



UNEQUAL ACCESS TO SCHOOL INFRASTRUCTURE AND LITIGATION TO FORCE CHANGE



CENTRE FOR
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catalysts for social justice



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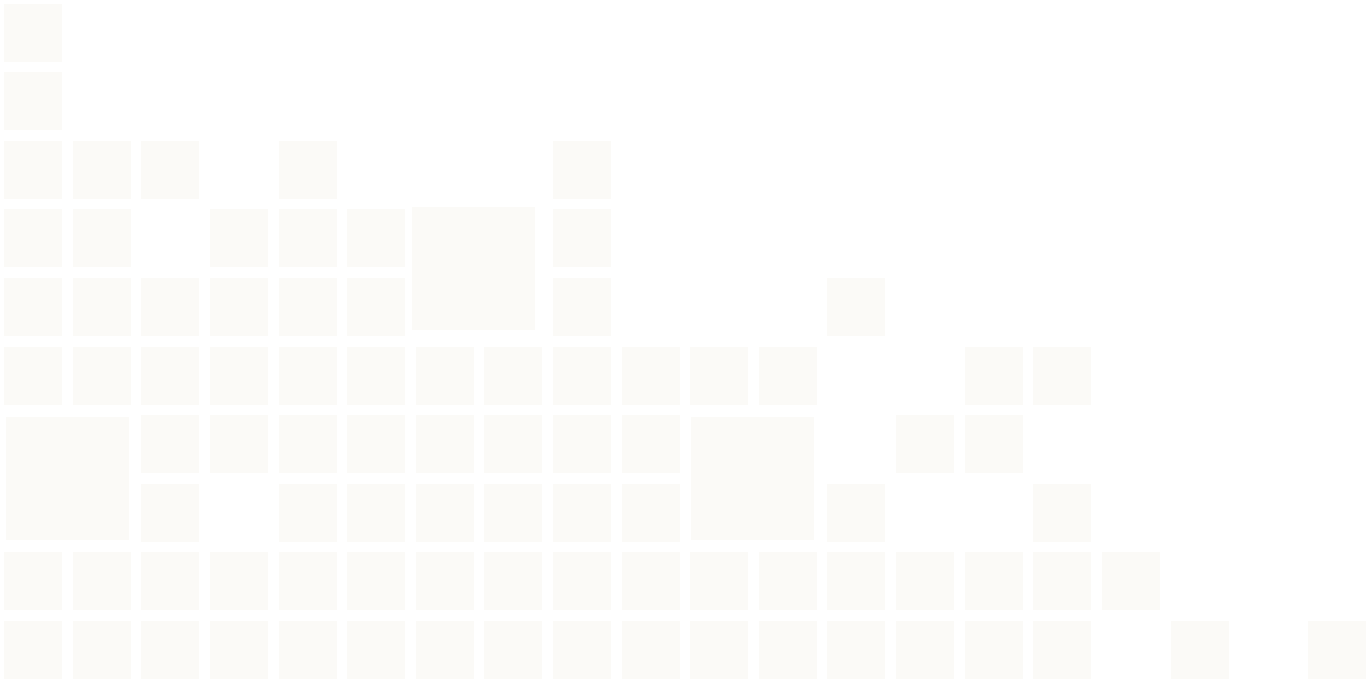
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List of Abbreviations

ASIDI	Accelerated Schools Infrastructure Development Initiative
CCL	Centre for Child Law
EE	Equal Education
EELC	Equal Education Law Centre
LRC	Legal Resources Centre
PAIA	Provision of Access to Information Act 2 of 2000
SADTU	South African Democratic Teachers’ Union
SCA	Supreme Court of Appeal



EXECUTIVE SUMMARY

The right to basic education, provided for in section 29(1)(a) of the Constitution, has long been seen as both a human right in itself, and an indispensable means of realising other human rights. Advancing the right to basic education requires ensuring that learners have access to the educators, materials and adequate facilities necessary for quality teaching and children's successful learning. This includes the provision of safe school infrastructure. This paper – the first in a series of four linked papers assessing the progress made over the last 10 years – focuses on reviewing litigation and advocacy efforts for the development of quality school infrastructure to replace substandard and dangerous structures inherited from an unequal education system. Since 2010, social activists and litigators – recognising the courts' potential to achieve children's right to basic education – have utilised litigation to seek the improvement of school infrastructure, set norms and standards for infrastructure, and challenge school rationalisation processes.

In 2010, the LRC, CCL, and the Infrastructure Crisis Committees of seven schools in the Eastern Cape, launched court action to eradicate mud schools in the Eastern Cape province. The government initially opposed the court application but then agreed – through a 2011 settlement – to provide the seven schools with mobile classrooms, sufficient desks and chairs, and water. It also agreed to commit R8.2 billion to replace inadequate school structures nationwide. Additional court action, advocacy and monitoring efforts ensured that government could not renege on its obligations, and also highlighted government's persistent failures to implement the original agreement timeously. The so called "Mud Schools case" was followed by the "norms and standards case" launched by Equal Education. After years of advocacy and mobilisation campaigns around the Minister of Basic Education's failure to develop and implement minimum norms and standards for school infrastructure, Equal Education launched a court application in 2012 to compel the Minister to promulgate the norms and standards. The litigation, together with persistent mobilisation campaigns, resulted in a settlement in which the Minister conceded and developed regulations – which had to be revised – and ultimately promulgated the norms and standards. Over the years, the provincial education departments have closed down, and, in some instances, merged, many schools in outlying or rural areas due to small learner numbers as part of their rationalisation and re-alignment programme. This paper highlights instances of rationalisation and re-alignment, their impact on affected children, and advocacy and or litigation around them.

Progress has been made in addressing inappropriate and unsafe school infrastructure, in large part due to the litigation and advocacy efforts of civil society organisations and affected schools, communities and learners. However, the work is not over yet, and much remains to be achieved to ensure that all children going to school have access to safe schools that are conducive to learning. There are concerning regular reports of children learning in schools flooded by rain, and children dying due to falling into pit latrines.

1

INTRODUCTION

The right to basic education has long been seen as both a human right in itself, and an indispensable means of realising other human rights.¹ It is viewed as an empowerment right through which economically and socially marginalised children can lift themselves out of poverty and obtain the means to participate fully in their communities and society as a whole.² The importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of the human existence.³ The Constitutional Court has affirmed the importance of education by noting the following:

Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now.⁴

The conditions – such as the quality of school infrastructure – under which education is provided play a crucial role in children's successful schooling, and the ultimate realisation of education's outcomes.

1 Committee on Economic Social and Cultural Rights "General Comment 13: The right to education" (1999) para 1.

2 *Ibid.*

3 *Ibid.*

4 *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* (CCT 209/15) [2016] ZACC 14 at para 1.

In 2004, former President Thabo Mbeki, noted that learning is critical to the improvement of quality of life, and committed to ensuring that no learners would learn under trees, in mud schools or other dangerous conditions that would expose them to the elements.⁵ In 2014, the political pronouncements and commitments continued, with former President Jacob Zuma noting that quality learning and teaching must happen in a conducive environment, and that the eradication of mud schools – to be replaced with modern schools – is one of the ways this will be achieved. He stated the following:

It pains us to see children being taught in dilapidated schools with no toilets, water or electricity, which is why this will be an ongoing programme to replace all inappropriate schools, no matter how long it takes us to do so.⁶

In 2019, President Cyril Ramaphosa continued on the same trajectory when, he noted that “inequality is still very much in evidence in thousands of schools across the country, where the lack of basic infrastructure impedes effective learning and teaching”.⁷ In 2020, he called for the banishing of mud schools and the intensification of efforts to ensure that schools have appropriate structures and sanitation, as well as adequate water and electricity supply.⁸ Over the past 20 years, South Africa’s successive presidents have acknowledged the urgent need to eliminate mud schools and ensure safe sanitation at schools, and made political commitments to do so in order to ensure equal access to quality education in conducive environments.

”

Inequality is still very much in evidence in thousands of schools across the country, where the lack of basic infrastructure impedes effective learning and teaching.

- 5 President Thabo Mbeki “Address of the President of South Africa, Thabo Mbeki, to the first joint sitting of the third democratic Parliament, Cape Town” (21 May 2004).
- 6 President Jacob Zuma “Address by President Jacob Zuma on the occasion of the Official Opening of Ngidini Primary School, Ngqeleni, Libode, Eastern Cape” (16 January 2014).
- 7 President Cyril Ramaphosa “Address by President Cyril Ramaphosa at the official handover of Enhlanhleni, Lembe and Ingweni Phaphama Primary Schools” (17 April 2019).
- 8 President Cyril Ramaphosa “Address by President Cyril Ramaphosa at the 2020 Basic Education Sector Lekgotla, Emperors Palace, Ekurhuleni” (16 January 2020).



