+SECTION27
catalysts for social justice

SECTION27's submission on the proposed amendments to the Regulations Relating to Uniform Minimum Norms and Standards for Public School Infrastructure

29 July 2022

1st floor, South Point Corner, 87 De Korte Street, Braamfontein, 2001. PO Box 32361, Braamfontein, 2017. T +27 (0)11 356 4100 info@section27.org.za

INTRODUCTION

1. SECTION27 is a public interest law clinic based in Braamfontein, Johannesburg. SECTION27 seeks to achieve substantive equality for all who live in South Africa by, in particular, advancing the rights to basic education and health in the Constitution through advocacy, research and legal interventions.

2. The persistence of the apartheid school infrastructure backlog is one of the visible indicators of educational inequality for South Africa's poorest learners. This has been repeatedly acknowledged by South Africa's Constitutional Court. The case of *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay NO* (*Juma Musjid*) described the extent of the apartheid legacy that has to be addressed. [1]

   "The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."

3. Similar utterances were made in other cases in the Constitutional Court.[2] It is also within the context of addressing this historical legacy of educational inequality that the right to basic education was framed differently from other socio-economic rights in the Constitution as an unqualified right not subject to progressive realisation within available resources. The Constitutional Court in *Juma Musjid* noted the different framing of the right to basic education and the necessity to prioritise this right as a right to be *immediately realised*[3] in contrast to other socio-economic rights that are *progressively realisable*. Moreover, the jurisprudence of the courts since the *Juma Musjid* case defined several essential components of the

[1] 2011(8) BCLR 761 (CC) para 42.
[2] *Head of Department, Mpumalanga Education Department v Hoerskool Ermelo* 2010 (2) SA 415 (CC) para 46; *MEC for Education: KwaZulu – Natal v Pillay* 2008(1) SA 474 (CC) paras 121 –124 and *MEC for Education in Gauteng v Governing Body of Rivonia Primary* 2013 (6) SA 582 (CC) para 2.
[3] *Juma Musjid* para 37

right. An important component of the right to basic education is *safe and decent school infrastructure*.

SECTION27's history in advocacy and litigation for safe and decent school infrastructure

4. Recognising the importance of safe and decent infrastructure as part of the right to education, SECTION27 has for many years been involved in advocacy and litigation to improve school infrastructure at the poorest schools.

5. In 2013, prior to the finalisation of the Regulations Relating to Uniform Minimum Norms and Standards for Public School Infrastructure ("the Regulations"), SECTION27 made two separate and detailed submissions in respect of the Regulations pursuant to the Department of Basic Education's calls for these submissions in both March and October 2013.

6. In addition, SECTION27 has engaged in litigation following the death of the young Michael Komape who drowned in a pit toilet at a Limpopo school in 2014. SECTION27 represented the Komape family in a damages claim but also sought a systemic remedy for the eradication of pit toilets in schools in the Limpopo province in the case of *Komape v Minister of Basic Education.*[4] The urgency with which pit latrines must be treated was emphasised in the judgment. In the first court order, the Limpopo Department of Education ("LDoE") was obliged to deliver a plan by August 2018 aimed at the eradication of all pit latrines in public schools in Limpopo. The plan eventually provided by the LDoE suffered numerous flaws, including an undertaking to only replace pit toilets at public schools over an estimated period of 14 years. SECTION27 challenged the reasonableness and constitutionality of this plan. The judgement, which found the plan to be unconstitutional stated that: [5]

"Urgent and effective steps are needed. There is little doubt that adjustments need to be made with regard to the budget and the allocation of funds to cater for this

[4] (1416/2015) [2018] ZALMPPHC 18 (23 April 2018).
[5] The second *Komape* court order, para 7.

project. It is not business as usual. The replacement of pit toilets is a national emergency and must be treated accordingly. **A revised plan to implement the order with the necessary urgency must be given urgent attention. It cannot be gainsaid that the plan put forward by the defendants fail to meet the expectations expressed by the Regulations and the structural interdict."** (Own emphasis)

7. Currently, SECTION27 is engaged in monitoring government compliance in accordance with the second court order to replace all pit toilets in the province.

8. In 2018, in the case *of Equal Education v Department of Basic Education* ("*Equal Education"*),[6] the social movement, Equal Education (EE) instituted litigation, to challenge the constitutional validity of specific provisions in the Regulations. SECTION27 represented the Limpopo-based organisation, Basic Education for All (BEFA), that intervened as *amicus curiae* ("friend of the court") in support of EE's application. The application was successful in that the Bhisho High Court found specific regulations within the Regulations unconstitutional and ordered that these be amended. Notably too is that the court in this case held that "basic infrastructure is [an] indisputably integral component of the right to basic education…".[7]

9. Also in 2018, in the case of *School Governing Body of Makangwane v MEC of the Limpopo Department of Education,*[8] SECTION27 litigated on behalf of the school community because of the poor state of the school infrastructure that came to a head in January 2018 when the corrugated iron roof of one of the classrooms blew off during school break time, nearly injuring learners. Following this incident, the School Governing Body ("SGB") and community members decided to move the learners out of the classrooms to learn under surrounding trees due to concerns for their safety. The Polokwane High Court found in favour of the community and declared that government had violated the rights to dignity, equality and basic

[6] (276/2016) [2018] ZAECBHC 6; [2018] 3 All SA 705 (ECB); 2018 (9) BCLR 1130 (ECB); 2019 (1) SA 421 (ECB) (19 July 2018).
[7] Ibid para 182.
[8] 3158/2018 (1 February 2019).

education of learners at the school. A learner testimony in that case is worth repeating:

"The roof did not have a ceiling and the corrugated iron had spaces between the sheets. The floor of the classrooms had cracks and holes in the floor. When it rains, not only does the roof leak, it gets too loud to hear the teacher teaching. It is very distracting and after the roof collapsed, sometimes we are sent home if the rain is too much."

