



**EQUAL EDUCATION LAW CENTRE AND SECTION27 SUBMISSION TO THE
DEPARTMENT OF BASIC EDUCATION IN RESPECT OF THE DRAFT “NATIONAL
POLICY ON THE PREVENTION AND MANAGEMENT OF LEARNER PREGNANCY IN
SCHOOLS”**

APRIL 2018

I. INTRODUCTION

1. This is a joint submission by the Equal Education Law Centre (“**EELC**”) and SECTION27. This submission and the recommendations contained herein have also been endorsed by the Legal Resources Centre.¹
2. The EELC and SECTION27 are public interest law centres committed to defending and advancing human rights in South Africa. In particular, we are part of a small number of public interest organisations using legal advocacy and strategic litigation to achieve equitable and adequate basic education for all.
3. Our organisations have consistently been involved with issues relating to pregnancy in schools, including but not limited to, assisting pregnant learners who have been unlawfully excluded from schools.
4. The EELC has also represented Equal Education (“**EE**”), a membership-based, social movement of learners, parents, teachers and community members, as a ‘friend of the court’, in the Constitutional Court in the “*Welkom and Harmony*” case.² The case concerned the unlawful exclusion of pregnant learners from their schools and dealt with, *inter alia*, “*the rights that must be observed when formulating and implementing pregnancy policies for learners and the manner in which those rights are protected*”.³
5. SECTION27 continues to represent learners who have been sexually abused at schools and has since been involved in providing workshops and learning material to communities, learners and teachers on issues related to sexual abuse at school including sexual and reproductive health rights literacy.
6. It is also worth noting that both organisations have commented extensively on related policies, including the National Integrated Health Policy and the then draft National Policy on HIV, STIs and TB, published on 5 May 2015 (“**Draft HIV Policy**”). Apart from providing a detailed analysis of the Draft HIV Policy, the EE and the EELC also noted in their submissions the failure of the Draft HIV Policy to deal with pregnancy in schools. In fact,

¹ We also thank the Oxford Human Rights Hub for their research contribution, in particular, in respect of international and regional comparative laws, policies and principles relating to learner pregnancy.

² *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2013 (9) SA 22A(CC); 2014 (2) SA 228 (CC).

³ *Welkom and Harmony* note 2, at para 1.

the Draft HIV Policy failed to mention pregnancy *at all*. EE and the EELC noted further that a policy concerning HIV in schools is inextricably connected to the issue of learner pregnancy, and that in order to address one issue, one needs to engage with the other.

7. We note that a final version of Draft HIV Policy was published on 15 June 2017 (“**Final HIV Policy**”), and encouragingly, this final version addresses the issue of learner pregnancy and acknowledges it as being associated with considerations of HIV “*insofar as its prevention relies on the same means, including the correct and consistent use of the barrier protection of male or female condoms*”.⁴
8. The EELC and SECTION27 commend the DBE for its recognition of the link between learner pregnancy and HIV and other sexually transmitted illnesses in the Final HIV Policy, and for its publication of this specific draft National Policy on the Prevention and Management of Learner Pregnancy in Schools (“**Draft Policy**”).
9. We welcome the opportunity to provide input on the Draft Policy, which has the potential to, amongst other things, reduce the incidence of learner pregnancy, through the provision of quality comprehensive sexual education (“**CSE**”) and sexual reproductive health services (“**SRHS**”), and to promote the Constitutional rights of pregnant learners by ensuring retention of pregnant learners in the education system, and enabling a stigma-free, non-discriminatory environment for pregnant learners pre- and post-delivery.⁵
10. Accordingly, this submission makes a few general comments in respect of the Draft Policy. We then comment more specifically on each section of the Draft Policy and set out our recommendations for revising the Draft Policy. For ease of reference, we also include as Annexe A to the submission, a summary of each of our recommendations in respect of the Draft Policy.

II. GENERAL COMMENTS

a. *Vagueness of the Draft Policy*

⁴ DBE National Policy on HIV, STIs and TB, 15 June 2017, in the ‘Glossary of Terminology’, at page x. Regrettably, we note that the Final HIV Policy refers only to ‘unplanned’ pregnancies. It does not take account of circumstances in which learners in school have ‘planned’ pregnancies. All pregnant learners or mothers in school should have access to the rights contemplated in that policy.

⁵ DBE Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools, 23 February 2018, at section 3.

11. The Draft Policy is well-intentioned, however, in its current form it does not provide sufficient information for implementers to understand and to effectively implement the Draft Policy. In many respects, it does not serve the purpose of a policy, but instead appears to be a collection of broad policy statements in respect of the Department of Basic Education's ("DBEs") overall approach to school pregnancy. The DBE seeks to remedy some of the lack of detail and ambiguity through the development of an Implementation Plan. We were informed by the DBE that such Implementation Plan has not yet been drafted and will only be devised and finalised once the Draft Policy has been finalised. Without the benefit of being able to review and comment on the Implementation Plan, we cannot meaningfully assess whether the proposed Implementation Plan will sufficiently mitigate the vagueness of the Draft Policy
12. Moreover, whilst we agree that the purpose of the Implementation Plan will be to set out further specifics about the Draft Policy and its implementation protocols, and that not all such detail need be included in the Draft Policy itself, it is our view that in order for the Draft Policy to be effective, the vagueness which exists in the Draft Policy as a standalone instrument needs to be addressed.
13. As we understand it, an Implementation Plan is the more practical instrument of policy development and is intended to provide practical steps and guidance as to how the specific aims of the Draft Policy are to be achieved. Therefore, an Implementation Plan cannot take the place of or perform the functions of a policy document and it remains important for the Draft Policy, as a standalone instrument, to clearly assert its aims and to provide sufficient clarity for the role players implementing the Draft Policy and for those affected by the Draft Policy.
14. We appreciate that "policy" is difficult to define, however, various authors have described that it constitutes "*[a] proposed course of action or guidelines to follow to reach particular goals and objectives*"⁶. It is "*an authoritative statement on what government chooses to do or not to do and incorporate[s] the authoritative allocation of values for the society*"⁷. Further, it is necessary for policy to be articulated in sufficient detail to provide a level of

⁶ Roux NL, Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure. *Journal of Public Administration*, vol 37 no 4, December 2002 at 425.