”

The inequality in the education system finds its genesis in a pre-democracy system influenced by discriminatory apartheid policies, which resulted in problematic long-term education impacts for most children in South Africa.

However, progress has been slow belying the apparent urgency with which these political pronouncements were made.

The inequality in the education system finds its genesis in a pre-democracy system influenced by discriminatory apartheid policies, which resulted in problematic long-term education impacts for most children in South Africa (often black children from low income and poor contexts). These impacts perpetuate inequality through circumstances such as the appalling condition of schools. Children in provinces that experience particularly high levels of poverty, such as Limpopo and the Eastern Cape, bear the brunt of the inequality.⁹ Challenges such as no/unreliable water supply, pit latrines or no ablution facilities, no electricity supply, and dangerous/and or undesirable infrastructure persistently and negatively affect children’s experiences of learning.¹⁰

The year 2020 marked ten years since the Legal Resources Centre (LRC), the Centre for Child Law (CCL) and seven school governing bodies (representing seven schools in the Eastern Cape) launched a court application in the Eastern Cape High Court (the “Mud Schools case”). The court application was launched in a bid to have the dilapidated infrastructure of the seven schools – and other similarly situated schools – refurbished to provide safe schools conducive to learning.

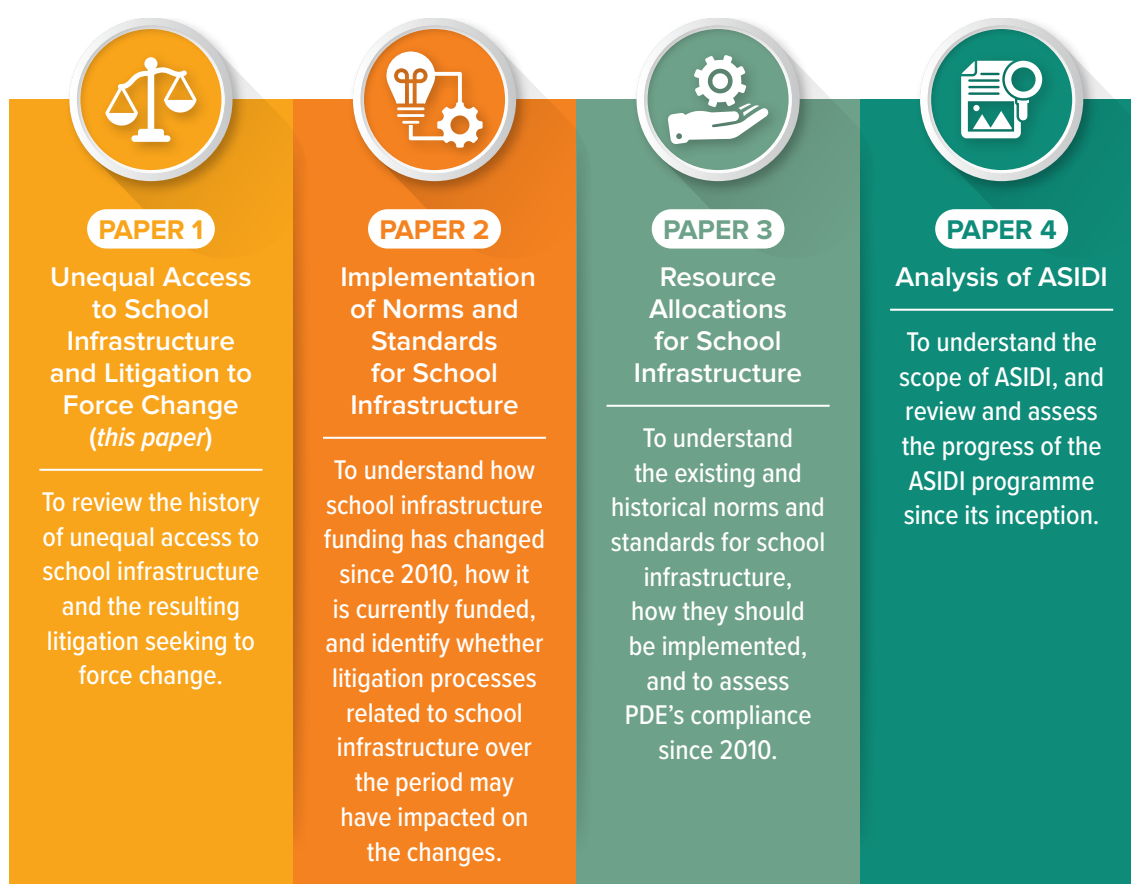
The court order obtained from this initial litigation was pioneering. The Department of Basic Education (DOE) was put to task and required to provide safe school infrastructure conducive to learning. The DOE reports that, because of the Accelerated School Infrastructure Delivery Initiative (ASIDI) – which commenced as a result of the litigation – in the 2019/20 financial year, 246 new schools reached practical completion.

9 McConnell C and Breener S “Litigating the Right to Basic Education” in Brickhill J *Public Interest Litigation in South Africa* 282–3.

10 *Ibid.*

The initial litigation also paved the way for further litigation (by various impact litigation groups such as Section27, Equal Education and the Equal Education Law Centre) on the safety of school infrastructure, and to address issues such as school sanitation and infrastructure norms and standards.

However, much remains to be achieved to ensure that all children going to school have access to safe schools that are conducive to learning. There are concerning ongoing reports about children learning in schools flooded by rain, and children dying due to falling into pit latrines. The presence of, and response to, the COVID-19 pandemic has highlighted, and further entrenched, the deep inequalities in the education system. This paper is the first in a series of four linked papers assessing the progress made over the last ten years. The titles, and a short description of each paper listed below.



This report will provide a review of litigation and advocacy efforts carried out with the aim of addressing the school infrastructure challenges of public schools, particularly those in low income and poor communities.

2

SCHOOL INFRASTRUCTURE –
THE APARTHEID LEGACY

The apartheid system ran on the principle of “divide and rule”, its main purpose being to entrench a system of inequality in which those classified as white were perceived as being systemically superior. The apartheid government instituted and pursued a legal and bureaucratic machinery for racial classification through the Population Registration Act of 1950.¹¹ In terms of the Act every citizen was issued with an identity document that recorded their race as white, coloured, or Native (hereinafter black/African).¹² It used skin colour as an indicator of racial differences.¹³ The classification formed the basis of the implementation of other racially based laws.¹⁴

One of the most influential pieces of legislation the apartheid government enacted to enforce the separation of races was the 1913 Land Act and its 1936 amendments.¹⁵ The Land Act forcibly moved millions of peoples into ethnic enclaves according to their racial classification.¹⁶ It sought to divide the land and resources to benefit those classified as white.¹⁷ Those classified as black/African faced the brunt of the Land Act’s consequences, as they were moved to “Bantustans”, far away from the centres of power and valuable resources.¹⁸

These “Bantustans” had their own state-like administrations, but were heavily supervised by the apartheid government and their appointed traditional leaders, and were situated within the borders of the highly racialised South Africa. By 1990, 44% of the total population of South Africa lived in these “Bantustans”.¹⁹

11 D Posel ‘Race as Common Sense: Racial Classification in Twentieth-Century South Africa’ (2001) 44:2 *African Studies Review* 98. See also Y Erasmus and G Ellison ‘What can we learn about the meaning of race from the classification of population groups during apartheid?’ (2008) *South African Journal of Science* 450–452.

12 *Ibid.*

13 *Ibid.*

14 *Ibid* and Sunday Times Heritage Project ‘An appalling science’ https://sthp.saha.org.za/memorial/articles/an_appalling_science.htm (accessed 04/04/2023).

15 P Christie ‘The long reach of coloniality: setting the scene from a marginal place’ in *Routledge Research on Decoloniality and New Postcolonialisms: Decolonising Schools in South Africa, The Impossible Dream?* (2020) p 1–16.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 C Linda and C Bagele ‘Contexts of educational policy change in Botswana and South Africa’ (2012) 42 *Prospects* 371–388.