The new amendments

10. SECTION27 submits these written submissions in response to a new invitation, published in Government Gazette No 46543 on 10 June 2022, to comment on the Amendments to the Regulations issued in terms of section 5A(1)(a) of the South African Schools Act 84 of 1996 ("SASA").

11. SECTION27 recognises that, as per Regulation 19 of the Regulations, the Department of Basic Education ("DBE") is obliged to periodically review the Regulations to ensure that they remain current and serve the needs of the teaching and learning process. However, SECTION27 is concerned that significant parts of the proposed amendments in their current form will **NOT** do this. Instead, certain proposed amendments (i) seek the removal of essential accountability mechanisms necessary to give effect to the right to basic education and (ii) whittle down what constitutes an enabling school environment from the Regulations.

12. SECTION27 submits that these aspects of the amendments are part of an **ongoing and sustained effort** by the DBE to avoid accountability under the Constitution, section 5(A) of SASA and the Regulations for its failure to provide safe and decent infrastructure for the majority of learners who continue to attend dilapidated schools with crumbling infrastructure 28 years into South Africa's democratic era.

13. These efforts to evade accountability by the DBE are even more concerning in the context of the anticipated increase in extreme weather events which are set to come as a result of climate change. The floods that that swept through KwaZulu-Natal in April 2022 demonstrated how vulnerable school infrastructure, and consequently access to education, is to extreme weather events such as floods.[9] In this context, the legal obligation to fix school infrastructure, thus making school infrastructure more resilient to extreme weather events, should be even more urgent. Yet, the DBE persists in its attempts to evade fixing school infrastructure urgently with problematic proposed amendments.

14. Accordingly, the submission is structured as follows:

    14.1 An overview of the proposed amendments.

    14.2 The removal of the accountability mechanisms in the proposed amendments is part of a longstanding and concerted effort to make the Regulations toothless and ineffective.

    14.3 The removal of the accountability mechanisms and the whittling down of what constitutes minimum education areas for an enabling school environment are retrogressive and therefore unconstitutional.

    14.4 The removal of the accountability mechanisms is irrational and vague and accordingly reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

AN OVERVIEW OF THE PROPOSED AMENDMENTS

Amendments pursuant to the 2018 Equal Education court order

15. SECTION27 notes the proposed amended sub-regulation 4(1)(a), which no longer subjects the implementation of the Regulations, as they relate to new schools, additions, alterations and improvements, to the "resources and co-operation of

[9] Government has reported that at least 630 schools were affected by the floods with a 124 of these schools suffering extensive damage: https://www.education.gov.za/ArchivedDocuments/ArchivedArticles/KZN-Flooding-422.aspx

other government agencies and entities responsible for infrastructure in general and the making available of such infrastructure", or to reasonable practicability.

16. In addition, SECTION27 notes the proposed amended sub-regulation 3 which states that:

"The Department of Basic Education must, as far as practicable, facilitate and co-ordinate the responsibilities of the government agencies and entities who have a role in the provision of infrastructure and related services."

17. These above-mentioned amendments not only align with the High Court order granted in the *Equal Education* case, which declared sub-regulation 4(5)(a)[10] unlawful and invalid,[11] but clarifies the Minister of Basic Education's responsibility in ensuring the implementation of the Regulations, and that non-compliance can no longer be justified by the failure of third parties.

18. SECTION27 further notes the proposed removal of the wording "with the exception of schools contemplated in sub-regulation (2)" from sub-regulation 4(1)(a). This signals the removal of sub-regulation 4(2)(b), which was declared inconsistent with the Constitution and invalid in the *Equal Education* case in so far as new schools and additions, alterations and improvements, which are the subject of 2013-2014, 2014-2015 and 2015-2016 MTEF plans, are not subject to the Regulations.[12]

19. SECTION27 notes the proposed amended sub-regulation 4(1)(b)(i) to the extent that it includes all schools and classrooms built entirely or substantially from mud

[10] Sub-regulation 4(5)(a) of the Norms and Standards Regulations state that:
"The implementation of the norms and standards contained in these regulations is, where applicable, subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and the making available of such infrastructure."
[11] Paragraph 1 of the court order.
[12] Paragraph 5 of the court order. Paragraph 6 of the court order adds that:
"Sub-Regulation 4(2)(b) of the Regulations is to be read as requiring that all current plans in relation to the schools and projects contemplated in paragraph (a) must, as far as reasonably practicable, be implemented in a manner which is consistent with the Regulations, and that all future planning and prioritisation in respect of these schools must be consistent with the Regulations."

as well as those schools built entirely or substantially from material such as asbestos, metal, and wood. The widening of the scope of sub-regulation 4(1)(b)(i) aligns with the High Court order[13] granted in the *Equal Education* case and will ensure that schools partially built from inappropriate materials will also be addressed in the Regulations.

