for non-personnel expenditure. The Norms and Standards for School Funding prescribe as a policy target that the personnel to non-personnel spending ratio should be in order of 80:20. Personnel to non-personnel spending trends are elaborated on in the chapter on funding basic education.

State allocation for non-personnel expenditure is made according to the quintile ranking of a school on the poverty index. Schools are ranked from the poorest to the least poor, with quintile one being the poorest schools and quintile five being the wealthiest schools.

Of the funds available for non-personnel expenditure, 80 per cent is allocated to the poorest schools that make up 60 per cent of the total. In other words, the bulk of the monies for non-personnel expenditure is directed to the poorest schools, which generally are also no-fee schools. The reasoning for this is that wealthier schools (those in quintiles four and five) can raise money through school fees and other fund-raising activities. While this is a progressive poverty-targeting measure, it constitutes a relatively small part of state spending on education.

In respect of textbook provisioning, the Department of Basic Education has published but not finalised its 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (LTSM). The draft policy broadly defines LTSM to include stationery and supplies, learning materials, teaching aids, and science, technology, mathematics and biology apparatus.

The draft policy also makes reference to national LTSM norms and standards to reflect government's obligations to give effect to the right to basic education. This appears to suggest that the draft policy is a precursor to a set of norms and standards for LTSM. As such, the draft policy seems to have been formulated based on Section 5(A) of the Schools Act.

The draft policy draws a distinction between 'core LTSM' that is essential to teaching the entire curriculum of a subject for a grade, and 'supplementary LTSM' which is used to "enhance a specific part of the curriculum".

Core LTSM includes a textbook, a core reader or novel depending on the grade, a workbook 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 more centralised procurement, and improved systems for the delivery of textbooks to classrooms and the retrieval of textbooks from learners every year. The Basic Education Laws Amendment Bill, 2022 (BELA) also proposes to amend the South African Schools Act to allow for a centralised system for the procurement of textbooks. It is unclear how the draft policy and the BELA will interact.

The absence of an effective system was repeatedly identified by various investigative processes that were undertaken following the Limpopo textbook crisis in 2012, eventually culminating in a judgment in the Supreme Court of Appeal in 2015. This litigation is discussed in the next section of this chapter.

#### (iii) Personnel provisioning

Education is regarded as a personnel-intensive sector, as the bulk of provincial spending is allocated to this line item. Post provisioning is the process of assigning educators, or teachers, to schools.

Section 5 of the Employment of Educators Act 76 of 1998 (EEA) provides that the Head of Department in a province determines the number and allocation

of educator posts in each province. In 2002, the Department of Education adopted the 'Post Provisioning Norms'. These allocate educator posts according to a formula that weighs certain specified factors such as class size, range of subjects offered, and level of poverty of a particular community. The higher the weighting, the more likely 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 per cent of posts for allocation in favour of 'needy schools' as defined by a formula.

Chapter 15 on teacher post provisioning provides a detailed description of the mechanism for allocating teachers to schools. It explains how the mechanism is applied in provinces, and where the pitfalls are.

Commentators have argued that the Post Provisioning Norms continue to disadvantage poor schools. For instance, Chapter 15 notes that poor-quality data on the number of learners in a province means provinces cannot make proper decisions about how and where to allocate teachers, because they do not have the basic information that shows where learners are attending schools. This problem is most pronounced in provinces such as the Eastern Cape, where administrative support is weak and resources are lacking.

Section 20(4) of the Schools Act provides that SGBs may establish posts for additional educators and may appoint additional educators. School fees and other fund-raising 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 and litigation, is scholar transport. In the 2020 National Household travel survey, Statistics South Africa reported that approximately 8.8 million children walked to school. On its own this statistic is not necessarily alarming, if schools are close to home or situated in safe spaces. However, most of these children are in rural provinces and are forced to walk many kilometres to get to school. Children can thus be exposed to harsh weather and are forced to risk their personal safety.

In 2015, the Department of Transport promulgated the 'National Learner Transport Policy'. This policy was developed in collaboration with the Department of Basic Education and aims to develop standardised criteria across the provinces for "needy learners" walking long distances to schools. The policy is discussed in detail in Chapter 17 on Scholar Transport. This chapter provides us with a useful synopsis of the experiences faced by many children, contextualising these circumstances in the applicable law and policy frameworks to demonstrate how far we still are from meeting the standards.



