

**THE RESOURCING OF PUBLIC SCHOOLS: AN
ANALYSIS OF COMPLIANCE WITH, AND
MEASUREMENT OF THE STATE'S
CONSTITUTIONAL OBLIGATIONS**

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by

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The opinions expressed in this paper are those of the author and do not necessarily reflect the views and opinions of the Studies in Poverty and Inequality Institute (SPII)

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LIST OF ACRONYMS AND ABBREVIATIONS

CALS	Centre for Applied Legal Studies
ICESCR	International Covenant on Economic, Social and Cultural Rights
DOE	Department of Education
GDE	Gauteng Department of Education
GEC	General Education Certificate (also sometimes referred to as the GETC, here we use the acronym 'GEC').
GHS	General Household Survey
MEC	Member of Executive Council
MLA	Monitoring Learner Achievement
NEIMS	National Education Infrastructure Management Study
SAHRC	South African Human Rights Commission
SASA	South African Schools Act 84 of 1996.
SGB	School Governing Body
SPII	Studies in Poverty and Inequality Institute

EXPLANATORY WORDS

Fee-free schooling:	Those public schools that are prohibited from levying compulsory school fees
Fee exemptions:	These are financial concessions by public schools that are allowed to levy school fees to parents who cannot afford to pay school fees.

EXECUTIVE SUMMARY

Unlike other socio-economic rights the right to basic education as set out in Section 29(1) (a) of the Constitution has no internal qualifiers. While the state is therefore merely required to consider if its policy in respect of a particular qualified socio-economic right is “reasonable”, the unqualified nature of the right to basic education appears to suggest that the state is under a direct, or immediate duty to provide basic education and that an *individual* may have a *direct* claim in respect of this right.

This review explores how the state in fact - and in stated objectives - has sought to provide universal access to basic education. It also explores how basic education is defined. The findings of this review are that the definitions and distinctions between basic and further education (the last three grades that are not covered in the definition) are arbitrary and obscure. The review notes, that despite the upgrading of some historically disadvantaged schools since 1994, significant backlogs in infrastructural provisioning persist resulting in continually high numbers of under-resourced schools. Furthermore, the review notes that there is a direct relationship between conditions at under-resourced schools and learner outcomes at these schools. The review also finds that despite the significant fee reforms, a high proportion of learners continue to find education unaffordable and as a result of this, struggle to access education.

Moreover, the review finds that the state’s interpretation of its obligations in respect of the right to basic education appears inconsistent and at times contradictory. Nevertheless, it is important to analyse policy trends, benchmarks and targets that emerge from government’s basic education policies.

These are:

1. The state’s definition of the General Education Certificate “GEC” phase of education as encompassing the scope of the state’s

obligations in respect of the right to basic education and pursuant thereto:

- (a) Making this phase of education compulsory and measuring universal access to basic education by high enrolment figures into this phase. (This does raise questions about the measurement of the quality of education that transcends questions of mere numbers of children who enter the education system.
 - (b) Prioritising this phase of education in spending and allocation for basic infrastructure.
 - (c) Due to the immediately enforceable nature of the right to basic education, whilst the Minister can decree schools up to grade 9 as fee-free, this discretion does not cover grades 10 to 12, which does impact on the nature of the right to education.
2. The pursuit of pro-poor policies premised on the notion of redress against the inequalities of Apartheid. These include:
 - (a) A policy of pro-poor targeting for recurrent, non-personnel expenditure. 80% of funds are to be distributed to the 60% of poorest schools under an apportionment framework of 80:20 for personnel: non-personnel recurrent expenditure.
 - (b) The introduction of fee-free schooling in at least 40% of the poorest schools.
 - (c) The retention of a system of charging school fees as part of government's commitment to pro-poor cross-subsidisation.
3. The setting of an annually reviewed monetary adequacy benchmark for non-personnel expenditure stipulating the amount which ought to be allocated to each learner to try to ensure that that each learner is able to receive an adequate education.

These seemingly progressive policies appear not to have been effective and in some instances have had unintended, negative consequences. For example:

- Excluding grades 10 to 12 from compulsory attendance and excluding these grades from the potential of being fee-free has led to high levels

fo drop-out in attendance in these years, which affects poor children's life options dramatically in light of high unemployment of semi- and unskilled workers.

- Moreover, measuring universal access by enrolment alone fails to take into consideration that enrolment is not equivalent to retention, as the schooling system is failing to retain high numbers of learners for various reasons, which include an inability to afford ancillary costs of education, e.g. transport, to questions of quality of teaching. The setting of the adequacy benchmark also appears to have been done arbitrarily and without sufficiently linking it to improving learner outcomes or the real cost of quality education in terms of infrastructure, services, retention of quality staff through competitive remuneration, etc.
- Finally, while the pro-poor policies reflect a clear pro-poor emphasis, they appear to occur within the framework of a resource allocation that is not determined by need, thus perpetuating the continued under-resourcing of disadvantaged schools.

In setting out options for the establishment of benchmarks or indicators that could be utilised within a discourse for monitoring the delivery of basic education in South Africa, this review highlights the "4 A"s approach of availability, accessibility, acceptability and adaptability as a possible mechanism for monitoring delivery of education. This Review also discusses the model for determining adequacy of educational standards and sufficiency of education funds developed by US courts.

Finally, the review makes recommendations for addressing the major challenges highlighted within this paper. In order to make education affordable and therefore accessible, the review recommends making all public schooling free. Alternatively, it recommends further reforms to the current fees and funding framework which include: increasing the percentage of schools that are fee-free, revisiting the method for the ranking of schools, having a quota system in place at schools for the granting of exemptions, and, the provision

of adequate compensation to schools for the granting of exemptions. In order to improve the quality of education at schools, the review recommends determining the adequacy of educational standards and sufficiency of funds through a transparent and participative process, . It also recommends the finalisation and implementation of the National Minimum Norms and Standards for School Infrastructure without further delay.

SECTION 1 – INTRODUCTION

The brief from the Studies in Poverty and Inequality Institute (SPII) was to develop a background paper that could inform a broader research project for the development of a measurement matrix in respect of the right to basic education and further education (limited to secondary education).

The terms of reference for this brief were to:

- Review the development of policy since 1996 in respect of the right to basic education and the limited right to higher education (limited to secondary education). Furthermore, to determine the extent to which, if at all, the limitation informs the commitment of the state to universally realize the right of access to both basic and higher education to all living in South Africa.
- Determine whether the state set itself indicators and benchmarks and time frames to measure its achievement of universal access to primary and secondary education, and if so, what they are? Do they include qualitative as well as quantitative measures?
- Determine whether in the absence of such explicit reference, what principles appear to guide policy development?
- Provide a brief statistical section of current primary and secondary school provision, backlogs, and a review of the number of people passing matric since 2000 with and without a matriculation exemption.

Before proceeding with this brief, and in particular the policy review, it should be noted that the legal framework for education seeks to regulate various components of the state's obligations in respect of the right to education. These include the civil and political components of the right such as the principle of non-discrimination in education, the freedom to establish and maintain independent institutions and language of choice. It also seeks to regulate the socio-economic components of the right. Essentially, this entails a study of the fees and funding framework for public schooling, also referred

to as the resourcing of public education. It is this latter aspect that is the subject of this paper.