⁷ *Ibid.*

stability, predictability and to enable a general understanding. It ought to articulate provisions so that role players are able to carry out their duties effectively.

15. In many aspects, the Draft Policy falls short of this definition. Examples of aspects of the Draft Policy which lack sufficient clarity, or which do not provide a clear course of action include, amongst other things:

15.1 the extent of the right of access to CSE and SRHS;

15.2 the meaning of “SRHS”, and who is responsible for providing these services (and more broadly, the approach to intergovernmental cooperation in the Draft Policy);

15.3 how the Draft Policy is to be funded, particularly because the implementation of the Draft Policy requires significant planning and resources;

15.4 details regarding the reasonable accommodation to be provided to pregnant learners before and after delivery; and

15.5 the procedure for handling incidents of learner pregnancy at schools.

b. Reliance on the Integrated School Health Policy for implementation

16. Throughout the Draft Policy, reliance is placed on nurses appointed under the Integrated School Health Policy (“**ISHP**”) to provide the services contemplated in the Draft Policy. This includes, provision of condoms and contraceptive services; care, counselling and support; information on termination of pregnancy; and general SRHS. It is important to note that since its inception, the ISHP has not been without major challenges. Some of these challenges include:

16.1 **Lack of communication:** The Department of Health (“**DOH**”) and DBE are mainly responsible for the development of policies such as the ISHP. The ISHP is then communicated to schools through the Provincial Basic Education Department. It then becomes the responsibility of the school managers to implement the ISHP. In many cases, however, there seems to be a lack of communication between the department and schools as well as inadequate training of school managers with respect to policy implementation.

16.2 **Lack of clarity on roles and responsibilities:** Research done by Restless Development South Africa⁸ notes that while all the district officials reported good awareness of the ISHP and acknowledged that they had been trained on the programme, school managers and primary healthcare facility managers reported receiving no training and not knowing what role they played in the implementation of the policy. Moreover, all the districts reported a lack of support and cooperation and a lack of uniformity in the implementation of the ISHP.

16.3 **Shortage of staff:** There are extreme shortages of professional nurses in general, and especially in rural areas. This serves as a major obstacle for all learners, particularly in rural schools wishing to access health services.

16.4 **Lack of transport:** There is a lack of transport to and from schools for those few nurses who are available to render their services.

16.5 **Lack of monitoring and support:** As at 2016, indicators for monitoring and evaluating systems to measure performance and evaluate ISHP outcomes were still under construction.⁹ Researchers found that one hundred percent of school managers admitted that no audit was completed at the schools to implement the programme effectively.¹⁰

17. Given all the challenges and difficulties associated with the implementation of the ISHP, it is clear that heavy reliance on ISHP nurses or mobile units may result in many of the services envisaged by the Draft Policy not being provided.

c. Protection of the rights of learner fathers

18. We note the Draft Policy's silence on the protection of the rights of learner fathers who may be required to leave school in order to financially provide for his child or to provide

⁸ Restless Development South Africa. 2013. Advocacy campaigns with school governing bodies in priority districts (OR Tambo, Alfred Nzo & Amathole) on young people's access to integrated SRH/HIV, GBV and prevention of teenage pregnancy. A final Report to UNFPA South Africa, Restless Development South Africa, East London at 13.

⁹ Shung-King, M, Orgill, M & Slemming, W. 2014. *School health in South Africa: reflections of the past and prospects for the future*. Durban: Health Systems Trust at 64.

¹⁰ Restless Development South Africa note 8, at 13.

support in the form of child care. This is mirrored by the absence of research and commentary on this issue, which in many ways reflects the society and gender prejudices that all responsibilities associated with child-rearing fall on the female learner.

19. **Accordingly, we recommend that:**

19.1 the Draft Policy be amended to provide for a clear, stand-alone framework for policy implementers to follow in order to achieve the objectives articulated in the Draft Policy, and that the proposed Implementation Plan be published for comment as a matter of urgency in order for us and other stakeholders to assess the adequacy of the Draft Policy when read with the Implementation Plan;

19.1.1 the challenges associated with implementation of the ISHP be acknowledged and accounted for when implementing the Draft Policy; and

19.1.2 the Draft Policy acknowledge the rights of learner fathers who may be required to leave school in order to support his child.

III. SPECIFIC COMMENTS

a) Preamble and purpose

20. We take issue with the framing of the Draft Policy. The beginning of the 'Preamble and Purpose' section of the Draft Policy, learner pregnancy is described as a "major social, systemic and fiscal challenge not only for the basic education sector, but crucially, for national development...."¹¹ This seems to place more emphasis on government planning than on ensuring access to education for pregnant learners. It is our view that the Draft Policy must be framed, from the outset, in terms of the absolute nature of the right of learners to access basic education and the state's duty to protect and promote this right.

21. Further, the Draft Policy must at all times be applied in the context of the Constitutional rights which underpin it. These are expressly stated in the Draft Policy to include the

¹¹ Draft Policy note 5, at section 1.

rights to education, non-discrimination, privacy, bodily and psychological integrity and dignity.¹² We note the absence of the crucial principle that, in matters concerning children, their interests are to be considered paramount. We believe this to be a critical error and omission in the framing of the Draft Policy.