In 2002, the Department of Education adopted the 'Post Provisioning Norms'. These allocate educator posts according to a formula that weighs certain specified factors such as class size, range of subjects offered, and level of poverty of a particular community.

#### (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 Department of Basic Education in 2001, outlines the government's strategy in respect of education for learners with disabilities. White Paper 6 envisions the need for an adequately funded three-tiered system of inclusive education. However, 21 years later that system remains elusive. This is discussed in detail in Chapter 6, on The Right to Basic Education of Learners with Disabilities. It is noteworthy that the White Paper

proposes a conditional grant for non-personnel expenses for inclusive education. To date, however, no such conditional grant has been provided.

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. SIAS makes reference to norms and standards for personnel provisioning for inclusive education. Section 19(4) states that:

Post-provisioning norms and standards will make provision for all categories of

staff required in an inclusive education system, including itinerant learning support, therapeutic and psycho-social support professionals, as well as teacher and class assistants, therapy assistants, technicians, interpreters and facilitators.

As with the conditional grant, the publication of these norms has not happened. Schools remain severely understaffed. More advocacy for an adequate law and policy framework for learners with disabilities is necessary. As the chapter on learners with disabilities points out, the 20-year implementation plan of White Paper 6 ended in 2021.

Although the policy is still in operation, it has been criticised as being outdated, and repeated calls have been made for its review. In 2021, the Department of Basic Education indicated its intention to begin the process of reviewing the policy.





## RELEVANT CASE LAW

Over the last 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 regarding the fulfilment of the right to basic education in respect of education provisioning.

### PROPERTY

In the *Governing Body of the Juma Musjid Primary School & Another v Ahmed Asruff Essay NO and Others* (Juma Musjid), a case in which a private property owner successfully sought to evict a public school operating on the owner’s property, the court went beyond the strictures of that case to comment on the extent of government’s obligations to protect the right to basic education. In the famous paragraph describing these obligations, the court said:

It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under Section 29(1)(a). Unlike some of the other socio-economic rights, this right is **immediately realisable**. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in Section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This right is therefore distinct from the right to “further education” provided for in Section 21(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible”. (Author’s emphasis.)

The Constitutional Court thus made clear that the right to basic education is an unqualified right; which means that an individual has a direct claim in respect of the right, and also that government is under an immediate duty to provide a basic education. This is in contrast to the qualified socio-economic rights such as health, housing, food, water and social security.

While the Constitutional Court acknowledges the absence of internal qualifiers to the right to basic education, it states that the right remains subject

to the limitation clause in terms of Section 36. The implications of the meaning of “immediately realisable” and the limitations clause are also discussed in more detail in Chapter 1.

### TEXTBOOKS

In December 2015, in the case of *Minister of Basic Education and Others v Basic Education for All and Others* (BEFA), the South African Supreme Court of Appeal (SCA) gave judgment in an appeal relating to the incomplete delivery of textbooks to learners at certain schools in Limpopo Province. The BEFA judgment was the culmination of a sustained campaign of litigation brought by public interest organisation SECTION27 for improved textbook provisioning.

In the judgment, the SCA confirmed that the right to basic education was “immediately realisable”. Further, the SCA held that the right included the entitlement that every learner at a public school must be provided with all relevant prescribed textbooks before the commencement of the academic year. The order further explicitly noted that it was government’s duty to provide such textbooks.

The BEFA judgment also rejected a budgetary-constraints justification from government in respect of full textbook provisioning. The SCA noted that government had made a “bald assertion” as to budgetary constraints, because government had failed to provide any evidence that it would be unable to procure the funds for textbook provisioning. The SCA also noted that government’s planning for the implementation of its textbook policy had been “inadequate”.

As the chapter on textbooks explains, while advancement in the law on universal access to textbooks for every

learner is well established, the state’s ability to deliver on its mandate remains lacking. This is most clear in the ongoing struggle for access to textbooks in braille and in other languages. Copyright laws also exacerbate challenges regarding access to textbooks for visually impaired learners, as there is no exemption in copyright for people with visual impairments to access, reproduce or copy copyrighted works. As Stein explains, such an exemption is critical for people with disabilities in order for them to reproduce and access content in other media formats, such as braille or audio.