20. These amendments which are pursuant to the court order in the *2018 Equal Education* case are welcomed.

The proposed removal of timeframes and the scope of infrastructure projects

21. SECTION27 notes the DBE's proposal to amend regulation 4(1)(b) of the Regulations to the extent that specific timeframes currently mentioned are removed and that infrastructure projects listed in proposed sub- regulation 4(1)(b)(i)-(v) must instead, "in order of priority", be "prioritised for planning and implementation".

Removal of the 3-year timeframe

22. In particular, proposed amended sub-regulation 4(1)(b)(i) removes the timeframe within which all schools and classrooms built entirely or substantially from mud as well as schools built entirely or substantially from materials such as asbestos, metal, and wood, must be replaced, namely by 29 November 2016.

23. Proposed amended sub-regulation 4(1)(b)(ii) also removes the timeframe within which all schools that do not have access to any form of power supply, water supply or sanitation, must be addressed, namely by 29 November 2016. This would include the removal of all plain pit and bucket latrines from all public schools, which are currently unlawful.

[13] Paragraph 2 and 3 of the court order.

24. The current deadline of 29 November 2016 stated in the Regulations expired more than five years ago. The solution to not meeting the deadline and being found to have failed to meet the deadline as was found in the *Komape* case, cannot be to remove the time frames. Rather it requires government recommitting resources and efforts to meeting the 2016 timeframes which have been highlighted by the DBE itself in the Regulations as the most urgent school infrastructure priorities. It also makes expressly clear that those projects not addressed within their specific timeframe continue to violate learner's rights to a basic education.

25. According to the most recent DBE National Education Infrastructure Management Systems ("NEIMS") data, 90 schools still have no electricity supply, while 2130 schools are still operating with pit latrines only.

26. The proposed removal of timeframes minimises the urgency of this crisis and removes the legal accountability mechanism that can be relied on by schooling communities in the event of non-compliance. Instead, the proposed amendments suggest that these infrastructure projects are subjected to the discretion of provincial department officials, who will determine the order of each project's priority, which will then be "prioritised for planning and implementation". The **vagueness** of this provision leaves officials without any guidance on the criteria that should be used to prioritise infrastructure projects, or when these should be completed. This may result in arbitrary and inconsistent decision-making, without any obligation to finalise projects and no legal means for affected school communities to hold officials accountable for delays.

27. SECTION27 notes further that the removal of timeframes in the proposed amended regulations 4(1)(b)(i) and (ii) is inconsistent with the High Court order granted in the *Equal Education* case.

28. In particular, paragraphs 2 and 4 of the court order state the following:

"Sub-regulation 4(3)(a) read with regulation 4(1)(b)(i) of the Regulations should read that all schools and classrooms built substantially from mud as well as those built substantially from materials such as asbestos, metal and wood **must within a period of three years from the date of publication of the Regulations**, be replaced by structures which accord with the Regulations, the National Building Regulations, SANS 10-400 and Occupational Health and Safety Act 85 of 1993;"

"Sub-Regulation 4(3)(b) read with regulation 4(1)(b)(i) of the Regulations is to be read as requiring that all schools that do not have access to any form of power supply, water supply or sanitation, **must within a period of three years from the date of publication of Regulations**, comply with the norms and standards described in regulations 10, 11 and 12 of the Regulations." (Own emphasis)

29. The intention of the court order is therefore to not only include schools built substantially from mud and other inappropriate materials in the Regulations, but that the phrase "must be prioritised" should be understood as requiring that the above-mentioned infrastructure projects be completed within a period of three years from the date of publication of the Regulations, namely by 29 November 2016.

30. Proposed amended sub-regulations 4(1)(b)(i) and (ii) are therefore inconsistent with the court order to the extent that they remove the timeframes expressly imposed onto regulations 4(3)(a) and (b) of the Regulations.

Removal of the seven-year timeframe

31. SECTION27 notes that the proposed amendments completely omit sub-regulation 4(3)(c) of the Regulations which, when read together with sub-regulation 4(1)(b)(ii), currently require the Member of the Executive Council ("MEC") to "prioritise the norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security" by 29 November 2020.

32. In its place, proposed amended sub-regulations 4(1)(iii) and (iv) merely state that:

> "the following, in order of priority must be prioritised for planning and implementation -
> …
> (iii) all those schools that do not have sufficient classrooms to accommodate the learners enrolled in schools;
>
> (iv) all those schools that do not have adequate perimeter fencing to comply with the norms and standards described in regulations 17 of the regulations."

33. The proposed amendments therefore remove the seven-year timeframe within which the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter security must be addressed. In addition, all references to the provision of electricity, water, sanitation and electronic connectivity are entirely omitted, and no information is provided on whether these will even be addressed under the revised Regulations, and by when.