Section 2 of this paper provides an overview of the state of education in South African through an analysis of data and statistics on education. It discusses data on education provisioning and infrastructural backlogs in order to determine whether current education provisioning is adequate. Furthermore, the paper uses both qualitative and quantitative data on attendance and enrolment as an indicator of the accessibility of South African schools for the country's poorest learners. Section 3 provides an overview of the meaning of Section 29 of the Constitution within the context of the socio-economic rights jurisprudence that has evolved since 1994. The purpose of this section is to attempt to define the scope and content of the *right* against which education *delivery* should be measured. Section 4 entails an overview of the school fee and funding framework. Finally, Section 5 provides an analysis of the rights-rhetoric employed by the state to determine how it views its constitutional obligations and how this translates into policy and the setting of benchmarks for the fulfillment of the rights.

SECTION 2 – THE STATE OF SOUTH AFRICAN EDUCATION, QUALITY AND ACCESS

(2.1) Infrastructural Backlogs

2.1.1 Background

The post-apartheid state inherited an education system that was racially segregated and highly unequal in terms of intra-racial budgetary and resource allocations, based on an foundation of ‘Christian National Education’. Under apartheid, Christian National Education was premised on the promotion of Afrikaner nationalism and separate and limited education for Blacks so as restrict their mobility in the labour market. This was characterized by gross inequality in the financing of education, with the African population receiving the smallest amount of money. In 1994, state education expenditure per capita was as follows:

R5 403 for white children; R4 687 for Indian children; R3 691 for coloured children; and an average of R 1 715 for African children.¹

As a result of this historically white schools had the advantage of decades of infrastructural investment and access to well-trained and qualified teachers as they were well resourced while African education was characterised by high teacher-pupil ratios, unqualified and under-qualified teachers, lack of books, libraries and laboratories, and a curriculum that perpetuated the myth of white superiority and black inferiority. Redressing this apartheid legacy requires a strongly pro-poor, redistributive funding policy for schools that helps upgrade the quality of infrastructure and teaching at historically disadvantaged schools. While there have been improvements to schooling infrastructure, historical backlogs remain and progress in upgrading under-resourced schools remains slow despite the passage of 16 years since the advent of constitutional democracy. This has resulted in the creation of a new generation of learners

¹ Department of Education *Report of the Committee to Review the Organisation, Governance and Funding of Schools* (1995) 27

that continue to receive a highly unequal and inadequate standard of education.

2.1.2 Infrastructural Backlogs and the Impact on Educational Outcomes

In 2002, of the 27 148 public schools, 2 280 (8,4%) had buildings in a state of disrepair, 10 723 (39%) had a shortage of classrooms; 13 204 (49%) had inadequate textbooks, 8 142 195 learners resided beyond a 5km radius from the school, 10 859 (40%) of schools were without electricity; 9 638 (36%) were without telephones; 2 496 (9%) were without adequate toilets, 19 085 (70%) lacked access to computer facilities; 21 773 (80%) lacked access to library facilities and 17 762 (65%) lacked access to recreational and sporting facilities.²

In January 2010, the 2009 National Education Infrastructure Management Study (NEIMS - Department of Education 2007) provided data of ongoing backlogs in the infrastructural provisioning in schools. According to this study, out of the 24 460 public schools:

- 3600 (14,7%) have no electricity supply, while a further 800 (3,3%) had an unreliable electricity supply;
- 2444 (10%) have no water supply, while 2563 (10,1%) have an unreliable water supply; only 7847 (32%) have municipal flush toilets, while 970 (4%) still do not have any ablution facilities and 11 231 (46%) still use pit-latrines.
- only 8% have stocked and functioning libraries;
- only 10% have stocked computer centres and;
- only 5% have stocked laboratories.³

Educational outcomes in South Africa also appear to be very poor. According to a systemic evaluation of Grade 3 and Grade 6 learners by the Department of Education in 2002, grade 3 students scored 68% for listening comprehension but only 39% for reading comprehension, 30% for numeracy,

² South African Human Rights Commission 3rd Socio-Economic Rights Report 2000/2002 258

³ National Education Infrastructure Management Report (NEIMS), 2009

and 54% for life skills. In 2004, grade 6 students obtained averages of 38% for language, 27% for mathematics and 41% for natural science. Of the 12 African countries participating in the 1999 UNESCO Monitoring Learner Achievement Project (MLA), South Africa scored the lowest in numeracy, the fifth lowest in literacy and the third lowest in life skills. In 2007, the overall national pass rate in Senior Certificate Examination (grade 12) for full-time candidates with six or more subjects was 65,2%. While this appears to be an improvement from previous years, the proportion of learners who obtained university acceptance dropped from 18,6% in 2003 to 15,6% in 2007.⁴ Moreover, the past two years has witnessed a steady decline in matric pass rates. In 2008, there was a 62, 5% overall pass rate. In 2009 this had dropped to 60,7%.⁵

There also appears to be a direct relationship between conditions at under-resourced schools and learner outcomes at these schools. Wealthier schools have far better learner outcomes than their poorer counterparts, thereby perpetuating race and class inequalities. Public schools in South Africa are divided into quintiles, with quintile 1 representing the poorest and quintile 5 the wealthiest schools. Learner achievements appear to be linked to the quintile their school is in. Mathematics results, for example, are between 15 to 30% higher in quintile 4 schools than in quintile 1 schools and 50 to 75% higher in quintile 5 schools than in quintile 4 schools.⁶

(2.2) Enrolment and Attendance

Section 3(1) of the South African Schools Act of 1996 (SASA) provides for compulsory education from the age of seven till the age of fifteen or for the completion of grade 9, whichever comes first. This phase of education is also referred to as the General Education Certificate (GEC). There is then an obligation on provincial Members of the Executive Council (MEC) to ensure

⁴ Organisation for Economic Co-operation and Development (OECD) *Reviews of National Policies for Education: South Africa* (2008) 49-55

⁵
⁶ OECD (note 4 above) 55

that there are sufficient places in public schools for all learners living within the province.⁷ There is a further obligation on the MECs to initiate an investigation when a learner falling within the compulsory phase is not at school and to take the necessary steps to ensure his or her attendance. Where a parent or caregiver fails to ensure the presence of a learner at school during the compulsory schooling phase, that person is guilty of an offence, the punishment for which could include imprisonment.⁸ This obligation continues until the learner reaches 15 years of age.

Enrolment is often used as an indicator for measuring access to education. However enrolment as an indicator of access, on its own may be viewed as flawed since despite the provisions set out above in respect of the MECs and parents, many learners in South Africa drop out of school for various reasons explored below. It is therefore important to differentiate between enrolment and attendance.

The South African state also uses enrolment figures as its benchmark for measuring access to education, often quoting high enrolment figures (in 2003 this was 96,6%) as proof of the achievement of almost universal access to education.⁹ However, net enrolment rates drop significantly after grade 3, suggesting that many learners are falling behind age-grade norms, and school enrolment figures decline markedly after grade 9 or age 15 indicating high dropout rates. Enrolment figures drop to 83,1% during this phase of education.¹⁰ This is also the end of the compulsory phase of education.

The 2006 General Household Survey (GHS) found that despite almost full enrolment rates in the GEC phase there remain 200 000 children in the 7-15 age group who do not attend education institutions. The majority of these children cite school fees as the main reason for not attending. Fees are also

⁷ Section 3(3)

⁸ Section 3(3)

⁹ OECD (note 4 above) 51

¹⁰ Department of Education Monitoring and Evaluation Report on the Impact and Outcomes of the Education System on South Africa's Population: Evidence from household Surveys (2006) 20

the main reason why 16-18 year olds do not attend school.¹¹ This is presumably because they cannot afford the fees. While learners who cannot afford school fees are entitled to exemption from school fees, the exemption system has proven extremely difficult to enforce. This is discussed in detail later in the paper.