The Land Act physically moved black people away from economic opportunities and reserved the most productive parts of the economy for white people at the expense of black people. The “Bantustans” were largely characterised by poor service delivery, unemployment, lack of infrastructure and negative economic growth.²⁰ The education of black youth, who were confined to schools within the “Bantustans” was similarly negatively affected. If the “Bantustan” as a whole was developed to largely separate black people from the economy, then their schools were conceived to develop a workforce that would struggle to overcome the hurdles enforced by the apartheid government.²¹

The largest disparity within the classification system existed between the white and the African/black classifications, with Africans/blacks depicted as representing the lowest of society while whites represented the highest. From the perspective of education, one can look to Charles T. Loram or the Eiselen Commission. Loram’s philosophy, outlined in his influential 1917 doctoral thesis, “The Education of the South African Native”, helped build the basis for the ideas around differences he believed were extant in the relative intellectual capabilities of the whites and Africans/blacks.²² He sought to highlight how these differences in intellect required different forms of education and training, which were controlled by the whites. As the former Natal Chief Inspector of Native Education, he was considered a leading figure in the field, so was brought in as a government advisor when the government began centralising education and excluding black people from participating in the development of their education system.²³ The 1949 Commission on Native Education, run by Werner Eiselen, complemented Loram’s arguments by calling for the centralisation of the education of black people, and the economic control of their school system.²⁴

Their findings formed the basis of what would become known as the Bantu Education Act of 1953, which governed the education system of black people.

This legislative context is important for understanding the structures that governed and regulated the schools black people attended. This idea of “divide and rule” existed beyond philosophy; the apartheid system ensured that it was the foundation for every major policy within the South African state. The Bantu Education Act centralised the education system under the control of the apartheid government, and organised schools with the explicit goal of ensuring that the education offered maintained the inequalities between white people and black people across generations.²⁵ One of the ways this can be observed is through the economics of the Bantu Education Act. Centralisation enabled economic control, which favoured schools attended by whites over schools attended by blacks.²⁶

20 *Ibid.*

21 *Ibid.*

22 L Arendse ‘Inequality in the Public Basic Education System: The Role of the SA Courts in Effecting Radical Transformation’ LLD thesis, University of Pretoria, 2020.

23 *Ibid.*

24 *Ibid.*

25 P Christie & C Collins ‘Bantu Education: Apartheid Ideology or Labour Reproduction’ (1982) 1 *Comparative Education* 59–75.

26 *Ibid.*

With severely limited budgets, and constrained by the Bantu Education Act that sought to keep black people inferior, the black schools generally had poor infrastructure. In conjunction with other legislation that sought to further segregate and exclude black people from public resources, these schools were mostly located in “Bantustans” or the townships that were developed to segregate the black population across geographical lines. The socio-economic environment of their parents was mirrored in the schools black children could access.

Funding disparities²⁷

The history of the education system in South Africa has always been one of separation and inequality. Not only the physical separation of black students from white students, but also in how government funding was spent on the different groups.

In 1920, the Transvaal provincial government imposed a tax on blacks, as the province was finding the education of blacks too costly. By 1945, government’s spending on education for white, coloured and black students was according to the ratio 100:30:8. In other words, government spent 12 times more on a white child’s education than on that of a black child. In 1953, the Bantu Education Act was introduced, with the main aim of providing mass education for the black population with the sole purpose of creating cheap labour. The education provided under this system was deliberately inferior. The Bantu Education Act also removed the reliance on missionary schools (which were primarily for black students). In 1955, it was announced that all subsidies to mission schools will gradually be reduced, and ended by 1958.

In 1969, the government stated that “education can be extended to Africans only when they themselves ask for it, when they can finance it themselves, and when their economy can absorb the increased number of education people”.

By 1970, for every R1 spent on a black child’s education, government spent R31.50 on each white child. This disproportionate spending was also seen in the literacy rate of black children. An analysis of the 1970 Census revealed that an estimated 48% of black children over the age of 15 were illiterate in terms of the current United Nations’ criterion for “functional literacy” of a minimum of four years schooling. In addition, in 1970 a black domestic worker paid roughly 47% of their income in school fees, including textbooks, writing materials, examination fees and sometimes sport fees, whereas white students had these fees subsidised by the state. By 1971, there were only 438 private schools for black students, compared to over 5 000 state-aided mission schools for black students in 1953.

The salaries of teachers also varied significantly. In 1973, the starting salary of similarly qualified male teachers was R71 per month for black teachers, R123 per month for coloured and Indian teachers, and R209 per month for white teachers.

²⁷ Information from this section was extracted from B Blumfield, ‘A timeline of South African events in Education in the Twentieth Century: 1900–1999’, 2008

The historic discrimination based on skin colour created the foundation for the current form of the basic education system in the country, and the skewed provision of infrastructure resources. However, it is important to note that the historical context cannot fully explain the failure of school infrastructure in relation to the black child. The advent of democracy did not change these imbalances. Instead, the inequalities have been perpetuated.

Despite black learners now being able to attend former white schools, the economic barrier to entry is still immense for black students. In addition, the post-apartheid government has also not kept pace with addressing the infrastructure backlog at former black schools. The persistent dilapidation of rural schools and their facilities, the lack of adequate resources and, in some cases, buildings, and the continued disparity in expenditure between urban vs rural schools show that the government has largely failed to realise a fully accessible basic education system.²⁸ The result is that the infrastructure backlog mainly impacts black learners, who form the largest population of learners in rural schools in former “Bantustans”.²⁹ Addressing the infrastructure backlog is a key mechanism in bringing about greater equity in opportunities for black learners.

To move forward, the question of why the democratic government has not been able to make more progress in rectifying the legacy of apartheid becomes more pertinent. Issues around government mismanagement of funds, backlogs in implementing legislation and policy, and continued neglect of rural schools in favour of urban schools better explain why these apartheid-era conditions have persisted. What follows are discussions of the advocacy and/or litigation efforts that have been carried out in order to hold government to account in the fulfilment of its constitutional obligations and the dismantling of the apartheid-era legacies of inequality in the education system.

28 S Johannes ‘The Provision of Rural Education in Three Provinces of South Africa since 1994: Implications for School Improvements’ (2011) *Journal of Educational Studies* 138–152.

29 *Ibid.*



3

THE RIGHT TO BASIC EDUCATION AND SCHOOL INFRASTRUCTURE

The Constitution, in section 29(1)(a), is clear about the fact that everyone has the right to a basic education.³⁰ This right has two streams; it creates a positive right — that basic education be provided for every person — and a negative right — that no-one should be obstructed from accessing basic education.³¹ Government duty-bearers must ensure that, in performing their functions, providing resources and meeting needs in relation to the provision of basic education, they are acutely aware of and act in accordance with these two streams.

Furthermore, this right has been affirmed by the Constitutional Court to be immediately realisable without any internal limitation that requires the right to be “progressively realised” within “available resources” subject to “reasonable legislative measures.”³² The right to a basic education may be limited only in terms of a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³³

It has been noted that making education available means ensuring that schools are equipped with adequate facilities that include school infrastructure, basic services and materials to support learning and teaching, and basic services such as electricity, water, sanitation and internet connectivity.³⁴ The lack of adequate school infrastructure has an impact on children’s access to teaching and learning, as highlighted below:

30 Section 29(1) of the Constitution.

31 *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* [1996] ZACC 4 at para 9.

32 *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13

33 As above and section 36(1) of the Constitution.

34 Kamga SD “The right to a Basic Education” in Boezaart T *Child Law in South Africa* (2017) 525.

When school environments are threatened by poor, dangerous or dilapidated buildings, learners are forced to learn in conditions that leave them feeling anxious, unsafe and distracted, which affects their ability to concentrate and learn. ... Poor infrastructure challenges also have a negative psychological impact on learners and teachers ... some learners reported ... that they feel demotivated, disinterested and dejected, while teachers find it difficult to stay at these schools and feel pressured to catch up lost work when learners are absent or dismissed due to bad weather.³⁵

Litigation, and advocacy, play a crucial role in developing, interpreting and implementing children's access to adequate school infrastructure as a component of the right to basic education. Social activists and litigators, recognising the courts' potential to achieve children's right to basic education, have utilised litigation from around 2010 to seek the improvement of school infrastructure, set norms and standards for infrastructure, and challenge school rationalisation processes. They have obtained court orders and judgments affirming the right to education and related rights, interpreting the right to education in relation to school infrastructure, highlighting the State's persistent and inexcusable failures to ensure access to safe and adequate school infrastructure, and requiring the government and/or provincial departments of education to fulfil their constitutional and legislative mandate and to provide safe, adequate school infrastructure.