34. This is particularly concerning considering that some schools are still in need of these infrastructure projects. For example, according to the 2021 DBE NEIMS data, 3343 schools have an unreliable electricity supply, while 5836 schools have an unreliable water supply. This omission will be discussed further below under "minimum education areas".

<u>Removal of the ten-year and seventeen-year timeframe</u>

35. SECTION27 notes that proposed amended sub-regulation 4(1)(b)(v) merely states that "all schools that do not have other minimum education areas for an enabling environment" must, in order of priority, be prioritised for planning and implementation.

36. The proposed amendment therefore omits sub-regulations 4(1)(b)(iii) and 4(3)(d), which oblige the MEC to phase in, over a period of ten years from the

publication of the Regulations, those norms and standards relating to libraries, and laboratories for science, technology and life sciences.

37. In addition, the proposed amendments omit sub-regulation 4(1)(b)(iv) which currently obliges the MEC to plan, prioritise and phase in all other norms and standards contained in the Regulations before 31 December 2030. This would include sports and recreation facilities as well as principles of universal design for learners with disabilities. The omission of these infrastructure projects is discussed further below under "minimum education areas".

<u>The removal of timeframes removes an essential accountability mechanism</u>

38. As indicated above, proposed amended sub-regulation 4(1)(b)(i)-(v) now obliges the DBE to place a more limited scope of infrastructure projects in an "order of priority" and prioritise them "for planning and implementation", without expressly stating what criteria must be used to prioritise projects, or by when such prioritisation, planning or implementation must take place. It is therefore not clear when these infrastructure projects will be addressed, how they will be selected and prioritised amongst other infrastructure projects, and how the DBE will prevent arbitrary and inconsistent decision-making.

39. In addition, the proposed amendments remove all legally binding timeframes within which the implementation Regulations must take place, thereby ensuring that the DBE cannot be held liable for any lack of progress or delays and removing all means by which school communities are able to hold the DBE accountable for non-compliance.

40. SECTION27 also notes that the proposed amendments make no attempt to impose new timeframes within which these infrastructure projects must be completed, and merely obliges their prioritisation, therefore removing any need for structured planning and budgeting.

41. **SECTION27 therefore recommends that the timeframes already expressed in the Regulations be retained. SECTION27 further recommends that the references to the provision of electricity, water, sanitation and electronic connectivity to be completed within a seven-year timeframe must not to be removed**

Lack of clarity concerning perimeter safety and security at schools

42. SECTION27 notes that proposed amended sub-regulation 4(1)(b)(iv) states that "all those schools that do not have adequate perimeter fencing to comply with the norms and standards described in regulations 17 of the regulations." This differs from the_Regulations which currently state that "a Member of the Executive Council must, for the purposes of subregulation (1)(b)(ii), prioritise the norms and standards relating to … perimeter security … ." While SECTION27 notes that regulation 17 of the Regulations addresses both perimeter security and school safety, the failure of the proposed amendment to specifically refer to the need to provide perimeter security and school safety may imply that only perimeter fencing needs to be prioritised at schools.

43. **SECTION27 therefore recommends that proposed amended sub-regulation 4(1)(b)(iv) be amended to expressly refer to adequate perimeter security and school safety, as opposed to only perimeter fencing, to ensure that the entire regulation 17 of the Regulations is given effect to.**

The alignment with the National Development Plan removes legally binding accountability mechanisms and creates unreasonably long and unconstitutional timeframes

44. SECTION27 notes that proposed amended regulation 4(2)(c) states that "all norms and standards contained in these regulations must be planned, prioritised and phased in, in line with the National Development Plan" ("NDP").

45. The NDP sets out two goals in relation to school infrastructure. The first of which is that school infrastructure backlogs should be eradicated and that all schools should meet legislated minimum standards by 2016.[14] The second goal requires an infrastructure audit to be conducted to enable proper planning and that all schools should have "high quality infrastructure" by 2030.[15]

46. The current timeframes in the Regulations remain preferrable to those contained in the NDP. First, because the NDP itself recommends that school infrastructure guidelines ought to be legislated to ensure compliance from education officials.[16] Thus, the NDP also envisions and directs that the norms be legislated to ensure accountability and to curtail non-compliance from government officials. **The NDP does not have the binding force of the law while the Regulations do**. The *Komape* litigation is an illustration of why it is important to have clear and legally binding time frames. In this case the court, in finding that government did comply with their obligations, noted:[17]

"Intrinsically linked to the structural order are the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure which contain the principles which the defendants are obliged to follow and implement. Regulation 12 (4) puts it bluntly that pit toilets are not allowed in school."

47. Second, the reference to the NDP causes more confusion than certainty. The timeframes in the current Regulations are clear on what should be/ ought to have been provided and by when. There is a rational prioritisation of different components with clear corresponding deadlines. On its own, the 2030 timeframe contained in the NDP is not sufficient to hold the DBE accountable to its obligations as the provision of all schools with "high quality infrastructure" by 2030 is **too broad and vague**. While the proposed amended regulations do list an order of priority for the different types of infrastructure needs/projects, the NDP does not

[14] National Planning Commission "Our Future – Make it Work: National Development Plan 2030" (2011) 313.
[15] Ibid.
[16] Ibid.
[17] The second *Komape* court order, para 3.

provide the necessary clarity on timelines for each priority project. Effectively, this means that an assessment can only be made in 2030 of whether the DBE has discharged its obligations.