22. **We therefore recommend that the *Preamble and purpose* section be amended to frame the Draft Policy in terms of the centrality of the rights of learners, and to expressly include the principle of the best interests of the child being paramount.**

b) Guiding principles

23. The Draft Policy sets out a list of key guiding principles which are informed by and are consistent with a number of local, regional and international obligations, commitments and targets,¹³ and which “serve as absolute points of reference in terms of its interpretation and application”.¹⁴ These guiding principles relate broadly to:

23.1 access to pregnancy prevention, comprehensive sexual education and sexual reproductive health services (*sections 5.3 – 5.5*);

23.2 access to counselling, care and support (*section 5.6*);

23.3 access to education (*section 5.1*)

23.4 the reasonable accommodation and retention of pregnant learners in the basic education system (*section 5.9*);

23.5 enabling a stigma-free, non-discriminatory environment for pregnant learners pre- and post-delivery, by *inter alia*, facilitating gender equality (*sections 5.5 and 5.7*);

23.6 ensuring the protection of the pregnant learner’s rights to dignity, privacy and confidentiality (*section 5.8*); and

23.7 the facilitation of critical partnerships with key stakeholders (*section 5.10*).

¹² Ibid.

¹³ Draft Policy note 5, at section 5.

¹⁴ Ibid.

24. We address some general, overarching concerns with the framing of these guiding principles below.

i. Access to comprehensive pregnancy prevention, CSE and SRHS

25. The Draft Policy makes provision for access to comprehensive pregnancy prevention, CSE and SRHS for children. In some places in the Draft Policy, access is limited by age, and in others it is provided without limitation. This causes internal inconsistencies which must be addressed. An example is at section 5.2 of the Draft Policy, which provides that every learner “*over the age of 12 years*” has the right to access means to protect themselves from unintended pregnancy.¹⁵ The Draft Policy then goes on to state that “*accurate, age-appropriate and comprehensive information and materials on SRHR, delayed sexual debut... and termination of pregnancy services will be made available or accessible to all learners....*”¹⁶ The Draft Policy is therefore inconsistent on who is able to access pregnancy prevention services, CSE and SRHS.

26. The inconsistency is further perpetuated by the Draft Policy providing that “*every learner in the basic education system from the end of its primary phase has the right to quality CSE...*”¹⁷ While we encourage the inclusion of the “quality” criterion in the provision of CSE, it is not clear what is meant by “*end of primary phase*”. We are uncertain whether the Draft Policy means that quality CSE should be provided at the beginning of high school/senior phase or the last few grades from the end of the primary phase i.e. grades 5-7. This needs to be clarified for proper understanding and implementation of the Draft Policy. As mentioned above, we note that elsewhere in the Draft Policy, rather than referring to the “primary phase”, the Draft Policy specifies that “*all learners will have access to CSE and other information*”.

27. As noted above, in some places, the Draft Policy uses age as means to limit access. We question the appropriateness of such age limitation, as well as the rationality of setting such age or grade marker at *12 years*, or at the *end of the primary phase*. The South African Medical Council’s 2nd South African National Youth Risk Behaviour Survey

¹⁵ Ibid at section 5.2.

¹⁶ Ibid at section 6.2.3.1.

¹⁷ Ibid at section 5.4.

(“YRBS”)¹⁸ found that the prevalence of learners who reported having first had sex before the age of fourteen years was 12.6%. Further that learners aged 13 years and younger who are engaging in sex are significantly less likely to use condoms, compared to other age groups:

*“significantly fewer learners [of] 13 years and younger (21.1%) used condoms as a method of contraception when compared to 16-year olds (45.6%), 17 year olds (47.4%), 18 year olds (50.6%) and those 19 years or older (45.8%).”*¹⁹ [Emphasis added]

28. Additionally, DBE statistics start measuring learner pregnancies as early as Grade 3.
29. The abovementioned statistics demonstrate that minors of a very young age (including those younger than 12, or at the beginning of the ‘primary phase’) are engaging in sexual activities and face a real risk of falling pregnant and/or contracting HIV/STI’s. Thus, efforts to provide access to comprehensive pregnancy prevention, CSE and SRHS must not be limited by age or even grade.
30. The Draft Policy makes provision for access to SRHS.²⁰ Whilst this is welcomed and appreciated, the Draft Policy fails to set out what these exactly services consist of.
31. **Accordingly, we recommend:**

31.1 the Draft Policy clarify the position on access to CSE, SRHS and pregnancy prevention services and reconsider the inclusion of the age and grade limitations to access;

31.2 that the Draft Policy clearly define the nature and extent of the SRHS envisaged.

¹⁸ *The South African Medical Council’s Second South African National Youth Risk Behaviour Survey (YRBS) 2008* at page 31. Accessible: http://www.mrc.ac.za/healthpromotion/yrbs_2008_final_report.pdf

¹⁹ Ibid at page 35.

²⁰ Draft Policy, note 5 at section 5.5.

ii. Access to education

32. The Draft Policy provides that “*every female of school age has the constitutional right to basic education and may not be denied access on the basis of her pregnancy, termination thereof, or the fact that she is a young mother*”.²¹
33. This guiding principle appears to limit the right of access to education to female learners of “*school age*”. The term “school age” is not defined in the Draft Policy, and it is unclear what is intended by the inclusion of this limitation. This lack of clarity may lead to the perhaps unintended consequence of “school age” being interpreted in line with the period of compulsory school attendance as set out in the South African Schools Act, 84 of 1996 (“**SASA**”); that is, “*from the first school day of the year in which a learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or ninth grade, whichever occurs first*”.²² This interpretation suggests that female learners older than 15 years, or who continue to grade 12, are not entitled to the same rights of access to education. Section 28(1) of the Constitution of South Africa, 1996 clearly states that *everyone* has the right to a basic education.²³ This would undoubtedly include those who wish to continue their education beyond the compulsory school going age.
34. The inclusion of the words “of school age” therefore has the potential of being interpreted unconstitutionally.
35. **We therefore recommend that the words “of school age” be removed from section 5.1 of the Draft Policy.**

iii. Reasonable accommodation and retention

36. The Draft Policy also states as one of its key guiding principles that schools will ensure the retention of pregnant learners “*during the course of their pregnancy*” and make provision for their short-, medium- and long-term absences during the term of their

²¹ Ibid, at section 5.1.

²² SASA, at section 3.