MAKING EDUCATION AVAILABLE MEANS ENSURING THAT SCHOOLS ARE EQUIPPED WITH ADEQUATE FACILITIES THAT INCLUDE:



School infrastructure



Electricity



Water



Sanitation



Internet connectivity

35 SECTION 27 "Basic Education Rights Handbook" (2022) 305.

4

LITIGATION AND ADVOCACY EFFORTS REGARDING SCHOOL INFRASTRUCTURE

This section will discuss the litigation and advocacy efforts to advance children's right to basic education through improved school infrastructure. Thematic reviews will focus on the issues that gave rise to litigation, the key arguments made during litigation, the court orders and judgments, and their impacts on policy, budgets and delivery.

4.1 Eastern Cape mud schools litigation

Mud schools, or schools made out of inappropriate structures, were often built by communities using traditional methods. They are made with mud bricks and wooden frames that are plastered with mud that has been mixed with cow dung.³⁶ The roofs are typically constructed out of thatch or corrugated iron.³⁷ These structures result in exposure to the elements, which poses a serious risk to learners' and teachers' health and safety, and make teaching and learning difficult if not impossible. A common feature is a lack of potable water, and often no water for long periods of time in the dry winter months when there is no rain.³⁸

Even though mud schools are found nationwide, they are particularly prevalent in the Eastern Cape.³⁹ In 2010, the LRC,⁴⁰ representing the CCL⁴¹ and the Infrastructure Crisis Committees of seven schools in the Eastern Cape, launched a court action to eradicate mud schools in the province.⁴²

36 McConnachie C and Breener S 288.

37 *Ibid.*

38 *Ibid.*

39 Abdoll C and Barberton C "Mud to bricks: A review of school infrastructure spending and delivery" (2014) 1.

40 The Legal Resources Centre aspires towards a fully democratic, equal society. Its goals are to promote justice using the Constitution, build respect for the rule of law, and contribute to socio-economic transformation within South Africa and beyond.

41 The Centre for Child Law is an impact litigation organisation that was established in 1998. The Centre is registered as a Law Clinic and is based in the Faculty of Law at the University of Pretoria.

42 McConnachie C and Breener S 288.

The court action arose as a result of the schools not receiving assistance from the Department of Education despite repeated requests. In addition, the budget allocated for school infrastructure was inadequate, and a moratorium had been placed on infrastructure projects.⁴³

It was argued that the conduct and policies of the government did not comply with the Constitution and relevant legislation, and was therefore unconstitutional.⁴⁴ An order was sought directing the government to develop a plan to provide infrastructure and water, and provide the seven schools with sufficient numbers of desks and chairs.⁴⁵

The government initially opposed the court application but then agreed, through a 2011 settlement, to provide the seven schools with mobile classrooms, sufficient desks and chairs, and water.⁴⁶ It also agreed to commit R8.2 billion to replace inadequate school structures nationwide, with R6.36 billion of this being directed to the approximately 445 schools in the Eastern Cape. Later, this funding came to be known as ASIDI, and broadened the impact of the case beyond the seven schools.⁴⁷ The government committed to spend these funds over a period of 3 years.⁴⁸

Three years later, as a result of the settlement, the seven schools and an additional 63 schools were replaced, and 230 were under construction or at an advanced stage of planning.⁴⁹ However, by January 2014 it was clear that the government-run ASIDI was at that point not being executed as envisioned. It was behind schedule, with more than 200 schools still needing assistance.

AS A RESULT OF THE SETTLEMENT



70

**SCHOOLS WERE
REPLACED**



230

**WERE UNDER
CONSTRUCTION OR AT
AN ADVANCED STAGE
OF PLANNING**

43 Legal Resources Centre "Ready to Learn? A legal resource for realising the right to education" (2013) 19.

44 Legal Resources Centre 20.

45 *Ibid.*

46 *Ibid.*

47 As above and Skelton A (for the Open Society Justice Initiative) "Strategic Litigation Impacts: Equal Access to Quality Education" (2017) 53.

48 Legal Resources Centre "Fighting to Learn: A legal resource for realising the right to education" (2015) 7.

49 *Ibid.*

In addition, many schools that needed assistance had not been included on the ASIDI list, schools that were on the list were not aware of this, and only a quarter of the money allocated had been spent.⁵⁰ The situation in many schools remained grave:

The conditions in many of the schools not included in the ASIDI programme are appalling. Children are exposed to the weather, walls crumble, and strong winds easily blow the roofs off. School attendance suffers, teaching and learning is disrupted and children are prevented from receiving a quality education. Repeated requests by these schools to be included on the ASIDI programme have been ignored, and requests by schools on the ASIDI list for information about their replacement have been similarly disregarded.⁵¹

In 2014, the CCL, as part of its monitoring and evaluation of the implementation of the court order, commissioned a study to be conducted, to track the spending of moneys allocated to eliminate mud schools and delivery of refurbished schools. The study found that:

... the national Department of Basic Education [had] woefully underspent the School Infrastructure Backlog grant for two years running. In 2011/2012 spending was a little over 10 per cent and only 23 per cent in 2012/2013 at the end of the third quarter. The ASIDI target for the number of schools to be built in 2011/2012 and 2012/2013 was 49. However, only 10 had been completed by the end of the first year. [It was predicted] that if the [Department] continue at the same delivery rate, a realistic timeframe for the eradication of schools with inappropriate structures is probably 2023/2024.⁵²

The government had yet again failed to fulfil commitments made to create safe and conducive environments for learning and teaching. It was left to civil society to hold them to account. A further court application was launched in 2014 by the LRC, this time on behalf of the CCL and five mud schools in the Eastern Cape that needed emergency relief. They sought a court order for relief for the five schools; the publication of a list of all schools in the province to be replaced; a comprehensive plan setting out what each school was to receive and the timetable for this; the publication of the criteria used by the Department when deciding how to include a school on the ASIDI list and give schools the opportunity to argue why they should be on the list.⁵³ The aim of the court application was to “compel the state to plan better and improve its ability to spend its budget and provide safe and adequate infrastructure for learners”.⁵⁴

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Abdoll C and Barberton C iv.

⁵³ Legal Resources Centre (2015) 7–8.

⁵⁴ McConnachie C and Breener S 288–9.

In August 2014, a settlement was reached that was made an order of court.⁵⁵ The Department committed to publishing the list of mud schools, or schools made of inappropriate materials, in the Eastern Cape, to producing the comprehensive plan, and to receiving submissions from schools not on the ASIDI list as to why they should be included on the list.⁵⁶

Subsequent to the second settlement and court order, efforts were made to monitor government's fulfilment of its undertakings. The LRC carried out monitoring visits of mud schools in the Eastern Cape to determine whether or not the ASIDI list was accurate, and if the plans produced in terms of the court order were reasonable. The aim was to ensure full compliance with the court order.⁵⁷

These two cases did not result in judgments, but they demonstrated government's persistent failure to prioritise the issue of providing adequate school infrastructure and its acknowledgement of this failure.⁵⁸ Government continued to perpetuate inequality in the education system, depriving a large number of children of access to school environments that fostered quality teaching and learning.

Government data indicates that 483 schools built from inappropriate material must be replaced with new schools that meet the department's standards of basic functionality and that, as of 2021/2022, 266 had been replaced.⁵⁹ The progress made is acknowledged, as well as the positive impact it has (and will continue to have) on the learners who are beneficiaries of the services provided. However, the pace of delivery has been painfully slow – reflecting a complete lack of urgency on the part of government to address the issue of inadequate school infrastructure.

The above analysis shows that on paper, the government prioritised the replacement of school infrastructure through the provision of funds in the budgeting process. However, implementation on the ground tells a different story, the national Department of Basic Education failed to put in place structures, such as a management team capable of planning and timeously implementing a large-scale school infrastructure delivery programme to ensure timeous provision of the much-needed school infrastructure. There was a need for further action. Litigation and advocacy around mud schools laid the groundwork for further litigation and advocacy on school infrastructure. It has also been incorporated into a campaign focusing on the development of norms and standards to ensure the improvement of all aspects of inadequate infrastructure.

55 Legal Resources Centre (2015) 8.

56 *Ibid*, and McConnachie C and Breener S 289.