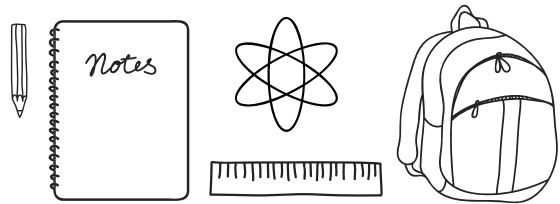
### FURNITURE

In the case of *Madzodzo and Others v Minister of Basic Education & Others* (‘Madzodzo’), the 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 furniture to schools where there were severe shortages. The court found that government’s failure to provide “adequate age- and grade-appropriate” desks and chairs to pupils at schools constituted a violation of the right to a basic education.

The judgment noted that the state’s obligation to provide a basic education was not confined to making a place in a school available to a learner, but also included a “range of educational resources”, including the provision of furniture.

The court also rejected a justification from government that the furniture had not been provided because of budgetary constraints. It found the government had failed to budget proactively for furniture shortages based on relevant information that was available at the time the budget was decided.





### EDUCATORS

The LRC has run several cases in the Eastern Cape to address poor teacher provisioning in schools in the province, where some schools have severe teacher shortages while there is an excess of teachers in others. These cases are discussed in detail in the chapter on post-provisioning. In short, the court has consistently found that there is a duty on government to advertise vacant teacher posts, to then appoint teachers to these posts, and finally to pay teacher salaries. In its first post provisioning case, *Centre for Child Law & 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 court noted:

[The Schools Act] requires both teacher and non-teacher establishments to be known by governing bodies before their budgets can be approved and to allow them to determine how many additional posts are needed at their schools. The only interpretation of the legislation that is consistent with the obligation on the respondents to respect protect, promote and fulfil the fundamental right to basic education is that the MEC is empowered and obliged to determine the establishment for both teaching staff and non-teaching staff at public schools in the province.

### SCHOLAR TRANSPORT

In the case of *Tripartite Steering Committee and another v Minister of Basic Education*

and Others (*'Tripartite Steering Committee'*), the Eastern Cape High Court confirmed that the right to basic education includes a direct entitlement right to be provided with transport to and from school at government expense for those learners who live a distance from school and who cannot afford the cost of transport.

### LEARNERS WITH DISABILITIES

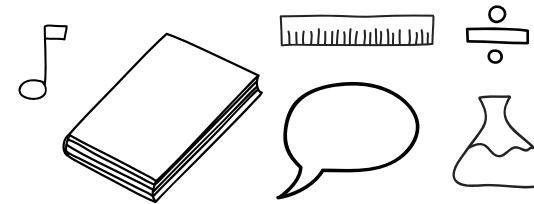
So far there has only been one case dealing with the right to basic education for learners with disabilities. The case of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another* (*'Western Cape Forum for Intellectual Disability'*) was brought by a coalition of non-governmental organisations that provide for learners with profound and severe intellectual disabilities who would not otherwise have access to education.

The organisations alleged that government provisioning for learners with profound and severe intellectual disabilities was less than that allocated to other learners, including learners with mild to moderate disabilities. An argument made by government was that learners with this category of severe disability would not benefit from education. Government also made a resource constraints argument, contending that given the many competing demands in

South Africa, it had to make difficult policy choices. Government argued that it could not afford to spend more on education, and that its failure to provide for this particular category of learners served a “rational connection to a legitimate government purpose”. The court strongly rejected government’s arguments, and said:

A government purpose which imposes a differential treatment on the affected children cannot in my view be said to be rational. It must be remembered that the applicants did not ask that the needs of the affected children be met by the provision of extra funds. What they ask of the respondents is to spread the available funds fairly between all children, including the affected children. I am accordingly of the view that the appellant has established that the rights of the affected children to receive a basic education are being infringed.

The court also ordered the respondents to take reasonable measures, which included interim steps, to give effect to the rights of severely and profoundly intellectually disabled children in the Western Cape. These included steps ensuring affordable access to basic education of an adequate quality. Further, such steps included providing adequate funds to ensure that organisations providing education to these learners have adequate facilities, can provide appropriate transport, and can hire and remunerate staff with proper accreditation, training and remuneration.