²³ The right of access to education for all is reflected in international instruments ratified by South Africa. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 13 of which protects everyone’s right to education. The Committee on Economic, Social and Cultural Rights adopted General Comment 13, which explains Article 13 of the ICESCR in more detail, and states that education must be accessible to all, without discrimination.

pregnancies. The learner *may* also return to the *appropriate grade* after giving birth, and the school and its principal and staff will take “*all reasonable steps to accommodate the learner’s learning, health and maternal needs*”.²⁴

37. The Draft Policy fails to explain what constitutes “reasonable steps” of accommodation. Ideally, and as discussed above, a policy should provide guidance on what steps must be taken in order for the relevant stakeholders to realise their obligations to facilitate reasonable accommodation.
38. Various regional instruments ratified by South Africa specifically speak about the retention of learners who become pregnant before completing their education. Notably, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) requires all African member states to take measures to promote keeping girls in schools and provides that “*State parties shall take specific positive action to (c) promote the enrolment and retention of girls in schools...*”²⁵ [Emphasis added]
39. It is therefore recommended that the Draft Policy provide guidance on what reasonable measures and *specific positive action* must be put in place in order to ensure the retention of learners who become pregnant before completing their education during and after their pregnancies.
40. A study and report commissioned by the Partners in Sexual Health (the “**PSH Report**”)²⁶ states that assisting teenage mothers to return to and to stay in school requires a “*multi-pronged response ... [and] is not merely a reproductive health matter*”, but includes social, structural and individual drivers.²⁷ Given the inextricable link between these multiple considerations, efforts must be put in place to empower young girls during this process.²⁸

²⁴ Draft Policy note 5, at section 5.9.

²⁵ Article 12(2)(c).

²⁶ Willan, S (2013). *A Review of Teenage Pregnancy in South Africa – Experiences of Schooling, and Knowledge and Access to Sexual and Reproductive Health Services*.

²⁷ Ibid at page 7.

²⁸ Panday, S., Makiwane, M., Ranchod, C., & Letsoalo, T. (2009). *Teenage Pregnancy in South Africa – With A Specific Focus on School-Going Learners*. Child, Youth, Family and Social Development, Human Sciences Research Council. Pretoria: Department of Basic Education.

41. We recommend the following factors which may affect the likelihood of teenage mothers remaining in the education system during pregnancy and returning to the classroom after giving birth, be included in the Draft Policy:

41.1 Providing a stigma free environment and requiring policies adopted in schools to be non-discriminatory and to facilitate such stigma free and judgement free environments – this will be discussed in more in detail at paragraphs 43-7 below.

41.2 Enabling a supportive environment for pregnant learners or mothers in the school environment, and empowering schools, including teachers, through training and resources, to provide the relevant support; for example, in the form of extra tutorials, and course packs for missed school work, health and nutritional support, and psychological support.

41.3 Requiring innovative methods of ensuring that affected learners are able to continue their education at the highest quality before and after giving birth, including by providing catch-up classes. In this regard, federal law in the USA, Title IX of the Education Amendments of 1972 (“**Title IX**”) states that “*when necessary, a school must make adjustments that are reasonable and responsive to the student’s temporary pregnancy status*”.²⁹ In Namibia, pregnant learners are permitted to write examinations in separate venues if they are not comfortable writing on school premises, and schools are obligated to reserve a learner’s place in school if the learner requires a long leave of absence (to a maximum of one year) following delivery.³⁰

41.4 We also note that when describing the principle of reasonable accommodation, the Draft Policy places most of its emphasis on retention of pregnant learners “*during the course of their pregnancy*”, i.e. ‘pregnant learners’, and fails to sufficiently address the rights to continued access to education of pregnant learners once they have given birth, i.e. ‘parent learners’, or issues of mothers who wish to parent at school. The Draft Policy simply provides that the

²⁹ Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972’ at page 9. Reasonable adjustments may include allowing pregnant learners to attend medical appointments or to be provided with larger desks. After birth, this may require allowing learners to breastfeed, to express and store milk, and in some circumstances to leave school to feed their babies at agreed times.

³⁰ Education Sector Policy for the Prevention and Management of Learner Pregnancy
<https://www.moe.gov.na/files/downloads/99b_Learner%20Pregnancy%20policy%20final%202010-10-18.pdf.

reasonable steps taken must accommodate the learner's *"health, learning and maternal needs"*.

41.5 Furthermore, the Draft Policy merely states that a learner *"may"* return to the *"appropriate grade"* after giving birth. The requirement to return to school is not strongly stated, creating the impression that whilst learners are not excluded from readmission, no strong emphasis is put on their re-entry. We acknowledge that this comes across more clearly elsewhere in the Draft Policy, but suggest that this be asserted clearly in the framing of the guiding principles which underpin the entire Draft Policy. The reference to *"appropriate grade"* is also unclear. In terms of Title IX, the learner must be reinstated to the same academic and extracurricular status as before her leave of absence began.³¹

42. In summary, we therefore recommend as follows in respect of reasonable accommodation:

42.1 that the Draft Policy provide guidance on what is required for reasonable accommodation in order to ensure the retention of learners who become pregnant before completing their education during and after their pregnancies; and

42.2 the inclusion of the factors referred to in paragraph 41 above be included in the Draft Policy.

iv. Creating a non-discriminatory environment and ensuring gender equality

43. The Draft Policy recognises that pregnant learners are often stigmatised and subjected to discrimination on the basis of their gender and pregnancy.

44. The Draft Policy therefore adopts the express guiding principle that learners may not be discriminated against or denied access to basic education on the grounds of gender, and that the application of the Draft Policy must be *"sensitive and responsive to the needs of female learners in particular"* and must *"recognise their particular vulnerability to gender-based violence and abuse"*.³² Furthermore, the Draft Policy requires every learner to be

³¹ Ibid at page 7.