The regulatory measures outlined above to enforce attendance are viewed as largely inappropriate and unenforceable due to the link between poverty and non-enrolment or non-attendance outlined above and because of the state's inability to provide sufficient places at schools for learners within affordable and attainable distance.¹² The apparent anomaly between high enrolment and compulsory education on the one hand, and high drop-out rates and for economic reasons on the other hand confirms the view of education rights activists such as the late Katarina Tomasevski, that education cannot be compulsory without also being made free.¹³

This is borne out by the latest version of the General Household Survey (2009). The survey notes a decline in attendance rates since the previous survey. Throughout the country enrolment at educational institutions of persons aged 7 to 24 increased between 2002 and 2007. Between 2007 and 2009, however, enrolment rates decreased in all provinces other than Gauteng. For example, enrolment decreased most steeply in the Northern Cape where it decreased by 3,3% between 2007 and 2009 to 70,7%. In the Eastern Cape enrolment declined by 3,2 % to 75,4% and in the Limpopo province enrolment decreased by 2,6% to 81,2%. The province with the lowest enrolment rate in 2009 was the Western Cape with a rate of 68,8% in 2009 down by 0,2% from 2007. Enrolment in Gauteng increased by 2,8%

¹¹ Ibid 22

¹² See for example F Veriava 'Access to Education for Learners in Thembelihle' (2006) Centre for Applied Legal Studies University of the Witwatersrand. Also S Wilson 'Out of site, Out of Mind: Relocation and Access to Schools in Sol Plaatje' (2003) Centre for Applied Legal Studies, University of the Witwatersrand. Both these studies detail the plight of large numbers of -school learners living in these informal settlements, and who are not attending schools because the Gauteng Department had failed to accommodate them in schools in areas where they live and because they cannot afford the school fees and/or transport costs to other schools.

¹³ See also K Tomasevski *Human Rights Obligations in Education: The 4-A Scheme* (2006)

between 2007-2009 to 71,5%. The authors of the survey put forward the view that this decline could be attributed to “the general deterioration of the economy experienced by most households during the latter part of 2008 and most of 2009”¹⁴, however others believe that the statistical decrease indicates that the system of capturing and recoding enrollments has in fact become more efficient.. This view appears to be supported by data showing that money for school fees was cited as the primary reason for non-attendance (35,7%), followed by the need to work (18,5%) and family duties (6.6%).¹⁵ Previous surveys have suggested that this is highly gendered and usually entails girls and young women having to care for the elderly and young children in the home, as well as doing housework.

Thus, the three main reasons for learners not attending school appear to be economic, that is they cannot afford school fees, they need to earn money or their labour is required in the home.

At the same time, while lack of money continues to be an issue in schools that are not no-fee the survey suggests that since 2007 there has been a dramatic increase in attendance at those schools that have been made fee-free. In 2009, 48% of learners did not pay school fees, 93% of these cases are because these learners are attending no-fee schools. In term of the study only 10% of learners benefited from an exemption at a fee-paying school.¹⁶

¹⁴ Statistics South Africa General Household Survey 2009 (2010) 10

¹⁵ Ibid 16

¹⁶ Ibid 13

SECTION 3 – SECTION 29 AND THE SOUTH AFRICAN JURISPRUDENCE ON SOCIO-ECONOMIC RIGHTS

(3.1) General

The right to education in the South African Constitution is entrenched in Section 29. This right is a hybrid rather than purely socio-economic right, as it is made up of a bundle of education rights that are divided into subsections. Each of the subsections confers specific and separate entitlements on right-holders, while the different subsections place concomitant obligations on the state that vary in nature and degree. Thus the section provides that insofar as the right is a socio-economic right, the state is obliged to make education accessible and available for all, but it is also a civil and political right as it contains freedom of choice guarantees, such as language choice in schools and the freedom to establish and maintain independent educational institutions and hence the freedom of individuals to choose between state-organised and private education.

The socio-economic entitlements under section 29 are also distinguishable from each other. Section 29(1) (a) is an ‘unqualified’ socio-economic right while section 29(1) (b) is a ‘qualified’ socio-economic right (i.e. subject to progressive realization within the state’s available resources).¹⁷

Section 29 (1) states, “Everyone has the right –

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

¹⁷See S Liebenberg ‘The Interpretation of Socio-economic rights’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional law of South Africa* 2ed OS (Juta & Co,2003) 33-5

This paper provides an overview of the socio-economic obligations arising in terms of section 29(1) (a) only, and not the socio-economic obligations arising in terms of sections 29(1) (b). This is based on the premise that the obligations that arise in respect of section 29(1) (a) are those which pertain to the schooling phase of education, while those in respect of section 29(1) (b) would pertain to education provisioning beyond grade 12. This is dealt with in more detail in the policy analysis section.

(3.2) Interpreting the right to basic education

Section 29(1) (a) states: 'Everyone has the right to a basic education, including adult basic education.' This right is often referred to as an unqualified socio-economic right as set out above. In the case of *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,¹⁸ which dealt with the equivalent provision under the interim Constitution,¹⁹ the Court held:

"[This provision] creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education."

Thus, the state is not only required to not interfere with an individual's enjoyment of the right (negative onus), but the state is also obliged to positively provide basic education. Save for acknowledging this positive obligation in the provision of basic education, South African courts have, to date, not had the opportunity to develop a test for adjudicating whether or not the current provisioning of public education has met or failed to meet this positive obligation, and as set out below, the courts in related socio-economic

¹⁸ In re School Education Bill of 1995 (Gauteng) 1996 (4) BCLR 537 (CC) para 9.

¹⁹ Sec 32 Constitution of the Republic of South Africa Act 2000 of 1993.

jurisprudence have been loath to specify the contents of socio-economic rights.

Qualified socio-economic rights are the rights of access to housing and health care services and the rights to food, water and social security (sections 26 and 27 of the Constitution). In *Government of the RSA & Others v Grootboom & Others*²⁰, the standard of review established in respect of these qualified socio-economic rights was to determine whether or not state measures were *reasonable* in progressively facilitating access to the right in question.²¹ This was confirmed in the case of *Minister of Health & Others v Treatment Action Campaign & Others* (the TAC case).²²

While the Constitutional Court has so far not developed a test for adjudicating on the unqualified socio-economic rights such as the right to basic education or the children's socio-economic rights enumerated under section 28(1)(c), commentators have suggested that socio-economic rights falling within the unqualified category could be read to imply that the state is under a direct, or immediate duty, to provide a basic education and that an *individual* (unlike as is in the case of the qualified socio-economic rights) may have a *direct* claim in respect of the right.²³ The reference to 'basic', however, suggests that the scope of the right is confined to the most 'rudimentary' or 'essential' entitlements in respect of the right. This of necessity then requires an inquiry into what constitutes the most "basic" or 'rudimentary', or 'essential entitlements' that make up the right to basic education, and which may therefore require a determination of the content of the right.

²⁰ 2001 (1) SA 46 (CC) para 22.

²¹ *Ibid* paras 39-44.

²² 2002 (5) SA 721 (CC) para 38.

²³ S Liebenberg (note 18 above) 33-48 – 33-52. In both the Grootboom and TAC cases, while the Constitutional Court did discuss the state's duties to provide children's socio-economic rights in respect of the unqualified right in section 28 (1)(c), it chose instead to base its findings on the rights of access to housing and health respectively and thereby avoided making decisions with respect to children's socio-economic rights. See also S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 113

The four 'A' scheme as elucidated in General Comment 13 to the International Covenant on Economic, Social and Cultural Rights (CESCR) has been proffered as a potentially useful device for the establishment of minimum standards for measuring any system of education and related to that, to determine obligations arising out of section 29(1)(a) as an unqualified right.