48. Third, the 2030 timeframe is also way too long for government to meet its school infrastructure needs. First, because the right to basic education is a right that must be immediately realised. Although the timeframes in the Regulations were staggered over four different phases, there was a logic to this that determined what was most urgent and provided for concrete outcomes within timeframes of what was reasonably possible. It is for this reason that civil society did not challenge the timeframes in the Regulations despite its incrementalist approach. Second, because the 2030 timeframe is unreasonably long. Again, the *Komape* litigation in the second court order is instructive in this regard. Discussing the deadline of 2030 initially proposed by the Limpopo Department of Education for the eradication of pit toilets in schools, the court noted in the most emphatic terms that this period was unreasonably long when children are, "[t]he most vulnerable members of society whose best interests are specifically protected by section 28 of the Constitution".[18]

49. **For the reasons discussed above, SECTION27 therefore recommends that the references to the NDP be removed.**

The removal of the MEC's reporting obligations

50. Proposed amended regulation 4(2)(f) obliges each Provincial Department of Education ("PED") to annually provide the Minister with detailed reports on plans and progress on the implementation of the Regulations. This differs from Regulation 4(7) of the Regulations which currently requires that "a Member of the Executive Council must, in a manner determined by the Minister, report annually to the Minister on the implementation of the plans required in terms of sub-regulation (6)". The proposed amendment therefore permits **any** official from a PED to provide such plans and progress reports to the Minister. By removing the

[18] The second *Komape* court order, para 11.

MEC's reporting obligation, the amendment dilutes the responsibility of the MEC, who is specifically mandated to oversee and execute national and provincial policy and law in his/her respective province.

51. This obligation is further emphasised in section 58C of SASA which states that:

"(1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), ensure compliance with -

(a) norms and standards determined in terms of sections 5A, 6 (1), 20 (11), 35 and 48 (1); …".

52. In addition section 58C(3) of SASA states that:

"The Member of the Executive Council must, annually, report to the Minister the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply."

53. Section 58C of SASA therefore expressly mandates MECs to ensure compliance with the Regulations, and it compels them to annually report to the Minister on the implementation of the Regulations. The proposed amendment to the Regulations is clearly inconsistent with this mandate. **SECTION27 recommends that MECs remain responsible for reporting on the implementation of the Regulations.**

54. The proposed amendment also removes certain components that must currently be included in these plans. In particular, sub-regulation 4(6)(b) of the Regulations state the following:

"The plans referred to in paragraph (a) are to make provision for, but not be limited to, the following:

(i) The backlogs at district level that each province experiences in terms of the norms and standards;
(ii) costed short, medium and long-term plans with targets;
(iii) how new schools should be planned and maintained and how existing schools are to be upgraded and maintained; and
(iv) proposals in respect to procurement implementation and monitoring."

55. The purpose of these structured reporting requirements is two-fold. First, it is designed to ensure that PEDs had carefully considered and budgeted-for plans capable of meeting targets and timeframes. Second, the detailed and structured reporting requirements provide a framework to assess and monitor how PEDs are meeting targets and timeframes.

56. The proposed amended regulations remove these guidelines and give no indication of what should be contained in PED's "detailed" reports. This removal further dilutes reporting obligations and leaves the contents of progress reports to the discretion of a provincial department official. This may create the risk of arbitrary reporting that lacks depth or detail and may create inconsistencies not only between subsequent reports of one province but also in reports between provinces.

57. **To ensure greater transparency, accountability, detail and consistency, clearer guidance must be provided to provinces regarding the contents of their progress reports, and it is recommended that the structured reporting currently detailed in the Regulations be retained.**

58. SECTION27 notes that the proposed amendment requires that "progress reports and plans shall be published on the DBE website and websites of all nine provincial education departments for access by the public." SECTION27 welcomes this amendment, which aligns with the High Court order granted in the *Equal Education* case. **SECTION27 recommends that the proposed amendment be further amended to state that the progress reports and plans be published**

on the DBE website and websites of all nine PEDs within 30 days after being made available to the Minister.

Greater accountability in respect of implementing agents is required

59. SECTION27 notes that over the years, under-performing implementing agents have caused significant challenges in the completion of school infrastructure projects. The Regulations do not currently address the monitoring or oversight of implementing agents or the making of publicly accessible information on their performance. In light of the severe impact under-performing implementing agents have had on the realisation of the Regulations, **SECTION27 recommends that the Regulations be amended to include accountability mechanisms focusing specifically on implementing agents.**

60. This may, for example, include the insertion of an obligation on PEDs to comprehensively monitor and report back on the performance of implementing agents at specific intervals. The performance of implementing agents should also be reported on in the MEC's annual progress reports to the Minister already envisaged by the Regulations. In addition, the Regulations may be amended to expressly state that steps to address under-performing implementing agents must be taken timeously, and that in severe cases, under-performing implementing agents must be blacklisted.

