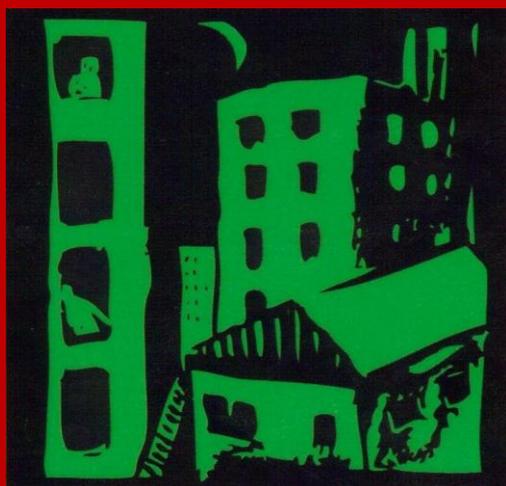
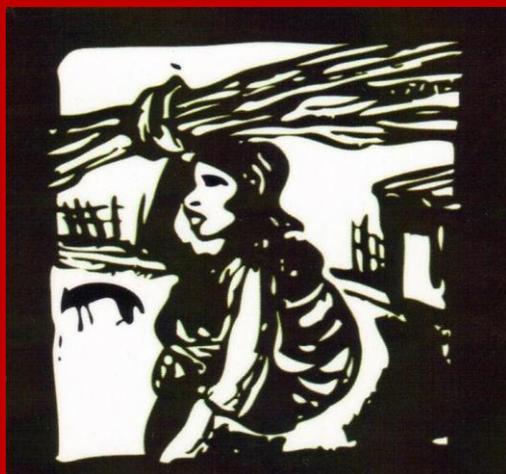


# LAW DEMOCRACY & DEVELOPMENT

VOLUME 15 (2011)



DOI: <http://dx.doi.org/10.4314/idd.v15i1.12>

ISSN: 2077-4907

## The school funding system and its discriminatory impact on marginalised learners

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### 1 INTRODUCTION

*“South African children are routinely underachieving – not only among the worst in the world, but often among the worst in the southern African region and in Africa as a whole. This is despite vastly superior resources in Africa’s most industrialised nation.”<sup>1</sup>*

Headlines reminding us of the poor state of education in South Africa have become commonplace. Statistics revealing the dire state of learners’ performances, however, have to be put into perspective. The disturbing reality is that the majority of learners who are branded as “among the worst in the world” are located at the former black schools in contrast to learners at former white schools who are on average

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<sup>1</sup> Bloch G *The toxic mix: What is wrong with South Africa’s schools and how to fix it* (2009) 17.

outperforming their counterparts at the previously disadvantaged schools.<sup>2</sup>

Uncertainty exists about the “the extent to which equality of educational resources is a necessary precondition of equality of educational outcome.”<sup>3</sup> However, recent support has grown for analyses which indicate that there is a strong causal link between good learners’ performance and a well-funded school.<sup>4</sup> The Department of Basic Education (“the Department”) endorses this view by acknowledging that an improvement in resources is thought to improve the output in education or the performance of learners.<sup>5</sup> This view is also supported by the fact that the “vastly superior resources” are almost exclusively located at the former white schools.

The root of this disparate situation is found in the education policy of the previous regime. One of the key features of apartheid education was the gross inequality in the funding of public schools.<sup>6</sup> The financing of public education under the previous regime occurred primarily on the basis of race, with black learners receiving the least.

Since 1994 the democratic government has implemented a whole range of laws and policies to ensure that public funding is aimed at redressing this disparity and that, ultimately, learners’ right to basic education is realised.<sup>7</sup> The financing of public schools is reliant on school fees to a great extent.<sup>8</sup> Because the exact amount of fees charged is determined by the parent community of a school, there is a growing concern that the public funding system is reinforcing the existing inequality between former black and white schools.<sup>9</sup> This argument is informed by the fact that wealthy schools can sustain their position of privilege by charging high school fees which enable them to operate on budgets far exceeding those of poor schools which cannot charge similar amounts.<sup>10</sup>

The main concern of this article is to shed light on the discriminatory impact of the school funding system on marginalised learners. I start by interpreting the right to basic education in its proper constitutional context. This is followed by an examination of the state obligations engendered by this right as was recently considered by the Constitutional Court (“the Court”) in *Governing Body of Juma Masjid Primary School v Essa NO*.<sup>11</sup> Thereafter an explanation of the current funding system is provided. I

<sup>2</sup> Bloch (2009) 59.