It states that, while the exact standard secured by the right to basic education may vary according to conditions within a particular state, education must exhibit the following features:

a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers on domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer laboratory and information technology.

(b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds;

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a 'distance learning' programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available 'free to all', State parties are required to progressively introduce free secondary and higher education;

(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to educational objectives required by article 13(1) and such minimum educational standards as may be approved by the State.

(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

The Constitutional Court in *Grootboom*²⁴ however displayed a clear reluctance to adopt the "minimum core" obligations as set out in the General Comments to the CESCR. The Court has clearly stated that it will only rely on a 'minimum core' – if at all - in so far as a country-specific core is capable of being ascertained.²⁵ Therefore, while the four "A" scheme may be useful for the purposes of identifying the essential elements which ought to comprise the right to education and

²⁴ [Government Of The Republic Of South Africa And Others V Grootboom And Others 2001 \(1\) Sa 46 \(CC\)](#)

²⁵ See Note 20 above para 29-33.

by which the right may be measure, it is also useful to also explore alternative models of standard setting.

Such an alternative and one that is increasingly being written about within the South African discourse on the right to basic education is the United States model which has been developed and utilised in many states in the US over decades of litigation, albeit in different forms. Essentially this model entails a determination of adequacy of educational standards and sufficiency of funds. Such a determination is made not at a national level but is a decentralised method for the setting of minimum standards, and which requires the participation of education activists and lobby groups. The setting of standards would include a determination of adequacy based on a number of factors ranging from class size, to specifying school facilities and to the material required for learning which would then be matched by improved budgets and equalised per learner allocations.²⁶.

²⁶ D Isaacs “Interpreting, litigating and realizing the right to basic education South Africa: Lessons from America.” SAJHR Forthcoming

SECTION 4 - THE POLICY REVIEW

(4.1) Background

The legal framework regulating schools is encapsulated in SASA and the National Education Policy Act of 1996, together with a plethora of subordinate legislation. This framework creates a single unified national system of schooling and provides for the desegregation of education, the establishment of school governing bodies, nine years of compulsory schooling, the funding of public schools and the establishment, and subsidizing of independent schools. While the Further Education and Training Colleges Act of 2006 is said to regulate all levels of learning and training above the GEC phase and therefore supposedly regulates learning and training for grades 10-12, it is silent in respect of the funding of grades 10-12. Funding of all schooling up to matric is regulated solely by SASA and its subordinate legislation. Accordingly, this policy review does not include a discussion of the Further Education and Training Colleges Act.

(4.2) An overview of the school fees and funding regime²⁷

In the 2010/11 South African National Budget, R165,1 billion was allocated to education. This constitutes a 10,9% increase in nominal terms from the R148,9 billion allocated in 2009/10 and an increase of over 5% in real terms after adjusting for the prevailing inflation rate. R127 billion, 77% of the overall education budget, was specifically earmarked for schooling. Planned public expenditure on education in South Africa in 2010/11 amounts to about 18,2% of the overall budget (the largest component of the budget) and to around 6,1% of South Africa's GDP.²⁸

²⁷ Aspects of the analysis set out below are based on that developed in a more detailed journal article. See F Veriava "The amended legal framework: A boon or a barrier?" (2007) 23 South African Journal on Human Rights 180

²⁸ This compares favorably to a world average of public expenditure on education of 4,6% of GDP, made up of 4,0% of GDP for low and middle-income countries and 5,4% of GDP for high-income countries. These figures are based on 2008 figures published in the 2010 World Development Indicators report of the World Bank.

Every year once the Department of Education receives its allocation, it apportions each province its share of the general education budget. Each province then develops its own education budget. These provincial budgets ought to be guided by the various norms and standards developed by the Department of Education.

Funding for schools is rather complex and may be delineated into three main categories:

- (1) infrastructural provisioning, i.e. the building of schools, classrooms and the provisioning of water, sewage and telephone services;
- (2) personnel expenditure, i.e. educator salaries, and
- (3) non-personnel recurrent expenditure, i.e. capital equipment and consumables used inside schools to ensure the proper functioning of schools such as textbooks, stationery computer etc.

Each of these areas is discussed in turn below.

4.2.1 Infrastructural spending

Infrastructural spending is currently guided by the principles set out in the Norms and Standards for School Funding, which requires that each province budgets for this category of expenditure in terms of their overall budget.²⁹ They must then target the neediest areas determined broadly, according to (a) the lack of schools and (b) the overcrowding of schools. Allocations should also prioritise the GEC phase of education.³⁰

In 2008 the Department of Education published the “The Draft National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment”³¹ (the National Policy) and “The Draft National Minimum Norms and Standards for School Infrastructure”.³² The National Policy document is an acknowledgment of the link between poor infrastructural conditions and poor learner outcomes. It also acknowledges

²⁹ See both General Notice 2362 (Government Gazette 19347) October 1998 and amended in terms of General Notice 2362 (Government Gazette 29178) August 2006

³⁰ See Sections 78-82

³¹ General Notice 1438 (Government Gazette 31616) November 2008

³² General Notice 1439 (Government Gazette 31616) November 2008

that problems have occurred with the application of the criteria set out in the Norms and Standards for School Funding for infrastructural provisioning in the provincial budget outlined above. In particular, it notes that the criteria have been applied in an *ad hoc* manner, with crisis situations often being the key determinant for how spending has occurred. Alternatively, the criteria have been applied differently in the provinces. For example one province may prioritise the building of school toilets while another province will prioritise the building of classrooms for “tree –schools” or over-crowded schools.

The National Policy therefore aims to develop new criteria for infrastructural planning. It states that from 2008:

“[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.”

The draft National Minimum Norms and Standards for School Infrastructure seek to set certain basic standards. Examples of this include:

- (1) “Architectural norms“ - sets standards for the building of schools and the size of classrooms.
- (2) “Planning norms” - provides norms for where schools should be situated or in which radius a schools must be located in a community, as well as setting the norms, for upgrading basic services such as us stating that pit latrines are no longer acceptable.

A process calling on the public to comment on these draft documents was completed in May 2010. No final draft of the National Minimum Norms and

Standards for School Infrastructure has been published since then. These Norms were initially meant to be implemented in 2008 but there appear to be ongoing delays in the implementation of these Norms. Social Movements such as Equal Education have been actively advocating for the finalisation of the Norms. Given the current draft status of these Norms it is unclear how they will look once they are finalized and when they will be implemented. Therefore this document will not be discussed in the analysis section below even though it remains highly relevant to the subject matter under scrutiny.

