South Africa is facing an education crisis, and one of the factors contributing to this crisis is the shortage of teachers in many schools. This problem is particularly severe in the Eastern Cape. For the most part, teacher shortages are caused by an incorrect allocation of teachers to schools. As a result, some schools end up with far more teachers than they need, while other schools have too few.

Post provisioning is the name given to the process of assigning teachers to schools across South Africa. It is a mechanism that aims to ensure that each school is allocated the correct number of teachers. The Member of the Executive Council (MEC) for Education in a province will determine the number and allocation of teacher posts, referred to as the ‘teacher-post establishment’ or ‘post basket’. Once the whole teacher-post establishment is determined for the province, posts are then allocated to schools.

This process is governed by the Employment of Educators Act 76 of 1998, and the policy that comes from it. In order to determine the correct number of teachers for a particular school, the following factors should be considered:

- The number of learners at the school
- The number of learners with special educational needs at the school
- The number of grades each school caters for
- The subjects offered by a particular school

Posts are allocated to schools by the Head of the Department of Education. In practice, this is done by an official at the Provincial Department of Education, using a computerised model. The Head of the Department’s office will issue each school with an allocation of posts each year. There are then various mechanisms in place that make sure that a teacher is appointed to each of these posts. If these mechanisms function well, there will not be an issue with teacher shortages in some schools and too many teachers in others. The mechanism should ensure a more equal distribution of teachers to schools. In turn, this will increase the quality of education at these schools.

This chapter will examine the steps that are to be taken – by both the Department of Education and the schools – during the post-provisioning process. It outlines the common problems that occur, how these should be addressed, and how to secure the payment of teachers by the Department of Education. The chapter will also explore ways to compel the Department of Education to fulfil its obligations in terms of the post-provisioning model without resorting to court action. It will conclude with a brief discussion on court cases that have already taken place that deal directly with problems in post provisioning in South Africa.

Lastly, this chapter will discuss why it is important that the post provisioning process works well in terms of addressing inequalities in the education system.
The Post-Provisioning Process is set out in three pieces of legislation:

- The Employment of Educators Act 76 of 1998 (EEA)
- The South African Schools Act 84 of 1996 (Referred to in this handbook as ‘The Schools Act’)
- The Labour Relations Act 66 of 1995 (LRA)

It is also necessary to consider the various policies implemented by the Department of Education that come directly from this legislation. The Post-Provisioning Model (PPM) envisages a process to be followed annually, in which an MEC calculates the number of teaching posts required by the provinces, and the Heads of Department (HODs) calculate the number of teaching posts required by each public school in the province and then allocate teachers to vacant posts. The aim of the PPM is to make sure that all schools are staffed adequately and run optimally.

While the outline of the process is contained in the legislation mentioned above, provinces may depart slightly from the standard model.

Section 5(3)(b) of the EEA states that ‘the educator establishment of a provincial department of education shall consist of the posts created by the Member of the Executive Council’ in other words, before an individual school’s post establishment is determined, the MEC must establish the overall provincial post establishment. This is the overall number of posts available for teachers in a particular province that the province can then distribute to schools for the following academic year.

It is only after the MEC for a province has created the provincial post establishment that the HOD of the province can allocate post establishments to individual schools. Individual post establishments provide each school with an indication of the number of teachers allocated to that school, and the total level of the allocated teachers and management staff, for example: one Principal, one Deputy Principal, four Heads of Department and 20 level 1 teachers.

A school’s post establishment is supposed to align with the specific needs of each school. The formula for determining the number of teachers needed for each school considers the following:

1. Maximum ideal class size applicable to a specific learning area or phase
2. Number of periods for each teacher
3. Need to promote a learning area
4. The size of the school
5. Number of grades
6. Number of languages of instruction
7. Disabilities of learners
8. Access to curriculum/what subjects are offered
9. Poverty (the department is supposed to place additional teachers at poor schools)
10. Level of funding (from just the DOE)

Although the formula for a school’s post establishment is comprehensive, in some instances it can lead to a skewed learner-to-teacher ratio, with some teachers teaching classes with low numbers of learners, while others teach classes of more than 40 learners. The Department of Education has a desired learner-to-teacher ratio of 40:1 in ordinary primary schools, and 35:1 in ordinary secondary schools. This ratio is not in place at all schools across the country, and many schools still suffer from a great shortage of teachers.