³² Draft Policy note 5, at section 5.2.

protected from all forms of stigma and discrimination based on their gender, pregnancy or motherhood.³³

45. In the absence of a national pregnancy policy, learner pregnancy is dealt with in different ways across provinces and SGBs have been left to determine their own pregnancy policies without any guidance, with the effect that some of these policies are discriminatory. This was seen in the *Welkom/Harmony* case where the pregnancy policies in question provided for the automatic exclusion of pregnant learners and the practice of not re-admitting into the school year in which they give birth. Pregnant learners were forced to repeat their current grade should they decide to return. These policies were drafted in line with the 2007 DBE Measures for the Management and Prevention of Learner Pregnancy (“**2007 Measures**”) which facilitated discriminatory conduct by promoting a leave of absence of up to two years to “*exercise full responsibility for parenting*”.³⁴
46. The Draft Policy states that SGBs are not responsible for the implementation of the Draft Policy, but are responsible for the formulation of policies and regulations to guide the daily management of schools and that their function should be to “*facilitate and not hinder or obstruct the implementation*” of the Draft Policy and to serve as the body through which parents and communities will also be able to action their roles.³⁵ School policies are therefore invariably interpreted and applied according to the values and ‘morals’ of parents and communities.³⁶ Mechanisms should therefore be put in place to ensure that school policies and codes of conduct are applied and interpreted in a manner consistent with the Draft Policy. Such mechanisms are discussed in more detail at paragraphs 94-7 below.
47. **We accordingly recommend that the Draft Policy include express minimum guidelines which school learner pregnancy policies must contain, and which prohibit the inclusion and application of potentially discriminatory provisions.**

³³ Ibid at section 5.7.

³⁴ 2007 Measures, at section 22, page 5.

³⁵ Draft Policy note 5, at section 6.1.5.

³⁶ PSH Report note 26, at page 13.

v. The protection of the rights to dignity, privacy and confidentiality

48. The Draft Policy provides that the rights of every pregnant learner to the protection of their dignity, privacy and confidentiality, regarding their pregnancy and related health, is also assured, *“at least to the point where pregnancy is physically evident”*.³⁷
49. The inclusion of the italicised words above implies that the learners’ rights to dignity, privacy and confidentiality are only to be protected until the point at which the pregnancy is not visibly obvious. This is probably based on the reasoning that once the pregnancy is visible, confidentiality and privacy cannot be maintained. This reasoning is problematic as the Constitutional rights to dignity and privacy apply to *everyone*.
50. Moreover, the Protection of Personal Information Act (“**POPIA**”)³⁸ regulates and safeguards the ‘processing’³⁹ of a data subject’s (in this case, the learner’s) ‘personal information’ by a ‘responsible party’⁴⁰ or an ‘operator’⁴¹ on behalf of the responsible party. ‘Personal information’ includes information relating, *inter alia*, to the gender, sex, pregnancy, age and physical health of the data subject.⁴²
51. POPIA imposes special processing requirements on the processing of the personal information of children.⁴³ These requirements must be observed over and above the ordinary requirements of POPIA and observing the ordinary conditions of processing.⁴⁴ In most cases this requires the consent of a competent person (parent or guardian) to be obtained,⁴⁵ over and above obtaining the consent of the child. ‘Consent’ in terms of POPIA must be a voluntary, specific expression of will. Information deliberately made public may also be processed; however, in the case of the information of children, it is

³⁷ Ibid at section 5.8.

³⁸ Act 4 of 2013. We note that POPIA has not yet fully come into force, however, it’s coming into force is imminent, and it would be prudent for the department to ensure compliance at this stage, since once

³⁹ "Processing" is a broad term defined in POPIA to include all actions that can be carried out in relation to personal information, including collection, recording, collation, retention, updating, modification, use, dissemination, merging, linking, restriction and destruction.

⁴⁰ "Responsible party" is the public or private body (acting alone or in conjunction with others) that determines the purpose and means of processing the information and must therefore ensure compliance with POPIA.

⁴¹ An "operator" processes personal information on behalf of the responsible party in terms of a contract or mandate, without coming under the direct authority of that party.

⁴² Section 1 of POPIA.

⁴³ Sections 34-35 of POPIA.

⁴⁴ These ordinary processing conditions include, but are not limited to, ensuring that the processing is limited to a specified purpose and ensuring that appropriate, reasonable security measures are in place to mitigate any risks and prevent loss, damage, destruction and unlawful access to the personal information.

⁴⁵ Section 35 of POPIA.

likely that even if the child has deliberately made information public, the requisite express consent of the child, as well as the consent of the parent or guardian would be required when collecting the relevant information.

52. Of course, POPI must be applied having regard to the paramountcy of the rights of the child. In particular, obtaining parental consent or the consent of the guardian must not override the rights of the learner, including the learner's right not to inform her parents or guardians of the pregnancy or of her sexual activity.
53. We note that that POPIA also imposes further processing requirements on information constituting 'special personal information', which includes information relating to the health and sex life of individuals.⁴⁶
54. In respect of special personal information, the processing of information concerning a data subject's sex life of health may also be authorised if such processing is done by schools when necessary to provide special support for learners or when making special arrangements in connection with their health and sex life; *however*, such information may only be processed subject to an obligation of confidentiality, or be treated as confidential, including may way of a written agreement. As mentioned above, in respect of the processing of the information of children, such agreement will also likely require the consent of the learner's parent or guardian.
55. **Accordingly, we recommend that notwithstanding the fact that pregnancy of a learner has become visible and obvious to the public, the Draft Policy must require that the rights and privacy of the learner be prioritised, that necessary consents be obtained, and the necessary confidentiality undertakings to be put in place when collecting the personal information of learners. Confidentiality undertakings are discussed further in paragraph 88.3 below.**

vi. Facilitating critical partnerships

56. The Draft Policy states that the DBE will ensure partnerships with key stakeholders to protect, support and advance the interests of pregnant learners. These partnerships are broadly described to include all directorates and units within the national, provincial and district education departments, other government departments such as the DOH and

⁴⁶ Sections 26-33 of POPIA.