4.2.2 Personnel Expenditure

Personnel expenditure constitutes the largest amount of state spending on schools - somewhere between 80-90%. Because teacher salaries have been determined according to qualifications and experience, the funds directed in respect of this line item is said to continue to favour historically advantaged schools as these schools continue to have better qualified teachers. In 2002, the Department of Education adopted the “Post Provisioning Norms”, which allocates teaching posts according to a formula which weights certain specified factors such as class size, the range of subject offered or the poverty of a particular community. The higher the weighting of a school, the higher the chances that the school will benefit by being allocated a teaching post. These Norms also instruct provinces to set aside between two and five per cents of posts for allocation in favour of “needy schools” as defined by a formula. However, many have argued that these Norms are insufficiently geared towards historical redress since other weighted factors continue to favour the more advantaged schools.³³

33 According to Porteus for example, several curricular area which enjoy added valued according to the ‘weighted norms’ are applied to special fields of study including agriculture, technology etc. These curricular areas are primarily offered in historically advantaged schools. Also, these schools enjoy educators with higher qualification. Thus in practice these schools enjoy higher per capita personnel expenditure than historically disadvantaged schools. K Porteus ‘Education financing: Framing inclusion or exclusion’ (2002) 9 (4) Quarterly Review of Education and Training in SA 13,14

4.2.3 Non-personnel Expenditure

State provisioning for non-personnel expenditure for schools is also guided by the principles set out in the Norms and Standards. State allocation for recurrent, non-personnel expenditure is made by ranking schools on a poverty index from the poorest quintile to the least poor quintile. Resource allocation is made according to the position of a school on the poverty index - 80% of funds for non-personnel expenditure are directed to 60% of the poorest schools. While this is seen as a progressive poverty targeting measure, it constitutes a relatively small part of state spending on education. The Norms and Standards prescribe as a policy target based on “local and international evidence”, that personnel: non-personnel spending ratio should be in order of 80:20. Yet, critics have suggested actual spending for non-personnel expenditure constitutes a significantly smaller portion of school budgets (about 10%), and therefore only a very small portion of education allocations are actually targeted towards redress of historical biases.³⁴

4.2.4 School fees

Once state funds have been allocated to schools for personnel or non-personnel expenditure, deficiencies in school budgets are made up through the charging of school fees or fund raising.

The South African Schools Act (SASA) attempted to alleviate the financial burden of school fees on parents who could not afford to pay for them in two ways: Firstly, it provided that a determination of whether or not fees should be charged at a particular school be an issue of individual school governance. Secondly, it allowed parents who could not afford to pay school fees to apply for exemptions from the payment of schools fees at schools where fees are charged. Thus, SASA provided that a school could charge school fees when a majority of parents attending the annual budget meeting adopted a resolution to do so. It then provided that parents must, at such a meeting, determine the

³⁴ Ibid.

amount of fees to be charged and the criteria for exemption.³⁵ The Exemption of Parents from the Payment of School Fees Regulations, 1998 (the 'Regulations') provided the parameters for determining eligibility for exemptions according to a means test.³⁶ This required a school to fully exempt parents whose combined annual income was less than ten times the annual school fee, and partially exempt those whose annual income was less than thirty times but more than ten times the annual school fee.³⁷ Partial exemptions were subject to the discretion of the school governing body. The Regulations also set out the procedures for applying for exemptions and for appealing decisions of the School Governing Body (SGB). Finally, SASA provided that where parents were not eligible for exemptions but failed to pay school fees, the school could sue the parents for outstanding school fees.³⁸ However, while the law provided that a school may sue a parent for outstanding school fees, the law nevertheless attempted to protect learners whose parents did not pay school fees from discrimination or exclusion³⁹

More than any other area of school funding, various difficulties were exposed as the result of the charging of school fees. These difficulties are alluded to briefly.

Schools fees became a barrier to access to education for poor learners for several reasons: Firstly, many learners whose parents did not pay school fees were treated differently and were discriminated against because of the non-payment of school fees. Examples of how learners were discriminated against included learners being denied access to the school and being sent home, or learners being denied access to some of the schools activities, or

35 Section 39.

36 Government Notice 1293 (Government Gazette 19347) October 1998. These Regulations were developed pursuant to section 39(4) and section 61 of SASA.

37 Regulation 3.

38 Section 40- 41.

39 Section 5(3)(a) of SASA stated that '[n]o learner may be refused admission to a public school on grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body under section 39.' In terms of Section 10(a) of the Admission Policy for Ordinary Schools General Notice 2432 (Government Gazette 19377) of October 1998, '[a] learner is admitted to the total school programme and may not be suspended from classes, denied a school report or transfer certificates, or otherwise victimised on grounds that his or her parent is unable to pay fees or has not paid the required fees.

learners having some of the services of the schools such as the provision of textbooks or report cards withheld.⁴⁰ This occurred despite the unequivocal prohibition in the legal framework against such discrimination.

Secondly, schools failed to comply with their obligations in respect of the exemption policy. This too manifested itself in various ways. Schools failed to inform parents of the existence of the exemption policy even though they are legally obliged to do so. Many schools did not have any exemption policy in place, or school principals set exemption policies that did not abide by the parameters set out in the Regulations. Many schools also failed to process and grant exemptions to eligible learners. Instead these schools retained debt collectors to exert pressure on poor parents by sending letters and even suing parents for arrear school fees.⁴¹ A study into exemption patterns at schools in 2002 illustrated that very few parents were able to access this benefit despite high levels of poverty and unemployment. In primary schools, only 2,5% of families overall and 4,1% in former white schools received fee exemptions.⁴² At secondary school only 3,7% of families overall and 5,7% at former white schools received exemptions. The main reason for schools non-compliance with the exemption policy appears to have been that schools were not compensated for exemptions granted to learners by the school. Hence, granting of exemptions would lower the amount of revenue received by schools.

Thirdly, the exemption policy was, and continues to be, inadequate in remedying the more indirect costs that make education unaffordable for poor learners. These include other costs such as uniform, stationery, books and especially transport costs that take up a substantial proportion of the

40 See for example: S Vally & Y Dalamba 'Racism, racial integration and desegregation in South African public schools' South African Human Rights Commission (1999) 47-50. See also S Liebenberg & K Pillay, 'Poverty and Human Rights in South Africa – Poverty Hearings Background Paper' (1998) Sangoco Publications 38-39.

41 For a discussion of some of these cases see F Veriava 'Enforcing the current laws on school fees' (2003) 4 (2) *ESR Review* 6-7.

42 See E Fiske & H Ladd 'Balancing public and private resources for basic education: School fees in post-apartheid South Africa' in L Chisolm (ed) *Changing class: Education and social change in post-Apartheid South Africa* (Cape Town: HSRC Press / London: Zed Press 2004) 72-74.

household income. Research conducted in the Sol Plaatje Settlement illustrated that the proportion of household income spent on costs normally associated with sending a child to school is inversely proportional to the level of household income. Except in the poorest households where transport costs make up between fifty and seventy percent of the access burden.⁴³

Finally, the exemption policy also failed to adequately take into account the number of children a family had at school.⁴⁴ It also failed to provide relief to those families who narrowly miss qualifying for an exemption but who are nevertheless poor.

Not only did school fees create problems of access for poor learners, but in some schools it also perpetuated the state of under-resourcing in fee-poor schools. Fee-poor schools are those schools catering for poor learners and can, therefore, not rely on fee revenue to supplement state allocations. Thus, these schools lack the financial resources to run their schools and therefore operate under sub-standard conditions. Unlike schools in wealthier communities who can raise funds through school fees in order to provide facilities necessary for a good basic education, schools situated in poor communities, where parents cannot pay school fees cannot supplement state allocations in this way. This is a problem, as no compensation was provided to schools for the granting of exemptions and has perpetuated the problem of poor schools operating under cash-strapped conditions.

In 2003 we saw increased mobilisation within civil society against school fees and the existing funding regime because of the difficulties and problems outlined above. In response the Department of Education initiated the “Review of Financing, Resourcing and Costs of Education in Public Schools.” (the

43 S Wilson(Note 12 above) 26.

44 Eligibility in terms of the formula for an exemption is determined by considering the schools fees of the child for whom the exemption is being sought in relation to the family income. Parents generally, however, have more than one child at a school or at different schools. Thus, the percentage of the family income being consumed by school fees may not appear to be high when considered in respect of one child, but may constitute the highest expenditure in a family when considered in respect of the total amount of school fees being paid for all of the children in the family.