57 Legal Resources Centre (2015) 8.

58 McConnachie C and Breener S 289.

59 See <https://www.education.gov.za/Programmes/ASIDI.aspx> (accessed 15 November 2022).

4.2 School infrastructure norms and standards

Section 5A(1)(a) of the Schools Act⁶⁰ states that the Minister of Basic Education may, after consultation with the Minister of Finance and the Counsel of Education Ministers, by regulation prescribe minimum uniform norms and standards for school infrastructure. Parallel to LRC and CCL's litigation action, Equal Education (EE)⁶¹ used this section as the basis for a campaign and legal challenge, calling on the Department of Basic Education to set uniform minimum standards (norms and standards) for public school infrastructure.⁶²

EE noted that, as result of government's failures – including not setting and implementing norms and standards – thousands of schools in South Africa suffered from a lack of resources such as electricity, water supply, ablution facilities, stocked libraries and laboratories, fencing, and computer centres, as well as being made of inappropriate materials.⁶³ The effect of the norms and standards would be to set a national minimum standard that provincial governments would have to comply with.⁶⁴ They would also be used to hold the provincial governments, circuits and districts to account.⁶⁵

The campaign, beginning in 2008, consisted of marching, picketing, petitioning, writing countless letters to the Minister, carrying out door-to-door support campaigns in communities, and spending nights fasting and sleeping outside Parliament.

... thousands of schools in South Africa suffered from a lack of resources such as electricity, water supply, ablution facilities, stocked libraries and laboratories, fencing, and computer centres, as well as being made of inappropriate materials

⁶⁰ Act 84 of 1996.

⁶¹ A community, membership-based organisation, advocating for quality and equality in the South African education system. See <https://equaleducation.org.za/> for more information.

⁶² Brickhill J "Strategic Litigation in South Africa: Understanding and Evaluating Impact" (2021) 192–3.

⁶³ Equal Education "School Infrastructure" (undated) available at: <https://equaleducation.org.za/campaigns/school-infrastructure/>.

⁶⁴ Brickhill J "Strategic Litigation in South Africa: Understanding and Evaluating Impact" (2021) 192–3.

⁶⁵ Equal Education "School Infrastructure" (undated) available at: <https://equaleducation.org.za/campaigns/school-infrastructure/>.

In March 2011, EE led a 20 000-strong march of learners and supporters to Parliament, demanding that the Minister and Department adopt minimum norms and standards for school infrastructure.⁶⁶

In March 2012, EE decided to launch a court application to compel the Minister to promulgate the norms and standards. EE, and the infrastructure committees of two schools in the Eastern Cape, were represented by the LRC.⁶⁷ The court application aimed to:

... [address and describe to the court] the widespread results of the government's failure to provide adequate infrastructure standards for public schools in terms of section 5A of the Act, a problem that most harshly affects the poorest schools in the country by perpetuating systemic school infrastructural problems and gross educational inequalities. The application showed in vivid and personal detail how many learners and teachers have been left in unsafe environments that are not conducive to learning, and which have undermined the ability of the learners to achieve in the classroom and fully realise their rights to an adequate education, equality and dignity.⁶⁸

EE intensified its public campaign at the same time as the court action.⁶⁹ It held marches, pickets, learners and supporters sent various communications to the Minister (emails, letters, faxes, tweets, and pictures), mass distribution of posters, fliers and pamphlets, radio adverts and more.⁷⁰ In November 2012, the Minister conceded and agreed to a settlement that provided the two applicant schools with adequate infrastructure, and to promulgate the norms and standards.⁷¹

The Minister published draft norms and standards for school infrastructure in January 2013. They were weak and underwhelming.⁷² They elicited a number of public submissions, including over 700 individual submissions collected by EE.⁷³ The Minister amended the draft in response to the submissions received, and promulgated the norms and standards in November 2013.⁷⁴

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 McConnachie C and Breener S 289.

70 Equal Education "School Infrastructure" (undated) available at: <https://equaleducation.org.za/campaigns/school-infrastructure/>.

71 Brickhill J (n41 above) 194.

72 Brickhill J (n41 above) 194–5.

73 Equal Education "School Infrastructure" (undated) available at: <https://equaleducation.org.za/campaigns/school-infrastructure/>.

74 Brickhill J 194–5.

They required all schools to have access to sufficient water, electricity, sanitation, safe classrooms, internet, security, libraries, computer and science laboratories, and recreational facilities.⁷⁵ They also provided time frames for implementation, and required the provincial departments of education to report on progress in implementing the norms and standards.⁷⁶

Despite improvements to the norms and standards, they still did not meet constitutional muster and were challenged in court by EE, represented this time by the Equal Education Law Centre (EELC).⁷⁷ They made implementation subject to resources and the co-operation of other government agencies and entities responsible for infrastructure in general, giving government a means to escape their obligations.⁷⁸ This also infringed on the Minister's obligation to make binding norms and standards. Portions of the norms and standards were vague and open ended, in a manner that provided little clarity on government's obligations to comply with the norms and standards, as well as the Schools Act.⁷⁹

The Bhisho High Court handed down judgment on 19 July 2018. The Court noted that the government has the overall responsibility to ensure state compliance with section 29(1) (a) of the Constitution, as well as the Schools Act.⁸⁰ It further noted that state action must be taken in a manner that is respectful of the inherent dignity of human beings.⁸¹ It went on to acknowledge the fact that it cannot be disputed that basic school infrastructure plays a weighty role in the delivery of basic education.⁸²

The Court, after setting out the above foundational principles, went on to hold that it is unacceptable to argue that the provision of appropriate schools is dependent on other entities, thereby essentially absolving the Department of its obligations – this is inconsistent with the Constitution; all schools built of inappropriate materials should be fixed, and not just those made entirely of mud; provincial reports on steps taken to remedy school infrastructure challenges must be made publicly available to ensure transparency and public accountability; and the norms and standards must be read to mean that the Department must fix schools and not just prioritise them.⁸³ The Minister was directed to fix the identified problems in the norms and standards.

75 Budlender S, Marcus G and Ferreira N "Public interest litigation and social change in South Africa: Strategies, tactics and lessons" (2014) 84.

76 *Ibid.*

77 The Equal Education Law Centre is registered as a law clinic with the Cape Law Society and its staff of social justice lawyers specialise in education policy, legal advocacy, community lawyering and public interest litigation.

78 *Equal Education and Another v Minister of Basic Education and Others* [2018] ZAECBHC 6 at para 59–63.

79 *Equal Education and Another v Minister of Basic Education and Others* at para 119–122.

80 *Equal Education and Another v Minister of Basic Education and Others* at para 168.

81 *Equal Education and Another v Minister of Basic Education and Others* at para 169.

82 *Equal Education and Another v Minister of Basic Education and Others* at para 170.

83 *Equal Education and Another v Minister of Basic Education and Others* at para 178–202.

The Department of Basic Education attempted to appeal the judgment and order of the High Court. The Constitutional Court dismissed the appeal in October 2018, finding that it bore no prospects of success.⁸⁴

Despite the existence of the court order, the Department has, at the time of writing, failed to meet its obligations as set out in the norms and standards timeously. Data from 2021 shows that thousands of learners are still being exposed to unsafe and unlawful conditions; 3 343 schools countrywide still have unreliable electricity supply, 5 836 schools have unreliable water supply, and 5 167 still utilise pit toilets.⁸⁵ The reduction of funds allocated to fixing school infrastructure contributes to these failures, as well as “inaccurate and unreliable data regarding the state of school infrastructure, difficulties attracting infrastructure specialists such as engineers and surveyors, especially in rural provinces, and community disruptions such as protests and vandalism.”⁸⁶ Furthermore, underperforming implementing agents have contributed to delays in addressing school infrastructure challenges through a lack of proper oversight of projects; overworked project managers, lack of transparency in relation to the procurement of these agents, and failure by the state to address problems, such as misconduct or neglect, with implementing agents.⁸⁷

On 10 June 2022, the Department, further exacerbating matters and potentially renegeing on the fulfilment of its obligations, published proposed amendments to the norms and standards that – according to EE and the EELC – have the following regressive outcomes:

1. The wordings of the proposed amendments are vague and confusing. They lack clarity on what is being changed or replaced, making it difficult for the public to engage with them.
2. The proposed amendments remove infrastructure delivery deadlines (2016, 2020, 2023 and 2030 deadlines). This makes it difficult for stakeholders to hold the Department accountable for the provision of appropriate school facilities.
3. Removal of guidelines to provinces about what they should report on, i.e., backlogs, plans for building new schools, plans for upgrading and maintaining existing school.
4. The use of the phrase “as far as practicable” by the Department in reference to ensuring that different state entities fulfil their roles in the delivery of school infrastructure.⁸⁸

84 Constitutional Court order, see <https://eelawcentre.org.za/wp-content/uploads/minister-of-basic-education-and-others-v-ee-amatolaville-norms-2-november-2018.pdf>.