61. In order to ensure greater transparency and accountability, **SECTION27 also recommends that information pertaining to blacklisted implementing agents should be made publicly available.**

The whittling down of what constitutes minimum education areas for an enabling school environment

62. Proposed amended sub-regulation 4(1)(b)(v) states that, as far as schools contemplated in sub-regulation 4(1)(a) are concerned, "all schools that do not

have other minimum education areas for an enabling school environment" must "in order of priority" be "prioritised for planning and implementation".

63. The Regulations define "minimum education areas" as "the minimum teaching and learning areas in a school, listed in Annexure A, that are essential to carry out the teaching and learning functions at a school." However, SECTION27 notes that certain infrastructure projects that are currently prioritised in the Regulations, specifically in Annexure A are removed by the proposed amendments.

64. SECTION27 notes that Annexure A identifies a science laboratory as a minimum education area. Sub-regulation 4(3)(d) of the Regulations currently obliges the MEC to specifically focus on the norms and standards relating to, amongst others, laboratories for science, technology and life sciences, not merely laboratories for science. The proposed amendment therefore appears to limit the scope of laboratories that must be provided, and further clarity is required.

65. SECTION27 is also concerned that sports and recreation facilities are not currently included in Annexure A of the Regulations as minimum education areas. Nor are sports and recreation facilities listed in proposed sub-regulations 4(1)(b)(i)-(v) as projects that, "in order of priority must be prioritised for planning and implementation". This implies that sports and recreation facilities are no longer infrastructure projects required at all schools.

66. This omission marks a tragic failure to recognise the important role that sport and recreation play in the development of learners. The recent death of 21 teenagers at in the Enyobeni Tavern in the Eastern Cape highlights the importance of providing sports and recreation spaces for the youth. If, as politicians asserted at the funeral, we have a higher standard of care towards our youth, the removal of these facilities from the minimum education areas for an enabling school environment is inexplicable.[19]

[19] CYRIL RAMAPHOSA: SA mourns the young lives lost in Enyobeni Tavern tragedy (ewn.co.za)

67. What is clear therefore is that the DBE has stripped down to the bare bones and whittled away what is considered the minimum education areas for an enabling school environment. Consequently, if a learner is poor and presumably Black, they must not expect the same facilities which their wealthier counterparts at other schools will have. They cannot expect the provision of basic services at their schools, technology and life sciences laboratories or sports and recreation facilities.

68. Lastly, SECTION27 notes that Annexure A of the Regulations, on its own, contains no time frames within which minimum education areas must be built. In addition, proposed amended sub-regulation 4(1)(b) merely states that "all schools that do not have other minimum education areas for an enabling school environment" must "in order of priority" ... "be prioritised for planning and implementation". Without specific timeframes, and no clear guidance on how facilities such as science laboratories, computer rooms, or school libraries must be prioritised, it is not clear how provincial departments will determine those projects that should take priority, and by when these will be completed. This approach leaves the planning, prioritisation and completion of minimum education areas at the sole discretion of provincial departments and, with the recurrent trend of failed infrastructure provisioning, and no legal obligation to ensure accountability and progress, there is little to guarantee that these projects will be properly planned and budgeted for.

69. **SECTION27 recommends that the minimum education areas currently listed in Annexure A to the Regulations be retained to include not just science laboratories but also technology and life sciences laboratories as well as sports and recreational facilities.**

THE REMOVAL OF ACCOUNTABILITY MECHANISMS IN THE PROPOSED AMENDMENTS IS PART OF A LONGSTANDING AND CONCERTED ATTEMPT TO MAKE THE REGULATIONS TOOTHLESS AND INEFFECTIVE

70. The proposed amendments to remove the accountability mechanisms such as the timeframes, reporting by the MEC and structured reporting will denude the Regulations rendering them toothless and ineffective.

71. Even more disturbing is that this development is just another round of several surreptitious and concerted attempts by the DBE to avoid its constitutional obligation to provide safe and decent school infrastructure. This is evident from the history which is set out below.

72. In 2007, the previous minister of education, Minister Naledi Pandor amended the SASA. Section 5A required that the Minister develop norms and standards for school infrastructure. Section 58C created an accountability mechanism requiring that MECs for basic education annually report on the extent to which the Regulations have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply with the Regulations.

73. In 2008, Minister Pandor published the first set of draft Regulations for comment together with the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment. The Policy acknowledges a clear link between poor infrastructural conditions and poor learner outcomes,[20] and further states:[21]

"[N]orms and standards for the physical teaching and learning environment will be set at the national level by the Department of Education. National norms and standards will set and express in terms of minimum and optimum provision. Along this continuum, norms and standards for school safety, functionality, effectiveness and enrichment will be explicitly defined at a national level by the Department of Education. The DoE will also set clear target dates by which a set proportion of schools will meet each level of enablement in its environment. The DoE will also set a clear date by which all South Africa schools will meet norms and standards for effectiveness."

[20] Para 1.2.
[21] Para 1.14.

74. In 2009, Minister Motshekga became the Minister of Basic Education. Despite several undertakings by the Minister between 2009 – 2012, the 2008 draft Regulations were never promulgated into law. Instead in 2012, School infrastructure Guidelines were published. The Guidelines were non-binding and therefore PEDS could never be held accountable for failing to meet the requirements set out in these.