<sup>3</sup> *National survey on barriers of access to education in South Africa: Baseline review and conceptual framework document* (Hereafter referred to as the *Barriers survey*) (September 2006), prepared jointly by Social Surveys and the Centre for Applied Legal Studies, University of the Witwatersrand, 23.

<sup>4</sup> *Barriers survey* 9.

<sup>5</sup> *National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning environment*. Government Gazette 33283 (11 June 2010) 9.

<sup>6</sup> Veriava F & Coomans F “The right to education” in Brand D & Heyns C (eds) *Socio- Economic Rights in South Africa* (2005) 60.

<sup>7</sup> Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996.

<sup>8</sup> Roithmayr D “Access, adequacy and equality: The constitutionality of school fee financing in public education” (2003) 19 (3) *SAJHR* 382.

<sup>9</sup> Roitmayr (2003) 382.

<sup>10</sup> Roitmayr (2003) 382.

<sup>11</sup> 2011(8) BCLR 761 (CC).

conclude with an enquiry into the discrimination suffered by learners as a result of this funding regime.

## 2 INTERPRETING THE RIGHT TO BASIC EDUCATION

The South African Constitution embodies a transformative model of constitutionalism.<sup>12</sup> This differs from traditional liberal constitutions which only place restraints on the exercise of state power.<sup>13</sup> Besides providing measures to curb an abuse of state power, the transformative Constitution requires of government to take steps “to advance the ideals of freedom, equality, dignity and social justice.”<sup>14</sup> In this regard, transformation, inter alia, involves the fulfilment of socio-economic rights”.<sup>15</sup>

### 2.1 The right to basic education and the transformative Constitution

As a socio-economic right, section 29(1) (a) of the Constitution obliges government to make basic education available and accessible to everyone.

Education is critical to the transformation of South Africa which today is one of the most unequal societies in the world.<sup>16</sup> The “socioeconomic (sic) distortion introduced by apartheid” has trapped the majority of the population in poverty.<sup>17</sup> Transforming South African society into one where the ideals of the Constitution will be more than just words on paper requires a multifaceted approach. However, education has recently been singled out by the National Development Commission as being of the “highest priority” in eliminating poverty and reducing inequality in our country.<sup>18</sup>

### 2.2 The right to basic education in context

The right to basic education cannot be interpreted in isolation but must firstly be construed in its social and historical context.<sup>19</sup> This entails an understanding of the right

<sup>12</sup> Brand D “Introduction to socio-economic rights in the South African Constitution” in Brand D & Heyns C (eds) *Socio- Economic Rights in South Africa* (2005) 1. The term “transformative constitutionalism” was coined by Karl Klare. For a thorough discussion of the transformative nature of the South African Constitution, see Klare “Legal culture and transformative constitutionalism” (1998) *SAJHR* 146.

<sup>13</sup> Brand (2005) 1.

<sup>14</sup> Brand (2005) 1. The transformative nature of the Constitution is confirmed in the preamble which states: “The Constitution is the supreme law of the land, adopted to heal the divisions of the past, to establish a society based on democratic values, social justice and fundamental human rights and to improve the quality of life of all citizens and free the potential of all people.”

<sup>15</sup> Brand (2005) 2.

<sup>16</sup> *National Development Plan: Vision for 2030*, prepared by the National Planning Commission (11 November 2011) 3. (Hereafter referred to as the *National Development Plan*). The National Planning Commission consists of 26 commissioners appointed by the President “to advise on issues impacting on long-term development.” Their latest project, the *National Development Plan*, charts the course to eliminate poverty and reduce inequality by 2030. See the Foreword.

<sup>17</sup> *National Development Plan* 325.

<sup>18</sup> *National Development Plan* 3-4. See also the Foreword.