85 Basic Education Rights Handbook 315.

86 *Ibid.*

87 Basic Education Rights Handbook 315. In 2019, the Department published Guidelines on Minimum Requirements for Implementing Agents to tackle challenges experienced with the agents, and set out their roles and responsibilities, minimum levels of service required, and structures and processes they must have in order to work with the State

88 Equal Education and Equal Education Law Centre “Joint Submission by Equal Education and Equal Education Law Centre on amendments to the regulations relating to minimum uniform norms and standards for public school infrastructure” 29 July 2022; and Equal Education and Equal Education Law Centre “Media Statement: EE and EELC make a written submission on the DBE’s proposed changes to the school infrastructure law, urging it not to scarp the urgency and accountability needed for fixing our schools!” 1 August 2022.

The proposed amendments were, at the time of writing, still being processed. EE and EELC continue to carry out campaigns opposing the draft amendments. On 30 June 2022, the two organisations organised a march to Parliament, attended by 60 learners, opposing the amendments.⁸⁹

4.3 Rationalisation and re-alignment of public schools

Over the years, the Department of Basic Education has closed down, and in some instances merged, many schools in outlying or rural areas due to their small learner numbers. The Department's guidelines for rationalisation and re-alignment of public schools describes the challenges as follows:

Learners in micro schools are not able to have a wide subject choice, especially in secondary schools, and also there are limited sport codes, therefore participation in sport and other extracurricular and/or extramural activities is compromised. The effectiveness of teaching is also affected by multi-grade teaching that is found in micro primary schools. The Department therefore considered it prudent to close down some of the micro schools and merge them with nearby schools as part of the School Rationalisation Process. The primary objective of the School Rationalisation Process is therefore to ensure that where possible, micro schools that are unviable are closed down and merged with nearby schools, having taken certain factors into consideration.⁹⁰

School rationalisation can have one of two impacts, depending on how and why it is carried out.⁹¹ Rationalisation has the potential to decrease high numbers of small and unviable schools and consolidate learners into larger schools.⁹² This allows provincial departments of education to save money and better support and monitor a smaller number of schools.⁹³ Small schools, which are often the focus of rationalisation, often have to contend with:

- multiple grades in a classroom as a result of low enrolments,
- limited subject choices, and teacher shortages.⁹⁴

89 Groundup "Learners march against proposal to end deadlines to fix schools" 30 June 2022. Available at <https://groundup.org.za/article/learners-march-against-proposed-changes-to-school-norms-and-standards/>.

90 Department of Basic Education "Guidelines for Rationalisation and Re-alignment of Public Schools: A Holistic Approach (2017) 6.

91 Equal Education "The good, bad and ugly of EC school closure" (2017). Available at <https://equaleducation.org.za/2017/07/06/the-good-bad-and-ugly-of-ec-school-closure/>.

92 *Ibid.*

93 *Ibid.*

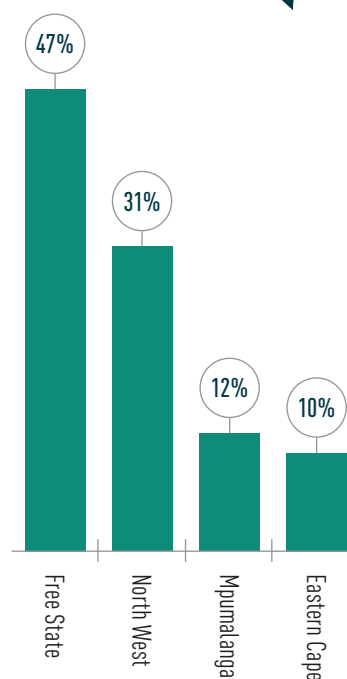
94 *Ibid.*

These small schools co-exist with other schools struggling with large learner numbers resulting in overcrowded classes and teacher shortages. If the rationalisation is implemented in conjunction with an effective allocation of teaching posts, it will ensure a more efficient distribution of teachers.⁹⁵

If rationalisation is not carried out in manner that is conducive to the needs of the children and communities affected, children will be forced to attend schools far away from their communities; scholar transport might be a challenge if sufficient funds are not allocated or planned for adequately; and existing schools would not receive assistance to improve school infrastructure and, instead, be marked for closure.⁹⁶

A 2014 report, commissioned and published by the CCL, notes dramatic decreases in the number of public schools between 2000 and 2012, particularly in the Free State (with the highest decreases at 47%), the North West (31%), Mpumalanga (12%) and the Eastern Cape (10%).⁹⁷ Based on the most recent data, in total South Africa's public schools have decreased by 4 200 since 2000⁹⁸, with the EC and FS accounting for the highest decreases at 1 132 and 1 592 over the 22 year period. Due to a lack of explanation from the national and provincial departments at the time, it was hypothesised that the decreases were as a result of rationalisation and mergers of small schools to form larger schools, mostly driven by rural-urban migration.⁹⁹ This raised concerning questions about the accessibility of schools for learners in rural areas, who were being forced to travel even longer distances to alternative schools.¹⁰⁰

Decreases in the number of public schools between 2000 and 2012



⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Abdoll C and Barberton C (2014) 12.

⁹⁸ 2000 data from *Education Statistics at a Glance in 2000*, Department of Education (February 2002)

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

The table below includes the latest number of schools per province for the period 2010 to 2022.

TABLE 1 Number of public schools per province, 2010–2022

PROVINCES	2010	2011	2012	2013	2014	2015	2016
Eastern Cape	5 588	5 589	5 558	5 562	5 554	5 527	5 469
Free State	1 422	1 371	1 351	1 327	1 306	1 260	1 214
Gauteng	2 013	2 040	2 045	2 056	2 070	2 080	2 083
KwaZulu-Natal	5 927	5 957	5 955	5 937	5 915	5 899	5 895
Limpopo	3 965	3 931	3 935	3 924	3 929	3 893	3 867
Mpumalanga	1 838	1 821	1 807	1 768	1 762	1 744	1 725
Northern Cape	597	591	560	553	551	552	545
North West	1 646	1 614	1 591	1 551	1 515	1 490	1 471
Western Cape	1 455	1 451	1 453	1 458	1 458	1 460	1 450
Total	24 451	24 365	24 255	24 136	24 060	23 905	23 719

Source: *School Realities 2010–2022*

Eastern Cape and Free State both saw the largest decrease in the number of public schools over the period, with 542 and 476 schools being closed respectively. The number of public schools in Gauteng increased by just 43 in the same period.

According to the 2021 EMIS report for quarter 2 of 2021, the Eastern Cape data shows that a further 350 public schools have a *pending closed* status.¹⁰¹

The closure of schools needs to be viewed in relation to the movement/migration of learners within and between provinces. The table below shows the number of learners that were enrolled in public schools per province from 2010 to 2022.

101 EMIS <https://www.education.gov.za/Programmes/EMIS/EMISDownloads.aspx> – accessed 16 November 2022

2017	2018	2019	2020	2021	2022	% CHANGE IN NUMBER OF SCHOOLS FROM 2010-2022	CHANGE IN NUMBER OF SCHOOLS 2010-2022
5 389	5 210	5 205	5 213	5 109	5 046	-10%	-542
1 184	1 117	1 085	1 045	990	946	-33%	-476
2 207	2 077	2 071	2 071	2 067	2 056	2%	43
5 879	5 849	5 821	5 853	5 801	5 801	-2%	-126
3 866	3 843	3 773	3 716	3 675	3 646	-8%	-319
1 726	1 751	1 679	1 666	1 654	1 649	-10%	-189
550	545	546	545	545	545	-9%	-52
1 487	1 454	1 451	1 447	1 450	1 448	-12%	-198
1 508	1 443	1 445	1 448	1 449	1 452	0%	-3
23 796	23 289	23 076	23 004	22 740	22 589	-6%	-1 547

Number of public schools per province, % Change in number of schools from 2010-2022