Some schools are able to achieve a lower learner-to-teacher ratio if they offer more subjects and if they are able to properly diagnose and identify learners with special needs. This often favours the wealthier schools, who have the resources to identify learners with special needs and who are able to offer more subjects through the use of teachers appointed by the school governing body. Poorer schools are forced to offer a limited number of ‘core’ subjects due to the low learner numbers and shortage of teachers funded by the provincial education department. The MEC and HOD are not the only actors in the post-establishment process. They must engage with the recognised unions representing various staff in the education sector. The law states that the provincial post establishment should be decided in consultation with these bodies before the post establishments are created. The main unions in South Africa are:

- The South African Democratic Teachers Union (SADTU) – largest membership
- The National Professional Teachers’ Organisation of South Africa (Naptosa) – second-largest membership
- The South African Teachers Union (in Afrikaans: Suid-Afrikaanse Onderwysersunie) (SAOU)

The HOD requires accurate data from each school in order to determine each school’s post establishment. Because factors at schools change, school post establishments are not fixed. These factors include: a change in the number of learners enrolled at a particular school, a change of curriculum, a change in the grading and classification of a school (for example, from no-fee to fee-paying), and financial constraints.

Many of the poorer schools are immediately disadvantaged as they are not able to or do not submit accurate data to the provincial education department – often because of practical hurdles, such as not having phones, faxes or email facilities – and there appears to be little incentive for district offices to ensure that this data is obtained and submitted in the appropriate form. This leaves many schools under-resourced, on an ongoing basis, and discriminates against learners at these schools.

The process begins with the calculation of the number of posts required by the province.

The Post-Provisioning Model (PPM) envisages a process to be followed annually, in which an MEC calculates the number of teaching posts required by the provinces, and the Heads of Department (HODs) calculate the number of teaching posts required by each public school in the province and then allocate teachers to vacant posts. The aim of the PPM is to make sure that all schools are staffed adequately and run optimally.

While the outline of the process is contained in the legislation mentioned above, provinces may depart slightly from the standard model.
Once an individual school’s post establishment has been created by the HOD, the school is informed, and needs to work with the department to ensure that its posts are filled.

The department must ensure that schools receive their school post establishments by 30 September of the year before the school calendar year to which they apply. Schools use their post allocation to plan for the year ahead, and to decide on their budget. Based on the budget and allocation of teachers, in fee-paying schools the SGB might decide to increase school fees to increase the funds available to hire additional teachers – known as ‘school governing body teachers’ – and plan their subject and class allocation for each teacher. The timely release of the post allocation is critical to the preparation of the school’s budget. The release of a school’s post establishment to the school can be done in different ways, including printing and posting the school-establishment letters directly to the school, printing and distributing a letter via the district office, or emailing the school or district office. They are commonly collected by the schools from the district offices.

Once the SGB knows their post establishment for the year, they set about filling any vacant posts.

The SGB submits profiles of their vacant substantive (teaching and management) posts to the department. These vacancies are advertised in post bulletins. Post bulletins allow teachers to become aware of the vacancies in public schools. A teacher becomes a potential candidate when he or she submits an application to the department. The application is then forwarded to the relevant SGB for consideration.

Many provinces have a priority placement facility for teachers who received bursaries to study from Funza Lushaka bursary-holders. The SGB submits profiles of their vacant substantive (teaching and management) posts to the department. These vacancies are advertised in post bulletins. If a teacher is interested in applying for a position, they submit an application to the SGB. The SGB sorts through the applications and distributes them to the relevant department.