75. EE therefore instituted an application to compel the promulgation of binding Regulations. A few days before the matter was to be heard, a settlement agreement was reached with the Minister agreeing to publish binding Regulations. However, when these draft Regulations were published in January 2013, they were vague, and failed to establish minimum benchmarks, timeframes or reporting mechanisms.

76. Facing renewed threats of litigation from EE, a second settlement agreement was reached for a new set of Regulations that was eventually promulgated on 30 November 2013.

77. These Regulations were however far from perfect. In 2018, therefore, EE in the 2018 *Equal Education* case again instituted litigation, this time to challenge the constitutional validity of specific provisions in the Regulations. While several provisions in the Regulations were challenged, the main challenge was in respect of sub-regulation 4(5)(a) which made the Minister's compliance with the minimum benchmarks "subject to the resources and co-operation of other government agencies and entities". The problem with this provision was that it created a legal loophole for government to indefinitely avoid its obligations to provide safe and dignified school infrastructure. The Bhisho High Court stated the following in respect of finding sub-regulation 4(5)(a) to be unconstitutional:[22]

"The crude and naked facts [staring at] us are that each day the parents of these children send them to school as they are compelled to, they expose these children

[22] Paras 194-195.

to danger which could lead to certain death. This is fate that also stares the educators and other caregivers in the schools in the face.

The obligation upon the respondent to provide basic education has been in existence since 1996 when the Constitution was born, 22 years ago. Thus, the respondent has had adequate time to plan and budget for all its duties in respect of the right to basic education. Even accepting that apartheid left gaping disparities and wide gap[s] in education infrastructure, with the proviso in sub-regulation 4(5)(a) there is no hope that such a gap will ever be closed or if so to a significant extent. **The proviso provides the respondent with a lifetime indemnity against discharging the duty she owes in terms of section 29(1)(a)**." (Own emphasis)

78. In an age in which accountability is sorely needed, it is time to call a spade a spade. The proposed amendments will completely remove the staggered timeframes and structured annual reporting requirements from the MECs to the Minister therefore seeking to introduce yet another "lifetime indemnity".

79. Furthermore, in a context of a transparent and accountable society where public officials must conform to the "basic values and principles of public administration" as set out in section 195 of the Constitution, it is important that the specificity of their obligations is made clear in legally binding timeframes. Without them, education officials may escape their obligations in perpetuity in violation of section 195 of the Constitution.

THE REMOVAL OF THE ACCOUNTABILITY MECHANISMS AND THE WHITTLING DOWN OF WHAT CONSTITUTUES MINIMUM AREAS FOR AN ENABLING SCHOOL ENVIRONMENT ARE RETROGRESSIVE MEASURES AND THEREFORE UNCONSTITUTIONAL

80. The removal of accountability mechanisms and the whittling down of what constitutes minimum education areas for an enabling school environment are retrogressive measures.

81. The concept of retrogression has long been in international law in relation to socio-economic rights. It has, furthermore, been adopted into the South African jurisprudence on socio-economic rights.

82. In 1994 the South African government signed the International Covenant on Economic Social and Cultural Rights ("ICESCR"). South Africa ratified the ICESCR in 2015.

83. States that are party to the ICESCR undertake to take steps to the maximum of their available resources, in order to **progressively realise** the rights recognised in the ICESCR. The rights in the ICESCR include various socio-economic rights such as the right to social security (Article 9), the right to an adequate standard of living, including adequate food, clothing and housing (Article 10); the right health care (Article 11) and the right to education (Article 13).

84. General Comment 3 developed by the Committee to the ICESCR sets out the nature of state party obligations to the ICESCR. Particularly relevant in the context of this submission is that the General Comment discusses the meaning of progressive realisation which imposes an obligation on states to move as "expeditiously and effectively" as possible toward the full enjoyment of the rights in the ICESCR. Related to this overall objective, the General Comment notes that any measures that were "deliberately retrogressive" for rights realisation ''needed to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[23]

85. This implies that a state is generally prohibited from implementing any measures that may involve a step back in the level of enjoyment of socio-economic rights.

[23] Para 9 of GC 3, 1990.

Various other General Comments have provided more detail on retrogressive measures in respect of specific socio-economic rights.

86. General Comment 19 provides an illustration of retrogressive measures in the context of the right to social security:[24]

"There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level."

87. Based on the various general comments and statements made by the Committee, the following appear to be relevant in an assessment of the lawfulness of a retrogressive measure:
    - Retrogressive measures are *prima facie* incompatible with the Covenant. States have a resulting burden of proof to justify the lawfulness of any such measures with due regard for the limitation provisions of Article 4 of the ICESCR.
    - Thus, a State that takes such measures will have the onus of proving that the measures taken are in pursuit of a compelling goal; that these measures

[24] Para 42 GC 19, 2008.

are strictly necessary; and that there are no alternative or less restrictive measures available.

- Participation of the affected groups.
- Whether the measures are discriminatory.
- The impact on the learners affected rights such as basic education, equality and dignity.