### SCHOOL NUTRITION

In *Equal Education and Others v Minister of Basic Education and Others*, an urgent case brought by SECTION27 and the EELC during the COVID-19 pandemic, the High Court held that the national Minister and provincial MECs for basic education have a constitutional and statutory duty to provide school nutrition to learners who require it. The court ordered government to implement the National School Nutrition Programme, which it was failing to do during the pandemic.

### STATIONERY

On 22 March 2022, in the case of *Khula Community Development Project v the Head of Department of Eastern Cape Department of Education*, the High Court (Eastern Cape Division) confirmed that stationery, like textbooks, is a component of the right to basic education. The case was brought by the Khula Community Development Project, represented by the LRC, and concerned the “unprecedented failure” of the Eastern Cape Department of Education to deliver textbooks and stationery to thousands of schools across the province in time for the 2022 academic year. The Department had blamed this failure on “unprecedented budget shortfalls”, which the court rejected as the Department had provided no details regarding such a shortfall. The High

Court ordered the Department to deliver all textbooks and stationery to schools by 31 March 2022. This judgment is an important piece of jurisprudence in that it gave judicial recognition to stationery as part of the “basket of entitlements” that constitutes the right to basic education.

### GENERAL LEGAL PRINCIPLES ON PROVISIONING

The following principles have emerged from the jurisprudence in respect of education provisioning:

- The right to basic education is an immediately realisable right. This means that every learner has a direct claim to be provided with a particular entitlement necessary for his or her education. This requires that government do everything possible to ensure that such an entitlement is provided to every learner.
- The courts have adopted a content-based approach to interpreting the right to basic education. This means that the courts have begun to define the ‘basket of entitlements’ necessary for a basic education, through recognising school infrastructure, teachers, textbooks, furniture, scholar transport and nutrition as essential components of the right to basic education.
- Government cannot make ‘bald assertions’ of budgetary constraints

without putting forward evidence of budgetary constraints. Government is obliged to budget appropriately for the right to basic education based on available information. This approach to a budgetary constraints argument is consistent with the developing principle in the wider socio-economic rights jurisprudence that there is an implicit duty on government to budget effectively. In the case of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd) and Another*, the Constitutional Court held:

This Court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. **In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.** (Author’s emphasis.)

- Learners with disabilities cannot be denied their right to a basic education. This means that learners with disabilities must be budgeted for, including in respect of the additional accommodations necessary to enable learners with disabilities to fully enjoy the right to basic education.



# CONCLUSION

The South African government has a number of obligations when it comes to the right to basic education. This includes providing enough money for teachers, infrastructure, textbooks, furniture, scholar transport and nutrition.

The shortcomings in provisioning education to realise everyone's right to basic education have been (and can continue to be) addressed through mobilisations, advocacy and even litigation.

School communities and organisations have used several different types of cases to tackle education provisioning, including test cases, damages claims, interdicts and class actions. Courts have crafted flexible and creative remedies, especially detailed supervisory orders to ensure that provisioning of inputs takes place.

There is no single silver bullet that will improve the quality of education. A multipronged strategy is required 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 must 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 adequate and equitable funding for education, including campaigns against austerity policies and budget cuts**
- SECTION27, the Budget Justice Coalition and other civil society organisations have been engaging in public participation processes concerning the budget in order to resist cuts to the basic education budget.
- Campaigns for the development of norms and standards for a quality basic education**
- Section 5A of the Schools Act 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.

- The LRC is continuing to tackle school overcrowding in the Eastern Cape, while SECTION27 focuses on infrastructure delivery in Limpopo.
- SECTION27, working with BlindSA and other partners, has taken up the issue of copyright as a barrier to access to educational materials, especially for people living with disabilities. These organisations successfully challenged provisions of the Copyright Act in 2021, and the matter will be heard by the Constitutional Court for confirmation of the order of invalidity in 2022. At the same time, parliament is still undergoing a process to reform the Copyright Act, with these organisations and others raising the crucial issue of how copyright impedes access to the right to basic education for poor learners and learners living with disabilities. Copyright is an important new frontier for education rights activists in South Africa.

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