“Review”) released in 2003 and the “Plan of Action for Improving Access to Free Quality Basic Education for All” (the “Plan) released later the same year. These documents, when released, formed the foundation for the significant funding reforms to SASA and its subordinate legislation and were implemented from 2005. The language of these documents also provides considerable insight into how the Department of Education views its constitutional obligations and how this translates into policy commitments and the setting of benchmarks or indicators. This is discussed in more detail in the next section of this paper.

Below is a brief description of some of the changes arising out of the reform process outlined above. They include:

Firstly, a shift from provincially to nationally determined quintiles was established. The rationale for this was to ensure that state funding for poor learners in the country is distributed across the country in a systematic manner and that all poor learners are subject to the same pro-poor targeting.

Secondly, national per learner funding norms and minimum standards were established. That is, every year the national department sets the amount the provinces ought to allocate to each learner in each quintile for non-personnel expenditure. The national department also sets the ‘adequacy benchmark’, which it considers the minimally adequate amount of money necessary in order for a learner to access his or her right to basic education. Thus, for example, in terms of the national norms in 2010 the poorest quintile in schools ought to receive an allocation of R855 per learner and the wealthiest quintile R 147. The adequacy benchmark is set at R571 for this year. In 2011 the poorest quintile of schools ought to receive an allocation of R901 per learner and the wealthiest quintile R155. The adequacy benchmark for 2011 is set at R602. It is important to clarify that these amounts are not the total amount of money spent on the education of each learner but merely constitute the amount that ought to be allocated by the state for non-personnel expenditure for each learner in a school in a particular quintile.

Thirdly, 'no fee' schools were established. School fees are no longer charged in the poorest schools - that is quintile 1 and 2 schools if these schools receive an 'adequate' school allocation from government.

Fourthly, where school fees continue to be charged, the amendments seek to improve the exemption policy and strengthen anti-discrimination provisions protecting poor learners. Significant changes include:

- Prohibiting a school from charging anything in excess of a single compulsory fee, subject to strict exemptions criteria. Amongst other things, this outlaws registration fees.
- A clear and unambiguous elucidation prohibiting the more pernicious forms of discrimination against children of non-fee paying parents.⁴⁵
- Placing an onus on a school to prove that it has implemented the regulations before taking legal action against a parent.
- Prohibiting an SGB from attaching a parent's home unless alternative accommodation is made available to the parent.
- Extending the scope of automatic exemptions to include not only orphans and learners in some form of foster care but also other learners supported by a grant from the government such as a child support grant. In the past the national department had advised parents to use their child support grants to pay for school fees.
- Improving the formula for determining exemptions.

45 In terms of the amendments, section 41(5) of SASA states that: a learner has the right to participate in the total school programme despite non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to (a) suspension from classes; (b) verbal or non verbal abuse; (c) denial of access to cultural, sporting or social activities of the school; or (d) denial of a school report or transfer certificates.

SECTION 5 – SCRUTINY OF THE FRAMEWORK: HOW THIS TRANSLATES INTO POLICY, BENCHMARKS AND INDICATORS

(5.1) Constitutional commitments and the commitment to redress

Prior to the funding reforms initiated in 2003, rights rhetoric was largely absent from the legal framework. Where right obligations were noted, this occurred, as a passing reference and as a misinterpretation of the state's obligations. For example, the original Norms and Standards spoke of the obligation to “progressively realise the right to basic education”. As has already been highlighted in the section discussing section 29, the right to basic education is an *unqualified right* and is therefore unfettered by the progressive realisation qualifier.

What has remained consistent in all policy development since 1996 is the stated commitment to redress the historical legacy of apartheid education. For example, the preamble to SASA acknowledges, “this country requires a new national system for schools which will redress past injustices in educational provision.” The amendments to SASA then contain an interesting and innovatively worded amendment titled “Responsibility of the State.”⁴⁶ In terms of which Section 34(1) states:

“The State must fund public revenue on an equitable basis in order to ensure the proper exercise of the *rights* of learners to an education and the *redress of past inequalities* in education provision. (own emphasis)”.

As mentioned previously, the pressure from civil society resulted in the Department of Education introducing of the “Review of Financing, Resourcing

⁴⁶ Section 34.

and Costs of Education in Public Schools (the “Review” and “Plan of Action for Improving Access to Free Quality Basic Education for All” (the “Plan”) by the Department.

The Plan, at first blush, appears to be an emphatic statement by the Department of its constitutional imperatives. It acknowledges the rights of all South Africans to basic education, which it seems to suggest has been realised by making education compulsory for learners between the age of 7 and 15. It then goes on to outline the state’s constitutional commitment in respect of Grades 10 to 12 as being to *progressively improve access* to further education, thus implying a lesser obligation towards learners in these grades compared to learners in the compulsory phase⁴⁷

In discussing its constitutional obligations, the Plan introduces the language of “adequacy” to the policy discourse for the first time. It states that the Department’s emphasis is on “ensuring that our pro-poor funding mechanism brings about *adequate* funding for all poor schools” (own emphasis). The Plan states as an objective the aim of moving, “beyond free education”, claiming that through funding reforms a schooling system can be realized that is *free and of good quality for all poor* in the country.”⁴⁸

The Plan proceeds to justify a system that will continue to charge school fees at historically advantaged schools on the basis that such a system facilitates the cross-subsidisation of poor learners by parents of wealthier learners. That is, the fees paid by wealthier parents are sufficient to subsidise poor learners and thereby enable these learners to attend these historically advantaged schools and be exempted from the payment of school fees. In addition, income through fees at the historically advantaged schools allows the state to

⁴⁷ Section 2.5

⁴⁸ Section 2.6

redirect state funds according to a pro-poor policy that favors historically disadvantaged schools.⁴⁹

The Plan at various points then appears to contradict itself and instead refers to the “*progressive realisation of the right to basic education*,” and the “*progressive roll out of free-education*”. It appears, therefore, that, at best, the Department’s understanding of its constitutional obligations may be described as a misinterpretation. Alternatively, it has absorbed the language of rights and deliberately obfuscated it amidst civil society campaigns to draw attention to the state’s constitutional imperatives. This dynamic has been described by Stuart Wilson in the following terms:

“Yet, both in rhetoric and content, the Plan was an effort to seize the progressive ground occupied by many critics of education policy, and to re-assert the Department’s claim to be pursuing a vigorously pro-poor agenda. It did so by presenting its limited reforms in the rights language used by its critics and by articulating, often for the first time, many of the policy goals championed by its opponents. Nonetheless the Department subordinated both rights and reform to the same overarching fiscal conservatism and incrementalism that its critics found most problematic.”⁵⁰

From within this erratic outlining of the state’s constitutional imperative from 1996 to 2003 certain policy trends emerged. Some of these can be translated into benchmarks or targets by which the state can measure the realization of its commitment.

⁴⁹ Section 2.7

⁵⁰S Wilson “Taming the Constitution: Rights and Reform in the South African Education System.” (2004) 20 South African Journal on Human Rights 419

(5.2) Policy trends, benchmarks and indicators

5.2.1 The GEC phase as encompassing the scope of the state's commitment to basic education

The Plan stipulated that the GEC phase of education is the basic education phase. This has translated into policy making in three distinct areas:

Firstly, the state has made this phase of education compulsory, the premise being that this will ensure universal access to a basic education. The state then measures universal access based on levels of initial enrolment of learners in this phase of education. The analysis of data conducted in this paper has suggested that initial enrolment figures on their own cannot be used as a marker for universal access, since there are many and ongoing obstacles to access affecting attendance at schools.