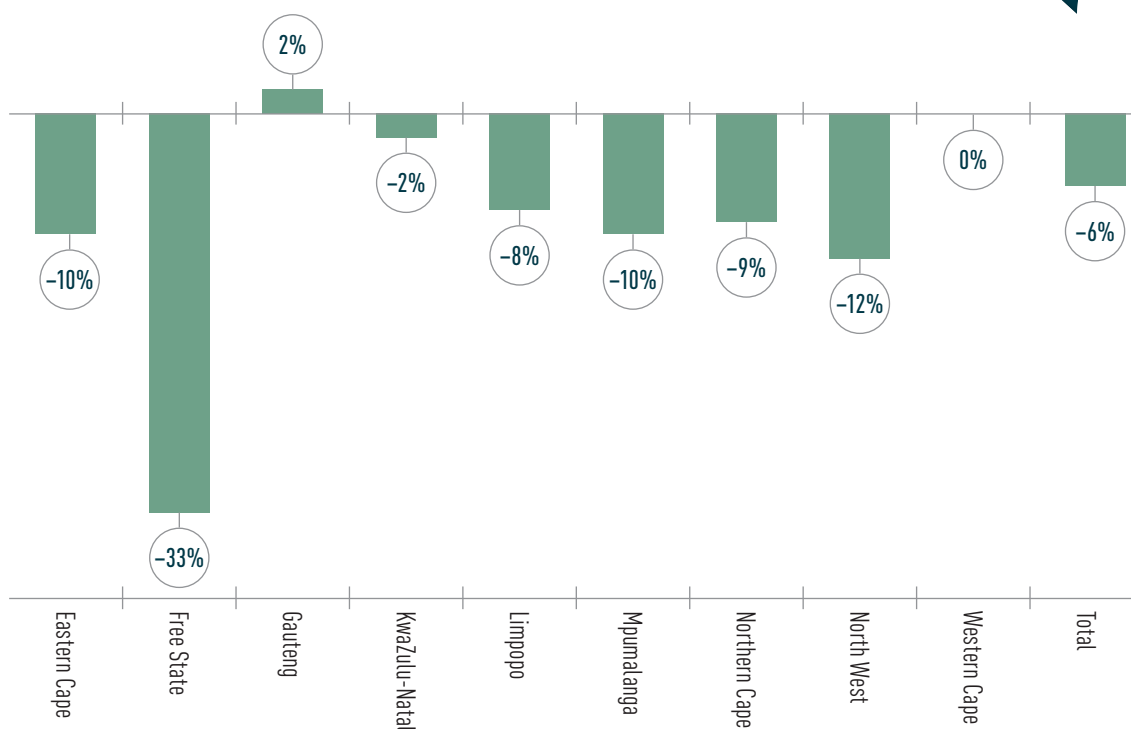


TABLE 2 Number of learners per province per province, 2010–2021

Public	2010	2011	2012	2013	2014	2015	2016
Eastern Cape	2 003 129	1 910 265	1 886 982	1 881 605	1 889 307	1 894 682	1 898 723
Free State	638 756	641 219	646 093	649 806	656 408	666 024	671 712
Gauteng	1 776 925	1 810 197	1 858 745	1 899 542	1 944 486	1 998 640	2 048 558
KwaZulu-Natal	2 743 979	2 781 830	2 812 844	2 798 975	2 831 311	2 811 418	2 808 137
Limpopo	1 660 700	1 645 746	1 665 013	1 662 106	1 665 516	1 694 884	1 706 725
Mpumalanga	1 013 760	1 021 722	1 027 851	1 025 859	1 034 151	1 052 207	1 046 234
Northern Cape	266 296	271 474	274 189	279 445	284 908	286 509	287 435
North West	746 096	751 294	760 272	773 040	784 184	797 438	811 340
Western Cape	959 714	970 319	991 685	1 005 466	1 026 744	1 046 477	1 063 349
Total	11 809 355	11 804 066	11 923 674	11 975 844	12 117 015	12 248 279	12 342 213

Source: *School Realities 2010–2021*

The number of public school learners in the Eastern Cape decreased by 251 633 learners between 2010 and 2022, while Gauteng saw the highest increase, of 477 466 learners, over the same period. The issue of schools and learner number are discussed further in paper 2.

In June 2012, EE carried out advocacy campaigns and launched court action to challenge a decision by the Western Cape Education Department to close 27 schools in the province. Twenty of the schools were in rural areas and seven in urban areas.¹⁰² The reasons given for the closures included low learner numbers, poor infrastructure, a majority of the learners in one of the schools coming from outside the area, and underperformance.¹⁰³ EE, acknowledging that the Department sometimes did need to close schools, expressed disapproval with the closure of schools labelled as underperforming, since they were not given the support necessary to improve, and the closure of those schools where the children were mostly from ‘outside the area’ overlooked the freedom to choose which

¹⁰² Equal Education “Annual Report 2012” (2013) 19.

¹⁰³ Equal Education “Other Campaigns: School closures” (undated). Available at <https://equaleducation.org.za/campaigns/other-campaigns/>.

						Difference in learners 2010 to	Average annual growth 2010–
2017	2018	2019	2020	2021	2022	2021	2022
1 742 817	1 775 602	1 770 289	1 768 040	1 772 877	1 751 496	–251 633	–1%
683 762	688 976	697 334	700 052	706 269	707 664	68 908	1%
2 261 935	2 109 890	2 151 095	2 186 156	2 227 733	2 254 391	477 466	2%
2 818 213	2 773 823	2 784 917	2 808 976	2 831 417	2 822 526	78 547	0%
1 717 779	1 659 635	1 687 376	1 686 170	1 723 583	1 715 130	54 430	0%
1 076 554	1 026 151	1 067 583	1 079 687	1 101 224	1 109 466	95 706	1%
290 327	291 461	293 315	297 669	298 253	299 014	32 718	1%
807 263	820 545	829 336	839 859	848 086	847 044	100 948	1%
1 091 482	1 084 111	1 127 510	1 176 810	1 196 715	1 178 155	218 441	2%
12 490 132	12 230 194	12 408 755	12 543 419	12 706 157	12 684 886	875 531	1%

school to attend.¹⁰⁴ Furthermore, EE was of the view that the Department needed to engage with the communities better, and that the timing of the closures was unfortunate and due to the Department taking long to make its decision and, as a result, placed learners, parents, teachers and principals in limbo.¹⁰⁵

EE, with the support of EELC, made a request for further information from the Department, using the Provision of Access to Information Act¹⁰⁶ (PAIA request), related to the school closures.¹⁰⁷ The Department refused to provide the requested information, a decision which EE and EELC appealed on the basis that the refusal would prevent EE, learners, teachers, parents and communities from engaging meaningfully with the decision.¹⁰⁸ EE engaged with the 27 schools to establish what was happening, and to offer support. EE met with the Department to discuss the issues it had with the school closures.¹⁰⁹

104 Equal Education (n72 above) 19.

105 As above.

106 2 of 2000.

107 Equal Education (n73 above).

108 Equal Education (n72 above) 19.

109 Equal Education (n72 above) 19.

EE organised a march to Parliament, picketed outside the offices of the provincial Department, conducted media interviews, and produced videos, all to raise awareness about the issue.¹¹⁰

In October 2012, the Department announced that seven of the 27 schools would not be closed. The Department undertook to work with those schools that had been labelled as underperforming,¹¹¹ provide transport to learners who attended schools far away, pay for school uniforms for the learners that were relocated, and school fees for the 2013 academic year.¹¹²

In November 2012, 18 of the schools were still facing closure, their governing bodies and the South African Democratic Teachers' Union (SADTU) sought an urgent interdict preventing their closure, which was granted. The Department was ordered to reinstate leases and basic services to 17 of the 18 schools while a final decision was being made.¹¹³ In December 2012, EE had a further meeting with the Department to hold them to the promises made to improve the education of the affected learners.¹¹⁴ The High Court held that the Department's decision to close the schools should be set aside.¹¹⁵ The Minister and the Department took the matter on appeal to the Supreme Court of Appeal (SCA) which took a view contrary to that of the High Court. The SCA¹¹⁶ held that the Department adequately conveyed the reasons for closures, except in one instance, and that the information provided was enough for those affected to carry out what was necessary to engage meaningfully with the Department's decision.¹¹⁷

it must be remembered that although the fairness of any procedure followed will depend on the circumstances of each particular case, a person affected by a decision usually cannot make meaningful representations without knowing what factors are likely to be taken into account. Accordingly, in a test regularly approved by this court, 'fairness will very often require that he is informed of the gist of the case which he has to answer'. As long as the gist of his reasons was conveyed, the Minister was thus not obliged to spell out in great detail why the particular schools were being considered for closure. ... In none of the cases can it be said that the gist of why closure was being considered was not apparent from the initial reasons.¹¹⁸

110 *Ibid.*

111 *Ibid.*

112 *Ibid.*

113 Equal Education (n73 above).

114 *Ibid.*

115 *Beauvallon Secondary School and Others v Minister of Education for the Western Cape and Others* [2013] ZAWCHC 101

116 *Minister of Education for the Western Cape v Beauvallon Secondary School* [2014] ZASCA 218.