88. In *Grootboom v Government of South Africa,*[25] the Constitutional Court cited with approval the views of the Committee in its General Comments in respect of retrogressive measures. In the 2020 case of *Equal Education v Minister of Basic Education,*[26] which was a case about the suspension of the national school feeding scheme during school closures under Covid, the court held that the state was prohibited from adopting "deliberate retrogressive measures".[27]

89. The DBE has provided no justification for the removal of timeframes or the reporting mechanisms. Nor has it provided a justification for why all references to the provision of electricity, water, sanitation and electronic connectivity are entirely omitted or why technology and life sciences laboratories or sport and recreational facilities have been removed from the minimum education areas for an enabling school environment. The learners most likely to be impacted by these amendments are learners who attend historically disadvantaged, under resourced schools with poor infrastructure. These are mainly poor African learners whose rights to basic education, equality and dignity are violated for as long at this status quo continues.

THE PROPOSED AMENDMENTS ARE VAGUE AND IRRATIONAL AND THEREFORE UNLAWFUL

90. Regulations require a degree of certainty to enable those who are bound by it to act in accordance with it. Thus, the Regulations must create a legal standard

[25] 2001 (1) SA 46 (CC) para 45.
[26] (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020).
[27] Para 54.

against which the conduct of holders of obligations may be measured. The Regulations must also be rationally connected to the purpose for which they were created.

91. The case of *Affordable Medicines Trust v Minister of Health*[28] involved a challenge to the constitutional validity of certain provisions of the Medicines and Related Substances Act, and regulations made under that Act. In an assessment of whether the regulations were lawful the Court discussed the test for vagueness. It stated:

"The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. …. **The ultimate question is whether so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them**." (Own emphasis)

92. The amendments seek the removal of all accountability mechanisms in the Regulations, this creates a degree of vagueness and uncertainty in the Regulations as to when specific school infrastructure deadlines must be met, who should report on compliance with the Regulations and what the content of such reporting must be. The proposed amendments will create a high level of uncertainty for public officials as to what their obligations are, and by when public officials should meet such obligations. Accordingly, the proposed Regulations are potentially void for vagueness.

[28] (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005).

SUMMARY OF SECTION27'S SUBMISSION

93. SECTION27 welcomes efforts by the DBE to amend the Regulations largely in conformity with the 2018 *Equal Education* judgment.

94. SECTION27 recommends that the timeframes already expressed in the Regulations be retained and that the reference to the NDP timeframes be removed. The NDP timeframes are not legally binding, they are also unduly long and do not comply with the "immediate realisation" standard in respect of the right to basic education.

95. SECTION27 recommends that the references to the provision of electricity, water, sanitation and electronic connectivity to be completed within a seven-year timeframe not be removed from the Regulations.

96. SECTION27 further recommends that proposed amendments expressly refer to adequate perimeter security and school safety, as opposed to only perimeter fencing, to ensure that the entire regulation 17 of the Regulations is given effect to.

97. SECTION27 further recommends that MECs remain responsible for reporting on the implementation of the Regulations and that the structured reporting guidelines be retained. While we welcome the recommendation that a progress report be published on the DBE website and websites of all nine PEDs, we recommend that this be further amended to state that the progress reports and plans be published on the DBE website and websites of all nine PEDs within 30 days after being made available to the Minister.

98. SECTION27 recommends that the minimum education areas currently listed in Annexure A of the Regulations not be whittled down but must be retained to include not just science laboratories but also technology and life sciences laboratories as well as sports and recreational facilities.

99. SECTION27 recommends that the Regulations be amended to include accountability mechanisms focusing specifically on greater monitoring and oversight of implementing agents, such as increased reporting obligations imposed on PEDs and the making of publicly available information on the performance of implementing agents and those who have been blacklisted.

100. SECTION27 notes that the removal of the accountability mechanisms in the proposed amendments is part of a concerted and sustained effort to make the Regulations toothless and ineffective. In the context of striving toward a more transparent and accountable society where public officials must conform to the "basic values and principles of public administration" as set out in section 195 of the Constitution, it is important that the specificity of their obligations is made clear in legally binding timeframes. Without them education officials may escape their obligations in perpetuity. The proposed amendments are accordingly in violation of section 195 of the Constitution.

101. SECTION27 notes further that removal of accountability mechanisms and the whittling down of what constitutes minimum education areas for an enabling school environment are retrogressive measures. The DBE has provided no justification for the removal of timeframes or the reporting mechanisms, nor has it provided a justification for the removal of technology and life sciences laboratories or sport and recreational facilities from the minimum education areas for an enabling school environment. The learners most likely to be impacted by these amendments are learners who attend historically disadvantaged, under-resourced schools with poor infrastructure. These are mainly poor African learners whose rights to basic education, equality and dignity are violated for as long at this status quo continues. Without any justification for why these retrogressive measures were taken, these measures are unconstitutional.

102. The principle of legality requires that the proposed amendments create a high level of certainty for public officials as to what their obligations are, and by when public officials should meet such obligations. It further requires that amendments are rationally connected to the purpose for which they intended. The proposed

amendments are inconsistent with the National Policy for an Equitable Provision of an Enabling School Physical Teaching that sets out the purpose for which the Regulations were created. Accordingly, the proposed amendments introduce a level of vagueness into the Regulations and are not rationally connected to the Policy. The proposed amendments are therefore unlawful.

For any queries or further information, please contact Dr Faranaaz Veriava at veriava@section27.org.za.