<sup>19</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 25.

against our specific “history and background to the adoption of the Constitution.”<sup>20</sup> According to De Vos, an understanding of the scope and content of the rights in the Bill of Rights is firstly dependent on the history that preceded our constitutional democracy.<sup>21</sup> This history has been interpreted by the Constitutional Court as the specific apartheid history in which the majority of the South African population were denied political freedom and deprived of opportunities to advance their economic and social position in life.<sup>22</sup> At the core of the transformative Constitution lies a commitment to address these conditions in order to ensure that the constitutional values of social justice, human dignity, equality and freedom will be enjoyed by all. A mere understanding of the specific historical context of a right is therefore not enough. In order to realise the goals of the Constitution, an interpretation of the right must be aimed at rectifying the injustices of the past.

The second leg of the contextual approach requires that rights be interpreted in their textual setting.<sup>23</sup> This requires an interpretation of the other rights in the Bill of Rights and the Constitution as a whole.<sup>24</sup> In *Grootboom* the Court emphasised the interrelated link between socio-economic rights and other rights enshrined in the Constitution by pointing out:

“There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential”.<sup>25</sup>

In *Khosa* the Court held that the rights to life, equality and dignity must be considered where it is implicated in cases dealing with socio-economic rights.<sup>26</sup> In interpreting the right to social security under section 27(1)(c)<sup>27</sup> of the Constitution, the Court found that the denial of social security to permanent residents is not only a violation of section 27, but also of their rights to equality and dignity which were described as founding values lying “at the heart of the Bill of Rights.”<sup>28</sup> This judgment, coupled with the abovementioned passage from *Grootboom*, seem to suggest that where the values of dignity, equality, life and freedom are implicated in socio-economic rights claims, it will be very difficult to justify an infringement of the socio-economic right and *vice versa*.

<sup>20</sup> *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 16.

<sup>21</sup> De Vos “*Grootboom*, the right of access to housing and substantive equality as contextual fairness” (2001) *SAJHR* 262 262-263.

<sup>22</sup> De Vos (2001) 263.

<sup>23</sup> *Grootboom* (fn 19 above) para 22.

<sup>24</sup> *Grootboom* para 22.

<sup>25</sup> *Grootboom* para 23.

<sup>26</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); 2004(6) BCLR 569 (CC) paras 40-44.

<sup>27</sup> Section 27(1) (c) of the Constitution provides: “Everyone has the right to have access to social security, including if they are unable to support themselves and their dependants, appropriate social assistance.”

<sup>28</sup> *Khosa* para 85.

### 2.2.1 *The legacy of apartheid*

The education system inherited by the post-apartheid government is “riddled with inequalities.”<sup>29</sup> South Africa, in reality, still harbours separate education systems in its public school domain: the one consists of the former Model C schools,<sup>30</sup> which is adequately resourced, and the other constitutes the township and rural schools entrenched in abject poverty.

The legacy of apartheid education is manifested in a minimum level of resources, lack of qualified teachers, high teacher-pupil ratios, lack of libraries and laboratories and a shortage of classrooms at the latter schools.<sup>31</sup> On the other hand, most of the former Model C schools are equipped with modern computers, well-resourced libraries and laboratories and well-qualified teachers.<sup>32</sup>

Today it is estimated that former Model C schools are charging school fees of up to R20 000 a year.<sup>33</sup> On the other hand, school fees in previously disadvantaged schools can be as minimal as R50 per year.<sup>34</sup> Because funding under the apartheid government occurred primarily along racial lines, there continues to be a strong correlation between a former department in which a school was located and the race of the learners it served.”<sup>35</sup>

However, the former Model C schools are open to learners who can afford the school fees. As a result an increasing number of black learners are gaining access to these schools. The socio-economic status of a learner has thus become a determining factor in respect of the choice of school he or she attends.<sup>36</sup> This means that the school funding system may indirectly exclude learners from access to schools on account of race as in some cases there may be an overlap between race and socio-economic status.

The right to basic education must therefore be interpreted against the background of an education system segregated along racial and/or class lines.

<sup>29</sup> South African Human Rights Commission *Socio-Economic Rights Report* (2001), 88. In 1986 the apartheid government spent R2 635 per year on every white child in comparison to R572 on every black child.