117 *Minister of Education for the Western Cape v Beauvallon Secondary School* at para 46.

118 *Minister of Education for the Western Cape v Beauvallon Secondary School* at paras 19 and 23.

The decision of the SCA set an important precedent for similar cases going forward. It provides guidance on the extent to which provincial departments' decisions to close schools can be challenged on the basis that sufficient reasons for the closures were not provided.

In 2016, the LRC, and the CCL intervened in attempts by the Eastern Cape Department of Education to close four farm schools in the Fort Beaufort District of the Eastern Cape, with a combined total of 65 learners, without having properly carried out consultations with all the parties affected by the closures, including the learners, parents, school governing bodies, principals and teachers.¹¹⁹

The parents of the learners were concerned that, amongst other things, in order to access education, they would have to attend schools far from their homes. This meant they needed to be accommodated in hostels where they would receive inadequate care, be at risk of bullying, violence and sexual assault, and would need additional support to transition from rural farm life to life in a hostel.¹²⁰ There was scant information about the hostel the provincial department proposed to make use of. There was no information about how transportation from the hostel to the school would operate, and back home for weekends and holidays. There was also no information about extra costs the parents or guardians would have to take on for board and transport.¹²¹

The LRC, representing the CCL and the four schools, approached the High Court in Makhandla for an order interdicting the provincial Department from closing and/or merging the four schools, and any other public school in the province, until it complied with the procedural requirements set out in the South African Schools Act¹²² and the relevant guidelines.¹²³ These procedures include giving notice to the parents, holding public hearings, giving parents the opportunity to make representations, and considering the representations.¹²⁴ The court application also asked the court to direct the department to provide the affected schools with a written plan and an undertaking setting out the closure and/or merger process, including where learners from the closed schools would be enrolled; if the learners would be provided with scholar transport or accommodation; the type of monitoring and evaluation that would occur after the closure and/or merger; and any other necessary information.¹²⁵

119 Founding Affidavit in the case of *The School Governing Body of Huntley Glen Farm School and Others v Minister of Basic Education and Others*, case no 1479/2016, The High Court of South Africa, Eastern Cape Division Grahamstown, 23 March 2016 at para 23–30.

120 Founding Affidavit at para 31–2.

121 Founding Affidavit at para 33–4.

122 84 of 1996. See sections 12A and 33(2).

123 Notice of Motion in the case of *The School Governing Body of Huntley Glen Farm School and Others v Minister of Basic Education and Others*, case no 1479/2016, The High Court of South Africa, Eastern Cape Division Grahamstown, 23 March 2016.

124 Founding Affidavit (n90 above).

125 Notice of Motion (n91 above).



The Framework aims to improve access to, and the quality of, education for learners in rural schools through building up the self-esteem of children and teachers; encouraging social connectedness to advance education; providing access to functional services, i.e health, social development and libraries, to learners and teachers.

The court application was ultimately withdrawn after the provincial Department committed to carrying out the necessary consultations¹²⁶ and following the legislative procedures appropriately. The schools were, in the end, not closed.¹²⁷

These case studies highlight the harmful consequences to children of school rationalisation processes that are not conducted with care, thorough stakeholder engagement and other prescribed procedures. Rationalisation of schools may be necessary in some cases, and may need to be avoided in others, but it is upon government duty-bearers, particularly the Department of Basic Education, to ensure that it is conducted in a manner that affirms and protects children's right to basic education, dignity and non-discrimination.

Concerns around how school rationalisation and re-alignment is conducted made it to the Parliamentary Committee of Basic Education in September 2022, where the Department of Basic Education was asked to make a presentation on the recently finalised and approved National Framework on Rural Education, previously the Rural Education Draft Policy. This Framework was approved in July 2022 after the Department took it through a round of consultations with the Council of Education Ministers, the Inter-Provincial Rural Education Committee, and other bodies.¹²⁸ The Framework aims to improve access to, and the quality of, education for learners in rural schools through building up the self-esteem of children and teachers; encouraging social connectedness to advance education; providing access to functional services, i.e health, social development and libraries, to learners and teachers.¹²⁹ The Framework also aims to facilitate the resourcing of rural schools through the mobilisation of communities to facilitate education and development initiatives; improve the recruitment, retention and development of teachers; and

126 Email communication with an attorney at the Legal Resources Centre, 5 December 2022.

127 *Ibid.*

128 Department of Basic Education Presentation to Parliamentary Portfolio Committee on Basic Education "National Framework for Rural Education: Enhancing Access, Equity and Quality in Rural Schools" (6 September 2022).

129 Department of Basic Education "Rural Education Draft Policy" (2017) 8 and 28. Available at <https://static.pmg.org.za/180126draftruraledupolicy.pdf>.

prescribe the minimum requirements for the continued running of small primary and secondary schools in order to support learning and teaching.¹³⁰

Lastly, the Framework sets out the roles and responsibilities of the different levels of the education sector, i.e national, provincial, district, and school.¹³¹

The Department also touched on the legislative and policy provisions for the merger and closure of public schools, including rural public schools.¹³² It was noted that closures and mergers are dealt with by the South African Schools Act as well as the regulations on the minimum uniform norms and standards for public school infrastructure. Rationalisations aim to ensure that there are only two types of schools in the country, primary and secondary, and ensure universal access to quality education in a rational and cost-effective manner.¹³³ The Department has established national and provincial steering committees to, amongst other things, discuss, address and align policy matters related to the rationalisation of schools, and monitor its progress.¹³⁴

Members of the Parliamentary Committee took issue with the fact that what had been presented by the Department, and the manner in which closures and/or mergers of schools was happening, differed markedly.¹³⁵ The importance of the Department carrying out sufficient stakeholder consultations was highlighted as an area in need of serious improvement, as was the Committee's need to play a stronger oversight role, provision of adequate services to learners – such as transportation – once closures and/or mergers are carried out, and other ancillary matters.¹³⁶

The rationalisation and re-alignment of schools continues to have a negative impact on learners' access to education, especially when decisions are made without the appropriate consultations being conducted and there is no provision of appropriate transportation and accommodation where necessary. However, the greatest impact is the removal of school infrastructure close to homes and communities where children live, requiring them to travel long distances every day or be separated from their families for extended periods of time. There is no doubt a need for further advocacy and litigation to protect and advance the rights of learners in rural and farm areas to ensure appropriate levels of access to basic education.

130 Department of Basic Education (n100 above) 33–4.

131 Department of Basic Education (n100 above) 35–6.

132 Parliamentary Monitoring Group “Draft Rural Education Policy (school closure, rationalisation, mergers): DBE briefing” (6 September 2022). Available at <https://pmg.org.za/committee-meeting/35472/>.

133 *Ibid.*

134 Parliamentary Monitoring Group “Draft Rural Education Policy (school closure, rationalisation, mergers): DBE briefing” (6 September 2022). Available at <https://pmg.org.za/committee-meeting/35472/>.

135 *Ibid.*

136 *Ibid.*

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CONCLUSION

The education system in South Africa carries the legacy of discriminatory apartheid-era laws and practices. Poor, mostly black, children still feel the effects of the discriminatory and exclusionary system, particularly in relation to accessing appropriate school infrastructure that promotes quality learning and teaching. Post 1994, South Africa's democratic government has adopted the Constitution, as well as various national laws and policies, that aim to dismantle the inherited systems and establish an education system that is non-discriminatory and enables all children to thrive and develop, no matter their skin colour, economic background or location.

While the inequalities in the education system have their origins in the apartheid-era laws and practices, those origins do not fully explain the persistence of the inequalities under the post-apartheid government. Over time, it has become clear to observers with an interest in children's rights that the Department of Basic Education is falling short in carrying out its mandate in this regard. Key areas affected have been poor school infrastructure, a lack of norms and standards, and the rationalisation and re-alignment processes that have been carried out inappropriately.

Therefore, rights activists and civil society organisations have joined forces with affected schools and communities to hold government to account through advocacy efforts and litigation, and monitoring government actions. They have brought government's failings to light, and continue to make use of platforms to ensure greater accountability and monitoring in the fight to ensure children's right to education is properly realised. While much progress has been made in all three areas, there is still much work to be done.

Notes

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