Secondly, within the context of no-fee schools, the Norms and Standards for School Funding leave it to ministerial discretion to establish no-fee grades, whilst allowing fees to be charged at no-fee schools in grades 10-12 which fall outside the GEC phase. Again, this is highly problematic when the high dropout rates during this phase of schooling are taken into consideration, as well as the fact that affordability is cited as the main reason for non-attendance at school.

Thirdly, the Department's interpretation of the scope of the basic education phase has translated into the prioritisation of allocations for building of schools and other infrastructural development in the GEC phase. In practice, and in the context of scarce resources, it appears that this can result in the extension of new primary schools or the building of primary schools only, to the exclusion of secondary schools.⁵¹

⁵¹ This was the basis of reasoning provided to CALS and the South African Human Rights Commission (SAHRC) in correspondence between the organisations and the North West Department as to the shortage of high schools in a particular area of that province.

The definition of the GEC phase of education as embodying the scope of the state's basic education mandate and the subsequent prioritisation of the GEC phase appear to be neither grounded in a rights-based premise nor rationally connected to the socio-economic realities of South African life. Indeed, commentators within an international discourse on education rights are increasingly putting forward the view that in order for education to impact and improve the lives of learners, as well as reduce poverty it cannot be limited to a few years of schooling but should be predicated on the acquisition of basic skills such as numeracy or literacy and should be lengthened to include secondary education. Such an approach would also be in keeping with the World Declaration on Education for All which states that:⁵²

“The focus on basic education must, therefore, be on actual learning acquisition and outcome rather than exclusively on enrolment, continued participation in organized programmes and completion of certification requirements.”

5.2.2 A pro-poor policy through socio-economic targeting and cross-subsidisation

Since 1996 and as a result of the 2003 funding reforms the Department has stated that its overall policy objective is the redressing of the legacy of apartheid education. It claims to have achieved this through the institution of a model of socio-economic targeting that distributes 80% of the funding for recurrent non-personnel expenditure to 60% of the poorest schools. Since the new funding framework has been instituted, this pro-poor policy has also included making more than 40% of the poorest schools fee free.

It has already been discussed above that the actual spending on education within this pro-poor framework constitutes a very small proportion of the overall spending on education, as the recommended 80:20 apportionment

⁵² Adopted in Jomtien in 1990. Article 4, see also Articles 1 & 5

between personnel and non-personnel expenditure does not occur in reality and personnel expenditure is insufficiently apportioned on a pro-poor basis.

Other pitfalls within the state's pro-poor policies have also become evident in the implementation of 2003 reforms. This is particularly the case for the shift from provincially determined to nationally determined quintiles through a process whereby provincial education departments assign a poverty score to each school based on the poverty of the community around the school.⁵³ This has resulted in significant hardships for many schools that have been inaccurately ranked.⁵⁴ As a direct consequence of being inaccurately ranked these schools receive low state allocations and because of the absence of sufficient fee revenue with which to maintain these schools, these schools exist in conditions of under-funding and under-resourcing. As a result of the incorrect classification of many schools not all schools that should be declared '*no fee schools*' have been declared thus.⁵⁵

The Norms and Standards contains a provision enabling schools to dispute the correctness of a poverty score assigned to it through a representation to the Head of Department and requires provincial departments to establish procedures for schools to do so.⁵⁶ The extent to which this provision has been successfully utilised by schools on a national level is unclear from the information available. In the first half of 2007, the Centre for Applied Legal

⁵³ Amended Norms (note 27 above) paragraph 101

⁵⁴ This is problematic because, firstly, the revised ranking system largely ignores the current reality of post-apartheid schooling, which is that many learners travel from poorer communities to attend schools in other areas with better infrastructure in terms of learning facilities and teachers. There are also case studies where learners in informal settlements and townships are inadequately catered for and therefore have no option but to travel to schools in other areas. See F Veriava (note 12 above). See also R Wildeman "Reviewing 8 years of the implementation of the school funding norms." (2008)39. He notes that the way targeting occurs (using census data) at ward level means that vastly different levels of incomes and educational levels are drawn into the same boundary that defines a ward.

⁵⁵ 'See no fee schools spark row' Sunday Times 1 October 2006. In this article it was alleged that there are dozens of schools across the country that are lodging objections to the ratings given to their schools because while their schools actually meet the criteria for being declared no-fee schools, these schools have been ranked as wealthy schools even though the learners come from mostly poor backgrounds.

⁵⁶ Amended Norms (note 28 above) paragraph 106

Studies (CALs), attempted to challenge the poverty ranking of a school in Lenasia, whose learners lived mainly in the neighbouring informal settlement of Thembelihle on the basis of this provision. The Gauteng Department of Education (GDE) at the time failed to respond to all representations made on behalf of the school. It was also clear at that stage that no procedures existed within the GDE that would enable schools to challenge their poverty ranking. However, according to Russel Wildeman who conducted interviews with officials from nine provinces, Western Cape and Limpopo education departments' officials reported to him that there were schools in their respective provinces that has successfully challenged their poverty rankings. Nonetheless, officials in these two provinces were unwilling to provide figures in this regard or make information of such challenges widely available for fear of opening the "floodgates" to further challenges.⁵⁷

Thus, while the state has pursued pro-poor policies, the resources allocated on this basis have been insufficient in addressing infrastructural and other backlogs in education. Moreover, where a pro-poor policy has resulted in fee-free schooling this has failed to cover all schools that ought to fall within this safety net.

5.2.3 Cross-subsidisation

While the plan talks about the "progressive roll-out of free-education", it also renews commitments to charging school fees at more advantaged schools. The rationalisation being that of cross-subsidisation by wealthier parents of poor learners through fee exemptions for poor learners at wealthier schools. However, Fiske and Ladd's research into exemption patterns at wealthier schools show low exemption uptakes and therefore does not provide support for this system. They also note that the extremely low number of exemptions at formerly white primary and secondary schools, the well-resourced schools,

⁵⁷ Telephonic interview with Russel Wildeman on 25 July 2010 in respect of his research into the implementation of the Normans and Standards. See note 60 below.

suggests that “race is being replaced by economic class as the determinant of who is able to go to formerly white schools.”⁵⁸ In terms of the latest GHS, only 10% of those surveyed stated that they benefited from full or partial exemptions in fee-charging schools. Research into the reformed funding framework also suggested that despite the tightening of the non-discrimination provisions in the funding framework, problems relating to the non-implementation of the exemption system and the discrimination of poor learners in fee-paying schools continue to persist.⁵⁹ It appears, therefore, that to the extent that wealthier parents subsidise poor learners at fee-paying schools, this subsidisation is negligible when weighed against the fact that fees continue to exist as a barrier to education for many learners. Nonetheless, education activist Doron Isaacs argues that the retention of fees at wealthy schools may yet have potential for cross-subsidisation if schools are adequately compensated and if schools are required by law to exempt a certain number of learners.⁶⁰ A draft amendment to Norms and Standards that provides for the compensation of schools is currently being discussed.

Government also argues for fee retention on the basis that it facilitates cross-subsidisation by allowing wealthier schools to charge fees, thus enabling the state to allocate fewer resources to these schools and thereby provide higher allocations to poorer schools, as well as making them fee-free. As stated earlier on in this paper the per learner target allocation for non-personnel expenditure for a learner in quintile 1 is R855 compared with R147 in quintile 5. Yet, this does little to achieve equality amongst schools or improve the quality of services at under-resourced schools. What it does do is widen the disparities between wealthy and poor schools. Fees charged at a historically advantaged school can be as high as R18 000 per annum. This puts these schools out of the reach of many learners unless they are able to secure an exemption, which as has been illustrated above, schools continue to be

58 Fiske & Ladd (note 41 above)74

59 See V Gullapalli, M Ngwenya & F Veriava ‘Implementation of the Schools Fees and Funding Framework: A study of three provinces’ (July 2006) Centre for Applied Legal Studies.