<sup>30</sup> “Model C” is generally used to describe the former white schools as they existed under the previous regime. However, this term requires explanation. In April 1992 the then Minister of Education announced that all white schools would become Model C status schools. This meant that these schools would be converted into state-aided schools managed by the principal and a management committee. The state paid the salaries of a set number of teachers whilst the rest of the costs at these schools became the responsibility of the parents. The management committee had the power to appoint teachers, determine admission policy and impose fees. Although, in theory, white schools could admit black pupils as from October 1990, many black learners were barred access to these schools due to high school fees and inability to meet certain selection criteria which, in fact, disguised racism. See South African Human Rights Commission *A report on racism, racial integration and desegregation in South African public secondary schools* (February 1999) 19.

<sup>31</sup> Veriava & Coomans (2005) 60.

<sup>32</sup> Roithmayr (2003) 411.

<sup>33</sup> “The cost of educating today’s grade one learner” at <http://mg.co.za/printformat/single/2011-02-14-the-cost-of-educating-todays-grade-one> (accessed 28 September 2011).

<sup>34</sup> Veriava F “Free to learn: A discussion paper on the school fee exemption policy” in Leatt A & Rosa S (eds) *Towards a Means to Live: Targeting poverty alleviation to make children’s rights real* (2005) 11.

<sup>35</sup> Veriava (2005) 15.

<sup>36</sup> Veriava (2005) 15.

### 2.2.2 Section 29(1) (a) and the related provisions in the Bill of Rights

The right to basic education is an empowerment right. It plays a central role in the fulfilment of socio-economic as well as civil and political rights. Education is vital to gaining access to the labour market. A person with no formal schooling runs a 30 per cent risk of remaining unemployed whereas a person with a tertiary education runs a risk of less than five per cent.<sup>37</sup> Furthermore, education is the greatest determining factor of salaries in South Africa. A person with no formal schooling earns 21 times less in a lifetime than a person with a tertiary education.<sup>38</sup>

These figures indicate that level of education plays a significant role in determining a person's quality of life. It is safe to say that most uneducated people are trapped in a cycle of poverty and are left dependent on the state for the fulfilment of their socio-economic rights such as housing and health rights.<sup>39</sup> Because these rights cannot be fulfilled immediately by the state,<sup>40</sup> it is arguable that a denial of the right to education inevitably results in a denial of other socio-economic rights.

Education also impacts the right to equality.<sup>41</sup> A denial of education prevents a person from competing on an equal footing with those who are educated in the pursuit of opportunities to ensure an improved quality of life. However, once a poor child receives an education equal to that of one more fortunate, both may have an equal chance of fulfilling their full potential.

Education may affect the inherent dignity of a person<sup>42</sup> In *S v Makwanyane*<sup>43</sup> the Constitutional Court held that “[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings [who are] entitled to be treated as worthy of respect and concern.” Education, we have seen, is essential to finding employment. Work, in turn, is one of the most fundamental facets of a person's life, providing the individual not only with a means of financial support; as importantly, a person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being by enabling her or him to play a contributory role in society.<sup>44</sup> Without the necessary education a person is severely limited in the endeavour to secure work and, by the same token, limited in the enjoyment of her or his inherent right to dignity.

<sup>37</sup> Schussler M *What are you worth?* 7<sup>th</sup> United Association of South Africa (UASA) Employment Report (2008) 13.

<sup>38</sup> Schussler (2008) 13.

<sup>39</sup> *National Development Plan* 325.

<sup>40</sup> The rights to have access to housing and health care services and the rights of access to food, water and social security are qualified to the extent that the second subsection of these rights states that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of each of these rights. The state is therefore under no obligation to immediately realise these rights. See sections 26 and 27 of the Constitution.

<sup>41</sup> Section 9 (1) of the Constitution provides: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

<sup>42</sup> Section 10 of the Constitution provides: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

<sup>43</sup> (1995) 3 SA 391 (CC) para 328.

<sup>44</sup> *Hospersa obo Venter v SA Nursing Council* (2006) 6 BLLR 558 (LC) para 27.

In sum, the realisation of the right to basic education is crucial to the fulfilment of the ideals of a transformative Constitution. It facilitates the enjoyment of all other rights in the Constitution, is key to the achievement of an individual's full potential and enables the realisation of a society built on the constitutional values of dignity, equality and freedom.