The timeous release of the post application is critical to the preparation of the school’s budget. The release of a school’s post establishment to the school can be done in different ways, including printing and posting the school-establishment letters directly to the school, printing and distributing a letter via the district office, or emailing the school or district office. They are commonly collected by the schools from the district offices.

Once applications have been sent to a school, it can begin the process of short-listing and interviewing potential candidates. This is done by the SGB. Although the SGB has significant power and discretion with regard to the appointment of teachers, the final power to appoint or transfer a teacher lies with the provincial head of the education department. These powers and functions are laid out in both the EEA and Section 20 of the Schools Act. This process generally takes a long time, as the applications for each vacancy are first submitted to the department. The department must sort the applications and distribute them to each school. The school has two months within which it must complete the interview and recommendation process. According to Section 6(3)(a) of the EEA, after SGBs make recommendations for the posts based on their interviews, final appointments of teachers are made by the department. However, there are limitations regarding which teachers the SGBs can recommend for a post. The SGB can only recommend candidates that the HOD has identified as being:

- From a group of teachers identified as being in excess of what is required within a province.
- Required within a province.

Similarly, the SGB must ensure that its recommendations for appointment take into account Section 6(3)(b) of the EEA, which provides that all appointments and recommendations must be in line with the principles of equity, representation and redress. The SGB must submit three names to the department for each post. If they submit fewer than three names per post, this must be done through consultation with the HOD. In order for the recommendations from the SGB to be considered by the department they must conform to conditions set out in Section 6(3)(b)(i)-(v) of the EEA. These include:

1. The democratic values and principles referred to in section 7(1) (equality, equity and the other democratic values and principles in the Constitution of South Africa)
2. Any procedure whereby it is established or determined by the Minister for the appointment, promotion or transfer
3. Any requirement collectively agreed on or determined by the Minister for the appointment, promotion or transfer

Lastly, if the SGB fails to make a recommendation within two months after it was requested to do so, the EEA provides that the HOD is authorised to make an appointment without a recommendation.

The allocation of teachers is not altogether straightforward. The SGB must submit three names to the department for each post. If they submit fewer than three names per post, this must be done through consultation with the HOD. In order for the recommendations from the SGB to be considered by the department they must conform to conditions set out in Section 6(3)(b)(i)-(v) of the EEA. These include:

1. The democratic values and principles referred to in section 7(1) (equality, equity and the other democratic values and principles in the Constitution of South Africa)
2. Any procedure whereby it is established or determined by the Minister for the appointment, promotion or transfer
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Lastly, if the SGB fails to make a recommendation within two months after it was requested to do so, the EEA provides that the HOD is authorised to make an appointment without a recommendation.
PROBLEMS AND POSSIBLE SOLUTIONS IN POST PROVISIONING

THE DEPARTMENT FAILS TO ADVERTISE VACANT POSTS
When the provincial department fails to fulfil its obligation to advertise posts, there are a number of steps that can be taken by schools to ensure the obligation is fulfilled.

Firstly, if the school’s SGB is part of an education-related union, such as the Federation of Governing Bodies of South African Schools (FEDSAS) or SADTU, the school should take up the matter with its union. The union can help to put pressure on the department to advertise vacant posts.

If the school is not associated with a union, or if this approach fails, the school could communicate directly with the department. This might involve writing to the department to highlight the posts allocated to the school in the post establishment, and pointing out that such positions have not been advertised by the department. This step should always be taken prior to litigation, to give the department a chance to fulfil its duty.

Only if the department is unresponsive or makes it clear that it does not intend to fulfil its obligation should schools resort to litigation (going to court). Litigation has been successful in the past.

THE DEPARTMENT ADVERTISES VACANT POSTS BUT FAILS TO MAKE APPOINTMENTS
It may be that the department does advertise the vacant posts, and the SGB of the school may then perform its role of recommending appointments; but then the department fails to make the appointments. In some instances, the department does not make the appointments because it no longer has the budget available to do so.

When the department fails to make an appointment, similar steps should be taken as in the situation in which the department fails to advertise at all (described above).

Schools should not simply fill these posts themselves, unless they have the funds to pay the appointed person.

There are many instances in which a school appoints a teacher, and tells that teacher that in due course the department will issue a letter of appointment and pay that teacher.

If a teacher is appointed in this manner, the department may not be obliged to appoint or pay him or her. It is very important for a school to keep records carefully, in order to reclaim funds or in case litigation may follow. These include records of all communication between the school and the department, the dates of appointment of the teachers, and records of amounts paid by the school to the teachers. Under no circumstances should a school appoint a teacher who is not suitably qualified or for whom they do not have a substantive vacancy.

THE DEPARTMENT APPOINTS BUT DOES NOT PAY TEACHERS
Even when posts have been advertised appropriately by the department, recommendations have been made by the school, and appointments have been made by the department, the department may fail to pay the appointed teachers.

Once again, similar steps to those in the two scenarios above should be taken in order to put pressure on the department to fulfil its obligation.

The school should attempt to resolve the issue by taking the matter to the union and approaching the department before proceeding with litigation. It is very difficult to succeed in forcing the department to pay appointed teachers if no letter of appointment has been issued. This means it is important to ensure that such a letter is issued.

If the department fails to issue a letter of appointment, then the teacher in question must not begin working at the school. It is the responsibility of the teacher in question, as well as of the principal of the school, to ensure that this does not happen.

If there is no letter of appointment, the school and the teacher should proceed on the assumption that the teacher does not have a contract of employment, and should not rely on verbal guarantees by the department that a letter of appointment will be issued. If a teacher begins work without a letter of appointment and the department fails to pay that teacher, there will be no contract to rely on in order to force the department to pay.
There have been a number of important cases concerning the issue of post provisioning in the Eastern Cape. These cases will be discussed below.

### CENTRE FOR CHILD LAW

In 2012, a number of schools in the Eastern Cape approached the LRC for assistance with their teacher shortages. The LRC began by writing to the Department of Basic Education to request that the problem be addressed, and that the posts be filled.

The department was unresponsive. The LRC launched an application on behalf of a group of named schools and the Centre for Child Law (CCL), which acted in the interests of all schools in the Eastern Cape. This decision in this case can be found in the law reports. Its official description is Centre for Child Law & Others v Minister of Basic Education & Others (known as Linkside I). The department failed to comply with the court order, except in respect of the appointment and payment of temporary teachers in 2012. Because the matter had been pursued in the public interest, most of the schools represented were nameless, and it was very difficult to assess the impact on those schools of the department’s failure to adhere to the terms of the court order.

The LRC decided that the best approach going forward was to enforce the order with regard to approximately 10 schools with which the CCL had a relationship, and where the implementation of the order could be monitored properly.

The impact on these schools due to the department’s failure to comply with the court order was that the schools had to appoint teachers out of their own budgets. So the order was enforced by approaching the courts and asking them to force the department to appoint the teachers who had been teaching at the schools, and pay their salaries from the beginning of that year (1 January 2013).

The Grahamstown High Court was approached, and an order was granted by consent. This means that the department agreed to the court order. The teachers were furnished with letters of appointment. However, the department failed to pay the teachers in accordance with the order. In response, the LRC applied to court for an order that the failure to pay a teacher in terms of a letter of appointment was a debt owed by the state to the teacher in question, in terms of the State Liability Act. The Minister and the MEC’s assets at both national and provincial level were ‘attached’ by the Sheriff to pay off the debt. This technique was successful in forcing the department to reimburse the schools in compliance with the order. Due to the manner in which the LRC had structured the court order, this debt could be recovered through the State Liability Act. The Minister and the MEC’s assets at both national and provincial level were attached by the Sheriff to pay off the debt. This technique was successful in forcing the department to reimburse the schools. The final important element of this case was that the LRC applied for certification of an opt-in class action, which was granted by the court. This will be explained below.

### LINKSIDE I

In the aftermath of the Centre for Child Law case, there remained a serious problem with post provisioning in the Eastern Cape.

Once again, the LRC launched proceedings in the Grahamstown High Court, this time on behalf of Linkside High School and approximately 35 other schools. The name of the case is Linkside and Others v Minister of Basic Education (known as Linkside II).

Once again, the LRC wanted vacant posts to be filled on a temporary basis in the short term, and permanently in the long term. The LRC also wanted the department to reimburse the schools for all payments made by schools (R28 million) in the three preceding years, to teachers who should have been appointed and paid by the government.

Because of the lack of compliance in the Centre for Child Law case, the order in Linkside II was formulated to include ‘deeming clauses’. This meant that if the department failed to appoint recommended teachers to the posts after a specified period of time, the appointments would be deemed to have been made. The order was granted, and the appointments were made in terms of the deeming clauses. However, the department failed to reimburse the schools in compliance with the order. Due to the manner in which the LRC had structured the court order, this debt could be recovered through the State Liability Act. The Minister and the MEC’s assets at both national and provincial level were attached by the Sheriff to pay off the debt. This technique was successful in forcing the department to reimburse the schools. The final important element of this case was that the LRC applied for certification of an opt-in class action, which was granted by the court. This will be explained below.

### LINKSIDE II

Knowing that many more schools were affected by the failures of the post provisioning process, following Linkside I the LRC went ahead with a class-action court case in order to address teacher shortages throughout the Eastern Cape.

A class action is an action brought on behalf of a large group of people or entities who are in a similar situation. In this case, a class action was brought on behalf of schools in the Eastern Cape who had substantive vacant posts that had not been filled from 2013 to 2014. This was an opt-in class action, which can be contrasted with an opt-out class action. In an opt-in class action, only the parties who expressly indicate that they want to be a part of the class action are included, whereas those who do not express an interest in joining the action are excluded.

The LRC decided on an opt-in class action, because this allowed the schools that wanted representation to approach the LRC with details of their problems. This avoided the problem that was faced in the Centre for Child Law – where the case was brought in the public interest, the LRC did not know the exact details of the schools they represented, and so the order was difficult to enforce. The opt-in approach allowed the LRC to have all the necessary details of the schools they represented, and to know exactly which teachers needed to be appointed where, and (where proper records had been kept) how much was owed to each school.

About 80 schools in the Eastern Cape chose to opt in to the class action. The order in Linkside II was constructed similarly to that in Linkside I – with deeming clauses, and that state assets could be attached to enforce reimbursement to schools. This was crucial for effective enforcement of the order.

The outcome of the case was that all the named teachers were appointed to the vacant posts, and about R28 million was paid out to the schools. The only outstanding clause of the court order, with which the department failed to comply, was the publishing of an open-teacher-post bulletin advertising the vacant positions at schools.

The LRC then went back to court to institute ‘contempt of court’ proceedings. The bulletin was finally published on 1 April 2016. This was the first open-teacher-post bulletin published in the Eastern Cape since 2012. Most of the provinces publish teacher-post bulletins on a regular basis.

One interesting aspect of Linkside II, and a novel approach in South African law, was to ask the court to order that the department appoint a ‘claims administrator’. The court ordered that a registered charitable accountant act as a claims administrator. This avoided the problem that was faced in the Centre for Child Law – where the department did not have to verify each school’s claim and then pay them the appropriate amount. This meant that no claim was paid unless the school had the paperwork to confirm that they had the vacancy on their post establishment, that the teacher had been appointed and had been paid by them (proof of payment was critical). On the whole, Linkside II was a resounding success, but it did not benefit poorer schools that were not able to join the class action, or did not have the paperwork to support their claims.
MTHATHA IN THE EASTERN CAPE

Lawyers from the Legal Resources Centre recently visited schools in the Mthatha area. The visit revealed that many schools had requested the Eastern Cape Department of Basic Education to assess the learners, but had received little or no feedback from them. In some instances the schools had been notified that assessments would be conducted, but on the day of assessment there was such an overwhelming number of learners who had to be assessed that the officials from the department refused to assess anyone.