Department of Social Development (DSD), teacher unions, schools and school management teams, school governing bodies (SGBs) as well as parent communities, learner organisations, non-governmental organisations, including community-based and faith-based organisations, development partners, and academic and research institutions.⁴⁷

57. The Draft Policy states that clear guidelines to address the responsibilities of key role players is central to the success of the policy,⁴⁸ and makes reference throughout to the “roles and responsibilities” of the various partners.
58. Apart from recognising the importance of intergovernmental coordination and wider stakeholder collaboration, the Draft Policy fails to clearly stipulate and allocate roles and responsibilities and to incorporate mechanisms which ensure regular and meaningful engagement between stakeholders throughout the planning and implementation stages of the Draft Policy.
59. Poor coordination and not clearly identifying roles may result in confusing mandates and may muddy the waters when it comes to responsibilities and accountability.⁴⁹
60. It is therefore recommended that the Draft Policy clearly set out the roles and responsibilities of the various government departments and other stakeholders, as well as the timelines according to which such roles and responsibilities must be fulfilled.
61. In this regard, it is particularly important to identify the *single* responsible authority for each function. It is vague and confusing when a policy states that two departments or authorities are responsible for the same function. By way of example, the Draft Policy currently states that a “*close working relationship*” between the DBE and DOH, and the “*collaboration*” of the DBE and DOH is required when it comes to the provision of SRHS⁵⁰. Furthermore, the Draft Policy provides that the “*DBE is one of several role players responsible for the...support of pregnant learners*”.⁵¹

⁴⁷ Draft Policy note 5, at section 5.10.

⁴⁸ Ibid, at section 6.3.4.

⁴⁹ Malan, L (2005) *Intergovernmental relations and co-operative government in South Africa: The ten-year review*, at page 238.

⁵⁰ Draft Policy note 5, at sections 6.2.2 and 6.2.5.

⁵¹ Ibid, at section 6.1.7.

62. Our experience indicates that this approach leads to severe lack of coordination and role identification. We therefore urge that the Draft Policy be revised to clearly set out which relevant department will be responsible for respective functions, and that these functions be clearly defined, relative to applicable timeframes.
63. We also recommend that mechanisms be incorporated which ensure regular and meaningful engagement between stakeholders. Such mechanisms may include placing obligations on responsible parties to establish joint planning committees, to engage and consult with specified stakeholders at specified intervals (for example, quarterly or biannually), and to produce and circulate written reports of such engagements.
64. Finally, we note that critical partners include 'faith-based organisations' and wish to point out that often such organisations hold conservative views on teenage pregnancy and are reluctant to endorse inclusive policies on learner pregnancy.
65. **Accordingly, we recommend as follows:**

65.1 that the Draft Policy clearly set out the roles and responsibilities of the various government departments and other stakeholders, as well as the timelines according to which such roles and responsibilities must be fulfilled;

65.2 that mechanisms be put in place to ensure regular and meaningful engagement between stakeholders; and

65.3 that the role of faith-based organisations be clarified.

c) Prevention

66. We appreciate the provision of scientifically accurate, age-appropriate and comprehensive information on SRHR to all learners through the DBE directly or through the ISHP. This appears to be in line with United Nations organisations such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and United Nations Population Fund (UNFPA).

67. UNESCO⁵² recommends that sex education begin early in order to be effective in transforming sexual and gender norms and to protect the health and safety of young people. UNESCO provides detailed advice on how to teach each proposed topic for different age groups.⁵³ This is further supported by the UNESCO Report on Early and Unintended Pregnancy & the Education Sector, which recommends that curriculum-based comprehensive sexuality education must be delivered in schools both prior to and after puberty to prevent early and unintended pregnancies.⁵⁴

67.1 UNFPA recommends providing CSE in both formal and informal sectors and across age groupings, starting from primary school age and level.

67.2 We therefore welcome the move to ensure quality CSE for all learners.

Access to condoms

68. The Draft Policy provides for “*reasonable access to male and female condoms ... to all learners 12 years and above, dependent on their level of inquiry and need*”.⁵⁵ We reiterate our concerns regarding age limitations given the statistics mentioned at paragraph 27 of this submission.

69. Furthermore, this section seems to limit access to condoms, making access dependent on “*level of inquiry and need*”. It is unclear what this means. Does this entail learners inquiring about condoms? Will access be sufficiently discreet? Will access be granted only under certain circumstances or purely through the designated areas or mobile clinics in terms of the ISHP? Would learners be required to disclose their sexual activity in order to demonstrate need?

⁵² UNESCO et al, ‘International Technical Guidance on Sexuality Education: An Evidence-Informed Approach’ Revised Edition (UNESCO, 2018).

⁵³ For example, the learning objectives for 5 to 8 year olds include understanding that pregnancy occurs when an egg and sperm unite in the uterus (knowledge) and encouraging students to ‘express how they feel about the changes that a woman’s body undergoes during pregnancy (skill)’. For 9 to 12 years old, the aim is to appreciate how the menstrual cycle works (attitudinal). The 12 to 15 years old are meant to learn the difference between reproduction and sexual feelings (knowledge) and how to prevent unintended pregnancies (skill). The last age group is designed to ensure that students should grasp the challenges of infertility (knowledge) and develop empathy for those struggling to conceive (attitudinal).

⁵⁴ UNESCO et al, ‘Early and unintended pregnancy & the education sector: Evidence Review and Recommendations’ (UNESCO, 2018).

⁵⁵ Draft Policy note 5, at section 6.2.3.2.

70. The phrase “level of inquiry and need” must therefore be clarified and the final provision must adequately safeguard the rights of learners. This includes the right to privacy, which:

*“fosters human dignity insofar as it is premised on, and protects, an individual’s entitlement to ‘a sphere of private intimacy and autonomy’”*⁵⁶

71. The clarification must also take into account research undertaken in the area of condom distribution. Research reveals learners’ reluctance to obtain condoms when issued by an authority figure.⁵⁷ It also reveals learners reluctance to attend DOH out-of-school services⁵⁸ where they had been referred to one. These findings support the need for condoms to be available freely and discreetly to all learners.