### 3 STATE OBLIGATIONS

The South African Constitution obliges the state to “respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>45</sup> In the so-called *School Education Bill* case<sup>46</sup> the Constitutional Court held that the right to basic education does not merely prohibit the state from impairing access to the enjoyment of the right but “creates a positive right that basic education be provided for every person”.<sup>47</sup>

In the *Juma Masjid Primary School* case<sup>48</sup> the Court confirmed that section 29(1)(a) of the Constitution requires positive steps by the state to ensure the provision of basic education.<sup>49</sup> The Court held further that the right to basic education is “immediately realisable”<sup>50</sup> and noted that this right can only be limited in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>51</sup> In this regard the court distinguished the right to basic education from the other socio-economic rights in the Constitution. The rights to have access to housing and health care services and the rights of access to food, water and social security are qualified to the extent that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of each of these rights.<sup>52</sup> The right to basic education is neither formulated as a right of access nor subject to the same internal qualifiers as sections 26 and 27.

#### 3.1 Access

Firstly, the Court found that access “is a necessary condition for the achievement of [the] right.”<sup>53</sup> A great deal of emphasis was placed on the compulsory nature of the right to basic education in terms of which parents may be fined or imprisoned for failure to ensure their children's attendance at school.<sup>54</sup> This obligation upon parents is necessary

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<sup>45</sup> Section 7(2).

<sup>46</sup> *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC). (This case was decided under the Interim Constitution).

<sup>47</sup> *Ex parte Gauteng Provincial Legislature* para 9.

<sup>48</sup> Fn 11 above.

<sup>49</sup> The Court held that the source of this positive obligation is section 8(1) of the Constitution which provides that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” See para 45.

<sup>50</sup> *Juma Masjid Primary School* (fn 11 above) para 37.

<sup>51</sup> *Juma Masjid Primary School* para 37, citing 36 of the Constitution (the “limitation clause”).

<sup>52</sup> See ss 26(2) and 27(2) of the Constitution.

<sup>53</sup> *Juma Masjid Primary School* para 43.

<sup>54</sup> Section 3(6) of the South African Schools Act 84 of 1996.

if it is considered that a parent may exercise choices that are detrimental to the child.<sup>55</sup> For instance, a parent may decide that a child should look after the household or contribute financially to the family by seeking employment instead of going to school.<sup>56</sup>

However, *genuine* access is not guaranteed by simply making basic education compulsory. Such a view is short-sighted and fails to take into account that the majority of South African parents may not be able to comply with this obligation because they are unable to afford the costs related to schooling.<sup>57</sup> In this regard the Schools Act prohibits unfair discrimination against learners on the basis of admission to school, in particular on the basis of refusing access because of a failure to pay school fees or an inability to pay school fees.<sup>58</sup>

### 3.2 Availability

Secondly, the Court recognised the state's duty to ensure the availability of schools.<sup>59</sup> This encompasses more than mere physical structures in which teaching can take place.<sup>60</sup> This obligation must be understood in light of the objectives of the right to basic education identified by the Court. Nkabinde J remarked as follows:

“Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities”.<sup>61</sup>

Of significance is the acknowledgement by the Court that the right to education is crucial to the transformation of the South African society.<sup>62</sup> In order to reach this objective, schools must therefore be in a condition which makes meaningful teaching and learning possible.<sup>63</sup>

Section 5A of the Schools Act provides that the Minister of Basic Education may prescribe minimum norms and standards for school infrastructure, the capacity of a school in respect of the number of learners it can admit and the provision of learning and teaching support material. It defines school infrastructure as “the availability of classrooms, electricity, water, sanitation, a library, laboratories for science, technology, mathematics and life sciences, sport and recreational facilities, electronic connectivity at a school, and perimeter security.”<sup>64</sup> Capacity is defined as “the number of teachers and the class size, quality of performance of a school, curriculum and extra-curricular choices, classroom size, and utilisation of available classrooms of a

<sup>55</sup> Sloth-Nielsen J & Mezmur B *Free Education is a Right for Me: A Report on Free and Compulsory Education* Save the Children, Sweden (2007) 18.

<sup>56</sup> Sloth-Nielsen & