In South Africa today, there remain many schools that must function without the full ‘basket of entitlements’ necessary for a basic education. This is particularly the case in the vast majority of historically disadvantaged schools. Where schools do not have these essential entitlements, learning and teaching is affected, and learners cannot enjoy their right to a basic education. Since about 2008, therefore, civil society organisations such as the Centre for Child Law (CCL), the Legal Resources Centre (LRC), SECTION27 and Equal Education have led many campaigns for a better quality of education in historically disadvantaged public schools. Many of these campaigns have included litigation for improved education provisioning. The cases before the courts have addressed issues of poor school infrastructure, teacher provisioning, provisioning of desks and chairs, the delivery of textbooks to the classroom, and scholar transport. The purpose of this chapter is to provide an overview of all the chapters that follow, and which fall under the umbrella of education provisioning. The education provisioning chapters are not necessarily an exhaustive list of all entitlements that are required for a quality basic education; rather, these chapters reflect some of the entitlements that have been at the centre of civil society campaigns for improved education provisioning. As far as possible, the overview and the chapters that follow will also discuss basic education provisioning for learners with disabilities.

INTRODUCTION

Education provisioning refers to provisioning for the various educational inputs that are necessary to provide learners with a quality education. As civil society advocates for a quality education, we sometimes imagine these inputs as a ‘basket of entitlements’ that are necessary or essential for a learner to enjoy her or his right to a basic education. The corollary of this right is that there is an obligation on government to provide this ‘basket of entitlements’.

In South Africa today, there remain many schools that must function without the full ‘basket of entitlements’ necessary for a basic education. This is particularly the case in the vast majority of historically disadvantaged schools. Where schools do not have these essential entitlements, learning and teaching is affected, and learners cannot enjoy their right to a basic education.

INTRODUCTION

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Apartheid education existed as one of the main cornerstones of the ‘grand apartheid’ scheme, which – together with other policies, such as the Group Areas Act of 1950 – aimed to exclude blacks from white areas, while simultaneously relying on and exploiting cheap black labour. Apartheid education was essentially entrenched through: the unequal funding of basic education along racial lines; and the teaching of a curriculum, as spelled out in the so-called Christian National Education Policy of 1948, that promoted racial superiority.

There was therefore a clear imperative to transform apartheid education at the dawn of democracy in 1994. Consequently, the new South African Constitution included a Bill of Rights with an education clause. There was also a shift from Christian National and Bantu Education to Outcomes-Based Education (OBE), and a new legal framework for schooling – the main law and policy being the South African Schools Act of 1996 (the Schools Act), and the National Education Policy Act of 1996. The key features of the legal framework include: the desegregation of schools, nine years of compulsory schooling, the democratisation of the governance of public schools through the establishment of school governing bodies (SGBs) that include parents and learners in school governance, and a new system of funding for public schools. Yet despite these very significant developments, inequality in education persists. Historically advantaged schools – former white or ‘Model C’ public schools – have the advantage of decades of capital investment and of being well-resourced, with access to qualified and graciously dispensing teachers. Historically disadvantaged former African schools are characterised by high pupil-teacher ratios, unqualified and under-qualified teachers, and a lack of books, libraries, laboratories and other resources. This inequality in provisioning is further aggravated by the post-apartheid funding model, which while having some redress mechanisms nevertheless perpetuates inequality. According to this model, wealthier schools charge school fees to make up for deficits in state funding, while schools serving poor communities either charge low fees or (since 2006) are fee-free, following a reform in the legal framework. Noteworthy, too, is that while former Model C schools these days tend to be more racially mixed, and while former Indian schools today appear to serve both Indian and African learners, this integration occurs along class lines. Poor, predominantly African learners remain relegate to the historically disadvantaged schools in African townships and in rural areas.

This is what some commentators have referred to as ‘incomes-based education’, because of access to a better quality of education being dependent on a child’s family income. Education researchers have therefore referred to the South Africa’s schooling system as a ‘dual education’ system. This means that there are two different systems of schooling in public schools: the first being the well-resourced schools, which are the wealthy independent and former Model C schools, and to a lesser extent the former Indian schools, and the second system catering for poor, predominantly African learners, and being the majority of public schools existing along a continuum of under-resourcing and dysfunctionality. According to education researchers, this would constitute anything between 70% and 80% of South African learners.

The South African Constitutional Court has on several occasions commented on this apartheid legacy. In Governing Body of the Janua Musjaid Primary School & Another v Ahmed Asaad Essay NO and Others (Jama Musjaid), for example, the court noted: The inadequacy of schooling facilities, particularly for many blacks, was entrenched by the formal institution of apartheid, after 1948, when segregation in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are observable in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

**Building an Inclusive Education and Training System**

Special-Needs education is a sector in which the range of apartheid remains most evident. Here, the segregation of learners on the basis of disability, race and gender is observable to incorporate segregation on the basis of disability. Apartheid special schools were thus organised according to two segregating criteria, race and disability. In accordance with apartheid policy, schools that accommodated white learners with disabilities were well resourced, while the few schools for black learners with disabilities were systematically underfunded. Education White Paper 6 on ‘Special Needs Education: Building an Inclusive Education and Training System’
The matric or National Senior Certificate (NSC) exam marks the end of the schooling phase of a learner’s education. The matric pass rate was increasing steadily (68% in 2010, 70% in 2011, 74% in 2012 and 78% in 2013). Each year, the Department of Basic Education (DBE) cited these numbers as evidence of an improving system.

In 2014 the matric pass rate dropped to 70% and in 2015 to 71%. The DBE attributed this to an adjustment phase due to the introduction of a new curriculum. However, for many reasons education researchers question the use of the matric exam as an appropriate gauge of the functionality of a schooling system, or of a learner’s academic achievement. Researchers state that the matric exam encourages mediocrity, setting the bar too low. Learners are ‘encouraged’ to do easier exams that will make passing more likely. For example, learners are encouraged to do maths literacy rather than maths.

Education researchers note further that the matric pass rate masks the number of learners who have fallen out of the system. Only half of the learners who start Grade 1 actually make it to Grade 12, with most learners dropping out between Grades 10 and 12. Finally, education researchers note that the pass rate must be assessed against the number of learners who actually qualify for access to a bachelor’s degree or university entrance, with very few qualifying for such entrance. Put differently, therefore – according to Nic Spalding, an economist focusing on education – ‘Of 100 students that started school in 2003, only 48 wrote matric in 2014, 36 passed, and 14 qualified to go to university’. Taking these factors into account, according to Spalding, a more appropriate measure would thus indicate a pass rate (for example) of 36% in 2014.

What is clear is that to fix the crisis, or to remedy the toxic mix, a multi-pronged strategy is necessary. We need better laws, policies and programmes, adequate budgeting, and improved management.
In March 2012, Equal Education launched an education rights campaign for basic education, the upgrading of two schools in the Eastern Cape, and a court order compelling the Minister of Basic Education to finalise the norms and standards for basic infrastructure, almost four years after a draft was first introduced into the public domain.

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

Under increasing pressure from Equal Education’s relentless campaign for norms and standards – including marches, sleeping outside Parliament, and hearings in different provinces – and in the context of potential litigation under the right to basic education, in November 2012 (a few days before the matter was to be heard) an out-of-court settlement was reached between Equal Education and the Department. The Minister agreed to publish draft regulations for public comment by 15 January 2013 and to finalise the norms by 15 May 2013. In January 2013 a new set of draft regulations emerged. Civil society was very concerned that the Minister of Basic Education, in November 2013, a new set of draft regulations, some of the more general provisions are worth noting. Section 3 of the Schools Act makes schooling compulsory for learners from the age of seven to fifteen, or grades one to nine, whichever comes first. Section 3 further requires that a Member of the Executive Council (MEC) must ensure that there are enough places for all learners within this compulsory phase. In other words, government must ensure that all learners who fall within the compulsory phase of school have access to a school. This section could also be interpreted to imply that government must ensure that there is education of a sufficient standard to accommodate all learners within this phase of schooling. In 2007, the Schools Act was amended, in what can be viewed as a concerted effort to provide a framework for establishing minimum standards to improve the quality of basic education. Section 5A requires that the Minister of Basic Education provide norms and standards for school infrastructure – as evidenced in the case study – to date, norms and standards are yet to be determined in respect of the other areas noted in Section 5A.

Returning to a discussion of the specific line items in provisioning for basic education, this requires piecing together aspects of the Schools Act and its subsidiary legislation. Provisioning may be divided into three main categories: (1) infrastructural provisioning, which includes the building of schools, classroom and the provisioning of water, sanitation and services, (2) personnel expenditure, which includes educator salaries, and (3) non-personal recurrent expenditure, which includes capital equipment and consumables used inside schools for teaching support materials.

This overview will provide a broad outline of some of the law and policy frameworks for the implementation for these infrastructure targets. TARGET DATES IN THE INFRASTRUCTURE REGULATIONS:

- The eradication of rust and asbestos schools, and the provision of services to schools without any water, power or sanitation, must be prioritized within three years of the passing of the Infrastructure Regulations (November 2016)

- The norms and standards relating to the availability of class sizes, electricity, water, sanitation, test materials, and perimeter security must be phased in over a seven-year period (November 2020)

- The norms and standards relating to libraries and laboratories must be provided within ten years (November 2023)

- All other norms and standards are to be phased in before the end of November 2030. An example of this is compliance with the principles of Universal Design to make schooling accessible to learners with special needs. Thus, for instance, schools must have ramps, clear floor passages and walkways for wheelchairs, parking for people with disabilities, and visual aids for communication between learners who are deaf or hearing impaired. (The time frames for the implementation for these provisions appear to be unduly long.)
In 2008, the Department of Education published the ‘Draft National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment’ (the ‘National Policy’), and ‘The Draft National Minimum Norms and Standards for School Infrastructure’. These two documents together were intended to provide the blueprint to guide future infrastructural development in public schools in South Africa.

The National Policy document was finalised in 2010. This policy document acknowledges a clear link between poor infrastructural conditions and poor learner outcomes, and aimed to develop new criteria for infrastructural planning. As noted, however, the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure (‘Infrastructure Regulations’) were not finalised until the end of November 2013. These Regulations establish benchmarks in respect of provisioning for things like classrooms, electricity, water, sanitation, libraries, laboratories, electronic connectivity and perimeter security. They also set incremental target dates for meeting specified goals. Provincial Education Departments were also required to develop school infrastructure plans within a year of the publication of the Regulations, and to report annually to the Minister of Basic Education on their progress in implementing the Regulations.

State allocation for non-personnel expenditure is established according to the quintile ranking of a school on the poverty index. Schools are ranked from the poorest to the least poor. For example, quintile 5 is the wealthiest schools, whereas quintile 1 is the poorest schools. The reasoning is that the wealthier schools in quintiles 4 and 5 can raise money through school fees and fundraising activities. While this is seen as a progressive poverty-targeting measure, it constitutes a relatively small part of state spending on education.

In respect of textbook provisioning, the DBE has published but not finalised its ‘Draft National Policy for the Provision and Management of Learning and Teaching Support Material (LTSM)’. The draft policy broadly defines LTSM to include stationery and supplies, learning materials, teaching aids, and science, technology, mathematics and biology apparatus. Draft policy makes reference to national LTSM norms and standards to ‘enhance a specific part of the curriculum’. Core LTSM includes a textbook, a core reader or novel depending on the grade, a workbook (an activity book designed to cover the curriculum), and teacher guides. Core LTSM is defined as including learning materials such as atlase, dictionaries, subject-specific apparatus, and electronic and technical equipment. The draft policy seeks to achieve a more centralised procurement mechanism, and improved systems for the delivery of textbooks to classrooms and the retrieval of textbooks from learners every year. The absence of such systems was noted and the systems were repeatedly identified as necessary by the various investigative processes that followed the Limpopo textbook crisis in 2012, and eventually culminated in a judgment in the Supreme Court of Appeal. This judgment is discussed in the next section of this chapter.

Since 2008, the Department of Education has been implementing the Regulations. Commentators have argued that the Post-Provisioning Norms are insufficiently geared towards historical redress, since other weighted factors continue to favour the more advantaged schools. In 2003, the Department of Education adopted the ‘Post-Provisioning Norms’. This allocates educator posts according to a formula that weights certain specified factors, such as class size, the range of subjects offered, and the poverty of a particular community. The higher the weighting of a school, the more likely it is that the school will benefit in terms of the allocation of an educator post. These Norms also instruct provinces to set aside between two and five percent of posts for allocation in favour of ‘needy schools’, as defined by a formula.

In 2012/2013, personnel-to-non-personnel expenditure by province was as follows:

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Provincial provisioning

Education is regarded as a ‘personnel-intensive sector’, as the bulk of provincial spending is allocated to this line item. Education adopted the ‘Post-Provisioning Norms’ province. In 2002, the Department of Education argued that the ‘Post-Provisioning Norms’ are insufficiently geared towards historical redress, since other weighted factors continue to favour the more advantaged schools. That is, because educator salaries have been determined according to qualifications and experience, the funds directed in respect of
this line item are said to continue to favour historically advantaged schools, since historically these schools have had better-qualified educators. Also – since personnel costs constitute the lion’s share of the education budget – despite pro-poor targeting for non-personnel expenditure, funding for schools remains skewed in favour of historically advantaged schools.

Section 20(4) of the Schools Act then provides that SGBs may establish posts for additional educators, and may appoint additional educators. School fees and other fundraising initiatives generate the financial resources for this. Schools that cater for poor communities are therefore unlikely to benefit from this provision.

(iv) Scholar transport

An area of education provisioning that does not fall within the line items discussed above, but which is an area of increasingly vibrant education-rights activism, is that of scholar transport. In 2015, the Department of Transport promulgated the ‘National Learner Transport Policy’. This policy was developed in collaboration with the DBE, and aims to develop standardised criteria across the provinces for ‘needy learners’ who walk long distances to schools. The policy is discussed in detail in the chapter on ‘Scholar Transport’.

(v) Education provisioning for inclusive education

Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System (‘White Paper 6’), published by the DBE in 2001, outlines the South African government’s strategy in respect of the education of learners with disabilities. White Paper 6 envisions the need for an adequately-funded three-tiered system of inclusive education; but since the paper’s publication fifteen years ago, that system remains elusive. This is discussed in detail in the chapter on learners with disabilities. Some of the concerns in respect of adequate infrastructural provisioning for learners with disabilities have already been mentioned.

It is noteworthy that the White Paper proposes a conditional grant for non-personnel expenses. To date, however, no such conditional grant has been provided for inclusive education.

In 2014, government published the ‘Policy on Screening, Identification, Assessment and Support (SIAS)’. The purpose of SIAS is to provide for the standardisation of procedures and processes to identify and assess all learners requiring additional support. This Policy makes reference to norms and standards for personnel provisioning for inclusive education. Section 19(4) states:

Post provisioning norms and standards will make provision for all categories of staff required in an inclusive education system, including: classroom learning support, therapeutic and psychosocial support professionals, as well as teacher and class assistants, therapy assistants, technicians, interpreters and facilitators.

As with the conditional grant, the publication of these norms is yet to occur. The experience of organisations working in both special and full-service schools is that these schools remain severely understaffed, with insufficient teachers and specialised non-teaching staff. There is therefore a great need for stronger mobilisation and advocacy for both the implementation of White Paper 6 and an adequate law and policy framework for learners with disabilities.
In the Juma Musial Case

In Gobing Body of the Juma Musial Primary School & Anotrher v Ahmed &oruf Essay NO and Others (Juma Musial), a case in which a private property owner successfully sought to evict a public school conducted on its property, the court went beyond the strictures of that case – and, indeed, to some length – to comment on the extent of government’s obligation to protect the right to basic education. In paragraph 35 of its judgment 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)(e). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no necessity of any qualifications to the right being ‘progressively realised’ within ‘available resources’ subject to reasonable legislative measures. The right to a basic education in Section 29(1)(e) 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, social justice, fundamental freedom and equality’.

The SCA confirmed that the right to basic education ‘progressively available through reasonable measures, to make education and accessible’. [Author’s emphasis.]

The court elaborated on the content and meaning of the right. It noted that the state’s obligation to provide a basic education was ‘immediately realisable’.

The court held that the state is under an immediate duty to provide a basic education to every child. This is in contrast to the qualified socio-economic rights, such as health, housing, food, water and social security. The court’s ‘incrementalist’ approach to interpreting these rights has been set out in the chapter on ‘The Constitution and the Right to Basic Education’.

While the Constitutional Court acknowledges the absence of internal qualifications to the right to basic education, it states that the right remains subject to the limitation clause in terms of Section 36. The implications of the meaning of ‘immediately realisable’ and the limitations clause are also discussed in more detail in the chapter on ‘The Constitution and the Right to Basic Education’.

The Madzodzo Case

In the case of Madzodzo and Others v Minister of Basic Education & Others (‘Madzodzo’), the Legal Resources Centre (LRC), acting on behalf of the Centre for Child Law (CCL) and parents from a group of schools in the Eastern Cape, brought an application to compel the government to deliver basic education to seven schools where there were severe furniture shortages. The court found that government’s failure to respect this right ‘adequate and as a grade appropriate’ desks and chairs to pupils at schools in the Eastern Cape constituted a violation of the right to a basic education.

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The Tsiase Case

In December 2015, the South African Supreme Court of Appeal (SCA) in the case of Minister of Basic Education and Others v Basic Education for All and Others (the BEFA case) gave judgment in an appeal relating to the incomplete delivery of textbooks to learners at certain schools in the Limpopo Province. The BEFA judgment was the culmination of a sustained campaign of litigation brought by the organisation in 2014, and resulted in three separate court orders in 2016 and 2017. The fourth case was successfully instituted by the organisation in 2014, and was then appealed by government.

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The Tripartite Steering Committee Case

In the case of Tripartite Steering Committee and Another v Minister of Basic Education and Others (‘Tripartite Steering Committee’), the High Court in the Eastern Cape set aside a ‘rational connection to a legitimate government obligation’.

The parties included government and the Tripartite Steering Committee, which represents teachers and learners’ parents. An application was brought against the Eastern Cape Department of Education to determine whether the right to basic education included a direct entitlement necessary for his or her claim to be provided with a particular textbook prescribed for his or her grade before commencement of the academic year. The order further explicitly noted that the corollary to this right was government’s duty to provide such textbooks.

The judgment also rejected a budgetary constraints justification from government in respect of full textbook provision of textbooks for Grade 9. The court held that the state was under an immediate duty to provide textbooks to all learners.

The SCA held that government’s provisioning for full textbook provision was an immediate duty on government to deliver the books.

The Western Cape Forum for Intellectual Disability Case

In the case of Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another (‘Western Cape Forum for Intellectual Disability’), the court held that government’s obligation to provide for profoundly and severely intellectually disabled children was less than that allocated to other children, including children with mild to moderate disabilities. An argument made by government was that children with this category of severe disability would not otherwise have access to an education.

The organisations alleged that government provisioning for profoundly and severely intellectually disabled children was less than that allocated to other children, including children with mild to moderate disabilities. An argument made by government was that children with this category of severe disability would not otherwise have access to an education.

The courts have adopted a content-based approach to interpreting the right to basic education. This means that, by recognising textbooks and furniture as essential items for a basic education, the courts are beginning to define the ‘basket of entitlements’ necessary for the enjoyment of the right to basic education.

Government cannot make ‘bald assertions’ about budgetary constraints without putting forward evidence of a failure to budgetary constraints based on available information. This approach to a budgetary constraints argument is consistent with the developing principle in the socio-economic rights jurisprudence that there is an implicit duty on government to budgetary constraints. In the case of City of Johannesburg Metropolitan Municipality & Blue Moonlight Properties 39 Pty (Ltd) and Another, the court held that government had not made a ‘bald assertion’ about budgetary constraints. The court’s determination of the reasonableness of measures within available resources is ‘an implicit duty on government to provide an education’.

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The chapter has further noted that there is no single ‘silver bullet’ to improve the quality of education. What is required is a multi-pronged strategy to fixing the crisis in education. This is evident in the various campaigns of civil society for improved education provisioning that have contributed to holding government accountable to meeting its obligations in respect of basic education.

People need to pool their collective skills and knowledge to improve the resourcing of education. Below is a brief listing of potential examples of future education-provisioning campaigns.

Campaigns for the development of norms and standards for a quality basic education:
- Section 5(A) requires that the Minister of Basic Education provide norms and standards for Learner Teacher Personnel Provisioning for inclusive education; which provokes the implementation plans to meet the deadlines imposed by the Regulations. Following the BJECA judgment that requires government to provide every learner at public schools with every prescribed textbook for his or her grade before commencement of the academic year, SECTION27 and the organisation Better Education for All have been closely monitoring textbook delivery in Limpopo Province to ensure that all textbooks are delivered to all learners in all subjects. Similar monitoring initiatives should also occur in other provinces where there have been reports of textbook shortages.

Expanding the basket of entitlements that are essential to a basic education:
- Schools for the visually impaired rely on Perkins Braille Machines (“braille”) to enable learners to write and take notes. Blind learners also write their examinations using braille.

Faranaz Veriaeva is a senior legal researcher and legal counsel based at SECTION27.

CONCLUSION

This chapter has provided an overview of the South African government’s obligations in respect of the right to basic education, and how government has sought to give effect to these obligations through law and policy. In doing this, it has alluded to some of the vacuums in basic education provisioning that can be addressed through mobilisation, advocacy, and even litigation.

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People need to pool their collective skills and knowledge to improve the resourcing of education. Below is a brief listing of potential examples of future education-provisioning campaigns.

Campaigns for the development of norms and standards for a quality basic education:
- Section 5(A) requires that the Minister of Basic Education provide norms and standards for Learner Teacher Personnel Provisioning for inclusive education; which provokes the implementation plans to meet the deadlines imposed by the Regulations. Following the BJECA judgment that requires government to provide every learner at public schools with every prescribed textbook for his or her grade before commencement of the academic year, SECTION27 and the organisation Better Education for All have been closely monitoring textbook delivery in Limpopo Province to ensure that all textbooks are delivered to all learners in all subjects. Similar monitoring initiatives should also occur in other provinces where there have been reports of textbook shortages.

Expanding the basket of entitlements that are essential to a basic education:
- Schools for the visually impaired rely on Perkins Braille Machines (“braille”) to enable learners to write and take notes. Blind learners also write their examinations using braille.