72. Section 6.2.3 of the Draft Policy states that where schools cannot provide condoms and information on their use, learners must be referred to ISHP nurses who should ensure access to condoms and the requisite information. It is not clear what the circumstances are under which schools would not provide condoms and the necessary information. We wish to stress that this provision should not provide a loophole for schools to avoid giving learners access to condoms and information relating to the use of condoms.

73. The Draft Policy also provides that *“educators may refer pregnant learner to health clinics or school nurses for information on pregnancy termination.”*⁵⁹ This wording suggests that

⁵⁶ *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* ZACC 35; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC) at para 64. Accessible: <http://www.saflii.org/za/cases/ZACC/2013/35.html>

⁵⁷ Bennish ML, Hun J, *Condom Access in South African Schools: Law Policy and Practice*; Public Library of Science - Medicine, vol 6, issue 1, January 2009 at page 0027. Accessible: http://www.globalyouthdesk.org/index.php?option=com_k2&view=item&id=163:condom%20access%20in%20south%20african%20schools:%20law,%20policy,%20and%20practice&Itemid=63

Holt K, et al. *Assessment of Service Availability and Health Care Workers’ Opinions about Young Women’s Sexual and Reproductive Health in Soweto, South Africa*; African Journal of Reproductive Health, June 2012 at 16(2) 284. Accessible: <http://www.bioline.org.br/request?rh12037>

Blake SM et al, *Condom availability Programs in Massachusetts High Schools: Relationships with Condom Use and Sexual Behaviour*; American Journal of Public Health, vol 93, No. 6, June 2003 at page 960. Accessible: http://www.researchgate.net/profile/Susan_Blake/publication/10738008_Condom_availability_programs_in_Massachusetts_high_schools_relationships_with_condom_use_and_sexual_behavior/links/0c96052422f2beb83f000000.pdf

⁵⁸ Beksinka, ME et al., *The Sexual and Reproductive Health Needs of Youth in South Africa – history in context*; South African Medical Journal, vol. 104, No. 10, October 2014 at page 677. Accessible: <http://www.scielo.org.za/pdf/samj/v104n10/17.pdf>

⁵⁹ Draft Policy note 5, at section 6.2.4.

that the only option available to the learner is termination. This is clearly not the case, and teachers must be equipped to advise and direct learners on all available options.

74. We therefore recommend as follows:

74.1 that the phrase “level or inquiry of need” be clarified as described above, and the Draft Policy provide for free and discreet access to condoms; and

74.2 that section 6.2.4 be revised to include all options available to pregnant learners, or by amending the Draft Policy to provide that “educators may refer pregnant learner to health clinics or school nurses for all available options.”

d) Care, counselling and support

75. The Draft Policy provides that educators and other designated school personnel will be trained to provide CSE and information.⁶⁰ We applaud the inclusion of this provision as it equips educators with the tools to provide CSE and also has the effect of enabling schools to provide SRHR services to learners. This being said, we recommend that Life Orientation or Life skills (at foundation phase) teachers be specifically designated and trained to provide CSE, whilst more basic training be provided to other teachers. The reasoning behind this is that Life Orientation teachers are already trained to deal with sensitive subjects and to convey sensitive issues to learners, and thus may have already developed a relationship with learners that would allow learners to open up to them.

76. One of the central provisions of this Draft Policy is that it seeks to provide procedures for handling incidents of learner pregnancy. This is specifically set out in section 6.3.4 of the Draft Policy. However, the Draft Policy fails to provide guidelines addressing these procedures or to set out the corresponding roles and responsibilities of role players. These details are said to be contain in the Implementation Plan.

77. We have already expressed our concerns with relegating such crucial information to the Implementation Plan. It makes it difficult to gauge whether the necessary safeguards are provided for. It is also impossible to meaningfully engage with and comment on the Draft Policy without having regard to the Implementation Plan.

⁶⁰ Draft Policy note 5, at section 6.3.2.

78. We note the error in numbering - section 6.3.5 is numbered twice.
79. The Draft Policy provides that “*certain circumstances relating to learner pregnancy may give rise to mandatory or voluntary reporting by the educator appointed by the school to provide counselling, support and advice*”.⁶¹ We stress that all relevant primary legislation, in cases of sexual offences, child abuse and neglect, have mandatory reporting provisions. This provision is very important and must reflect the language contained in such legislation as failure to report carries serious consequences for the learners and the teacher/designated school official.
80. **In light of the above, we make the following recommendations:**
- 80.1 that Life Orientation teachers be specifically designated to receive training to deliver CSE with ordinary teachers receiving more basic training;**
 - 80.2 that specific procedures for handling incidents of learner pregnancy be detailed in the Draft Policy; and**
 - 80.3 that the Draft Policy reporting requirements be aligned with all relevant extant policies and legislation.**

e) *Impact mitigation*

81. Our comments below are to be read with the comments already made at paragraph 36-42 above in relation to the retention of pregnant learners in the education system pre- and post-delivery.
82. The Draft Policy provides that the basis on which the pregnant learner may be reintegrated into the basic education system after delivery “*will depend on medical advice and the point in the calendar year when she left school for delivery*”, and that the reintegration process and its timing is detailed in the Implementation Plan.⁶²

⁶¹ Ibid at section 6.3.5.

⁶² Ibid at section 6.4.2.