During the visit by the LRC, principals and teachers also complained that they do not have the capacity to accommodate children who are struggling, as they are already coping with overcrowded classrooms. Some teachers reported staying behind in the afternoons to assist special-needs learners in their own time, while others expressed the need for a class assistant to deal with the special-needs learners.

Schools reported that in many instances, learners with special needs end up leaving the school system prematurely because their parents realise that they will not be able to cope with the work. Schools reported that drug abuse was especially prevalent in these instances, with learners unable to cope with the work.

The case study

The number of public schools that make specific provision for learners with special needs is inadequate, and children with special education needs are often accommodated within the mainstream education system. This places a burden on teachers, who are expected to teach in already overcrowded classrooms while accommodating learners who require specialist attention.

In order to address this problem, the Department of Basic Education (DBE) has published a distribution model for the allocation of educator posts to schools. The model provides for learners with disabilities and educational challenges to be allocated a weighting that reflects their relative need in terms of post provisioning.

Before a weighting can be given to a learner, the learner must be assessed in terms of the National Strategy on Screening, Identification, Assessment and Support, which forms part of the implementation of Education White Paper 6 – Special Needs Education.

The post provisioning of the school must then be adapted, to ensure that there are more teachers available to accommodate the learners with special needs. However, the DBE is failing to assess learners who have been identified as requiring special-needs education. Without the proper assessment, schools are unable to adapt their post provisioning to reflect the educator needs of their learners.

Chapter 5 deals in detail with the issues of learners with disabilities.
regular bulletins. They have a large number of vacant positions. To deal with a shortage of teachers they increase their class size, employ additional teachers, ask parents to step in and look after a class, or ask teachers to volunteer to teach these classes. Wealthier schools address this problem by increasing school fees, and paying teachers (who should have been appointed by the department) themselves. In some instances, schools spend their budget on filling teacher positions and are then unable to afford other essential services, such as security; and maintaining the school may no longer be a priority, resulting in a deterioration of the building and grounds.

However, no-fee schools are the worst affected. They cannot afford to hire extra teachers on their own budgets. Many of these schools will ask for a registration fee or a ‘donation’ from parents in order to pay a teacher a small stipend (a small amount of money to be used for transport and food, but not equal to a salary earned by other teachers). Some simply fail to employ the required number of teachers, and learners have to share teachers across different grades, or are taught by teachers who are not trained to teach a particular subject. Many schools have had to reduce the number of subjects they offer. In other instances, teachers feel compelled to work for no pay, or accept a salary that only covers the cost of transport to and from school, hoping that the Department of Education will pay them at a later stage. The failure to fill vacancies also has a negative impact on the morale of teachers, who are often unable to pay their own bills and feed their families. The proper appointment and payment of teachers is vitally important. It is very important that each teacher post is filled at the beginning of the term, and that the teachers are paid. For this to happen, regular open-post bulletins must be published. The movement of teachers due to retirement, death and between schools can be catered for in this way. Proper planning by both schools and the department should ensure that the appropriate number of teachers is placed at each school, and that these posts are filled. This is a goal supported by the Department of Education and teacher unions; but problems in implementing steps to achieve this goal are common, especially in the Eastern Cape.

Sarah Sephton was appointed as the Director of the Legal Resources Centre’s Grahamstown office in 2003. In 2015, she undertook her pupillage and was admitted to the bar. During her time at the LRC, Sephton litigated extensively on the constitutional right to education, successfully securing valuable resources for many schools in the Eastern Cape. This publication is based on legal papers drafted by the Legal Resources Centre for the purpose of litigation on post provisioning. Only one of these cases has been reported in the Law Reports. The author was the attorney of record in this litigation.

It is very important that each teacher post is filled at the beginning of the term, and that the teachers are paid.