⁶⁰ D Isaacs “Don’t cap or scrap fees: use them to fix inequality. (2009) www.equaleducation.org.za/press-a-views/views-a-reports

reluctant to grant. The discrepancy between fees paid at certain schools and the level of funding provided to learners at poor schools intensifies the disparities in the quality of learning and teaching that learners have access to.

5.2.4 The Adequacy Benchmark

As has been noted above, one of the key features of the 2003 funding reform has been the setting of the adequacy benchmark for non-personnel expenditure as the minimally adequate amount that has to be allocated to a learner in order for his or her right to basic education to be realised. According to Wildeman, the concept of “adequacy” refers to a minimum resourcing level that makes the attainment of pre-defined standards possible by linking resources to outputs. According to him this can be achieved through the use of statistical equations or “best practice” examples of schools that do well with minimal resources. Wildeman’s research into the implementation of the amended Norms suggests that the Department relied on “best practice” examples to inform adequate funding levels of schools. They examined the recurrent non-personnel expenditures in Gauteng primary schools and used this information to develop as benchmarks for determining the adequate spending amount.⁶¹

According to Wildeman, these levels of funding are “*arbitrary and what works for the selected schools in Gauteng may not be as effective for schools in other parts of the [country].*”⁶² He also makes the point that paragraph 91 of the amended Norms clearly states that the entire government budget is one of the key considerations in the determination of the school allocation. Thus, it seems clear that what drives the determination of the adequacy benchmark appears to be affordability rather than any pre-defined and coherent notion of adequacy. This is borne out by the statistics quoted above, which reflect huge deficiencies and infrastructural backlogs at South Africa’s schools and

⁶¹ R Wildeman “Reviewing 8 years of the Implementation of the School Funding Norms” (2008) Idasa 52-55

⁶² R Wildeman (Ibid) 54

the concomitant link to inferior educational outcomes from the poorest schools.

SECTION 6 – CONCLUSION AND RECOMMENDATIONS

The rights-rhetoric employed by the state suggests that it has utilised the Constitution and in particular section 29 as a “policy structuring device”⁶³. However, on closer inspection the state’s interpretation of its obligations is inconsistent and even contradictory. According to Wilson, rights-rhetoric has been utilised in a manner that *“provide[d] ideological window dressing for policies and practices which actually place significant limits on the very rights they are supposed to advance.”*⁶⁴

Nevertheless, in the employment thereof some patterns in policy making begin to emerge, as well as certain benchmarks or targets which the state has identified and employs to show its compliance with the constitution. These are:

Defining the GEC phase of education as encompassing the scope of the state’s obligations in respect of the right to basic education and pursuant thereto:

- (c) Making this phase of education compulsory and measuring universal access to basic education by high enrolment figures.
- (d) Prioritising this phase of education in spending and allocation for basic infrastructure.
- (e) Due to the immediately enforceable nature of the right to basic education, whilst the Minister can decree schools up to grade 9 as fee-free, this discretion does not cover grades 10 to 12, which does impact on the nature of the right to education.

The pursuit of pro-poor policies premised on the notion of redress. These include:

⁶³T Roux, F Veriava, S Wilson “Comment on the Department of Education’s Report to the Minister on a Review of Financing, Resourcing and Costs of Education in Public Schools”(2003) Centre for Applied Legal Studies, University of the Witwatersrand.

⁶⁴ S Wilson(note 49 above) 424

- (a) A policy of pro-poor targeting for recurrent non-personnel expenditure. 80% of funds are to be distributed to the 60% of the poorest schools under an apportionment framework of 80:20 for personnel: non-personnel recurrent expenditure.
- (b) The introduction of fee-free schooling in at least 40% of the poorest schools.
- (c) The retention of a system of charging school fees as part of government's commitment to pro-poor cross-subsidisation.
- (d) The setting of the adequacy benchmark that stipulates the amount which ought to be allocated to each learner so that each learner can receive an adequate education.

Some of these policies such as the setting of the adequacy benchmark for non-personnel expenditure, and the limiting of the basic education phase appear to have been determined arbitrarily and with no rational connection to the objectives meant to be served. Moreover, the pro-poor policies continue to occur within the framework of affordability rather than the provision of an adequate standard of education. Wilson refers to this as the privileging of “equity” over “substantive equality”. Arguments for retaining school fees within the current framework as a form of cross-subsidisation also appear to be ineffective. That is, the very low numbers of exemptions granted at historically advantaged schools suggest that there is little to no cross-subsidisation by wealthy parents of poor learners at these schools. Moreover, to the extent that the charging of school fees at wealthier schools results in lower state allocations to wealthier schools thus enabling the state to direct more funds to poor schools, this “cross-subsidisation” remains inadequate in reducing disparities between wealthy and poor schools.⁶⁵

What is required is an interpretation of the right to education that is based on a sound and coherent analysis of its meaning and purpose in order to develop

⁶⁵ A more convincing reason for the state's stubbornly adherence to this appears is perhaps the original premise on which the system was initially devised. That is, in 1995 a pair of international consultants to the Department argued that if schools were not allowed to charge fees and use them to maintain quality in historically white schools, key ‘opinion and decision makers’ would remove their children from the public school system. They therefore proposed the system that was made into law in 1996. Fiske and Ladd (note 41 above)⁶⁵

policy and set benchmarks and indicators that are realisable and would provide access to an adequate education for all learners. Indicators against which education provisioning could be measured could include the CESR's 4-A scheme or the United States model for defining adequacy, both of which have been discussed above.

Clearly, however, there are challenges within the funding framework.

Firstly, schooling continues to be economically inaccessible for the poorest learners. Two options may be explored to address this problem:

Option 1: Making all public schooling completely fee-free and funding this through a form of progressive taxation. This approach would be in accordance with international law in respect of the free education guarantee.

Option 2: Making all, but quintile four and quintile five schools fee free. This would widen the net of fee-free schooling whilst retaining a degree of cross-subsidisation. For this option to work, it would necessitate a reform of the current method of poverty ranking to ensure that ranking of the schools takes cognisance of learner population at the school and not the area in which the school is located. It would also necessitate the imposition of quotas for exemptions at wealthier schools so that poorer learners can access these schools. It would also require that these schools be sufficiently compensated by the state for granting exemptions. However, scepticism persists amongst human rights advocates with regard to retaining an exemption system, albeit reformed framework. This is because of the historical difficulties in administering exemptions in South Africa, as well as international experience with exemptions.⁶⁶

Secondly, the huge disparities in education must be addressed in order to ensure that *all* learners have access to an adequate education that would enable them to pursue livelihoods and to live with dignity. What constitutes an "adequate education" cannot be arbitrarily determined as appears to have been the case in the past with setting the adequacy benchmark for the

⁶⁶ S Fredman Human Rights Transformed: Positive Rights and Positive Duties (2008) 174

allocation of non-personnel expenditure. The US model for determining adequacy of educational standards and sufficiency of funds could be useful. In future, this could be done through a public participation process which requires that the Department work together with education activists and lobby groups to define the elements that would constitute an adequate education in respect of non-personnel expenditure and then funding this accordingly.

There is also currently a process in place that aims to address the backlogs in infrastructure in the draft Norms National Minimum Norms and Standards for School Infrastructure. A step in the right direction would be the finalisation and implementation of these norms.

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