83. Research shows that the longer a pregnant learner stays out of school, the less likely she is to return. The amount of time spent away also impacts on likely academic performance when returning.⁶³ The timing of reintegration is therefore of critical importance. For reasons already discussed above, it is therefore wholly inadequate for the Draft Policy to simply state that the details of this timing will be detailed in the Implementation Policy. Moreover, it is unclear what is meant by the fact that timing will be dependent on the point in the calendar year when the learner left school. This criterion is arguably similar to the highly exclusionary provision in the 2007 Measures which states that the learner may not return to school in the year in which she gave birth.
84. We therefore recommend that the Draft Policy allow for learners to return to school as soon as possible, notwithstanding the point in the school year, and that more detailed criteria be provided for determining when and how this can be achieved.
85. Whilst the Draft Policy provides expressly that schools will allow pregnant learners to remain in school during and after pregnancy, it states that *“to facilitate the application of these rights, learners who are over six months pregnant will be required to submit a medical certificate indicating the status of their pregnancy and estimated delivery date”*.⁶⁴ In addition, the learner must provide medical reports to the school certifying that it is safe for her to continue her schooling if she wishes to continue her schooling beyond 30 weeks of pregnancy. Failure to provide this information without explanation, may result in the learner being asked to take a leave of absence.⁶⁵
86. Thus, if the required information is not provided, learners will be unable to access the rights provided for in the Draft Policy. This is contrary to the Constitutionally protected rights unpinning the Draft Policy. The ability to access education should not be predicated on the provision of the requested information. Moreover, and as already discussed in paragraphs 0 to 54 above, the processing of the personal information (such as pregnancy status) of children, in addition to being Constitutionally protected, is (or will soon be regulated) by POPIA.
87. As to the requirement of a medical report, whilst we can appreciate the need for schools to have such information in order to limit their liability and to take the necessary

⁶³ PSH Report note 26, at page 37.

⁶⁴ Draft Policy note 5, at section 6.4.2.

⁶⁵ Ibid.

precautionary measures, the upshot of failing to provide such information should not be a forced leave of absence. Once again, this is reminiscent of the exclusionary provisions contained in the 2007 Measures.

88. Should learners refuse to or be unable to provide such medical report and/or if the school is unable to obtain the requisite consent, instead of imposing a mandatory leave of absence, alternatives should be considered, including:

88.1 using a learner's antenatal clinic card to fulfil this requirement;

88.2 if a learner is unable to produce a medical certificate or antenatal clinic card, the learner should be allowed to provide reasons for such failure, and be referred to a youth friendly health facility for assistance; or

88.3 where the learner does not wish to share medical information, the school could consider entering into an agreement with the learner (with the assistance of a parent or guardian) in terms of which the school is indemnified for any pregnancy-related injuries or incidents.

89. **In summary, we recommend as follows:**

89.1 that the Draft Policy allow for learners to return to school as soon as possible, and that more detailed criteria be provided for determining when and how this can be achieved; and

89.2 that a mandatory leave of absence not be imposed should learners refuse to or be unable to provide a medical report, but that the alternatives recommended in paragraph 88 be considered.

f) Policy management and implementation

90. The Draft Policy emphasises the importance of structural arrangements in its implementation and provides for the establishment of a Monitoring Sub-Committee on Learner Pregnancy ("**Sub-Committee**") to "*guide and coordinate progress and reporting on the implementation of [the Draft] Policy and the achievement of its goals*".⁶⁶ The Sub-

⁶⁶ Ibid at section 6.1.4.

Committee is to include departmental representatives as well as NGOs. The responsibilities the Sub-Committee are wide-ranging and include overseeing the alignment, delivery and coordination of policy, operational activities, budgetary priorities, and educator and staff training in the DBE.⁶⁷

91. In light of the extensive responsibilities of the Sub-Committee, it does not seem appropriate for the Sub-Committee to comprise of members from NGOs and other stakeholders. It is unclear whether these members will be equipped to carry out these functions effectively, and there is the danger that their inputs might be coloured by their personal values or views regarding pregnancy.
92. **We therefore recommend that the Sub-Committee rather be comprised solely of departmental members and serve as a departmental task team of sorts with the ability to take advice and recommendations from members of NGOs or other external stakeholders.**
93. In addition, the Draft Policy speaks of the “*rights of the DBE, schools, principals, educators, families and communities*”. It is unclear what is meant by the rights of the DBE. We refer to our discussion above on the correct framing of the Draft Policy and the rights and best interests of the child being paramount.

g) Mechanisms of accountability

94. We note that the Draft Policy fails to provide mechanisms of accountability.
95. Instances where such mechanisms are likely to be required include where school policies and/or codes of conduct need to be challenged on the basis that they are discriminatory, or where there has been a decision to impose a leave of absence, for instance.
96. Research on the implementation of Title IX in the United States shows that students from low socio-economic backgrounds are unlikely to enforce their legal rights,⁶⁸ even though they are most likely to suffer harm from Title IX violations.⁶⁹ Mechanisms for enforcing

⁶⁷ Ibid at section 6.5.3.

⁶⁸ Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972'; Michelle Gough, 'Parenting and Pregnant Students: An Evaluation of the Implementation of the Other Title IX' (2011) 17 Michigan Journal of Gender and Law 211, 253.

⁶⁹ In terms of Title IX, school districts are required to adopt complaints procedures for discrimination against pregnant learners, and must appoint a Title IX co-ordinator who is responsible for handling individual complaints

legal rights must therefore be accessible to the most vulnerable. The National Women's Legal Centre has developed a toolkit which outlines the complaints process in a clear and accessible manner, and provides sample letters of complaint to Title IX co-ordinator as a helpful resource.⁷⁰

97. It is therefore our recommendation that:

97.1 there be mechanisms of reporting and accountability in the policy, including mechanisms to collect and process complaints, to report instances of errors or abuse, and to appeal decisions taken in terms of the Draft Policy; and

97.2 the Draft Policy detail how these mechanisms are to be accessed to ensure due process and that the requirements of administrative justice are satisfied.

IV. CONCLUSION

98. In conclusion, we once again thank the DBE for the opportunity to comment on the Draft Policy, and include as Annexe A to the submission, for the DBE's convenience, a summary of each of the recommendations contained in this submission.

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and investigating any systemic problems that may arise during the review of such complaints. A complaint of discrimination can be filed by the student herself or on her behalf by a parent, friend, teacher or other person, but must be done within 180 days of the alleged discrimination (or since the latest instance in the case of ongoing discrimination). The complaints process is treated as confidential and a complainant may not be targeted for asserting their Title IX rights.

⁷⁰ 'Pregnant and Parenting Students' Rights Toolkit' (National Women's Law Centre 2016).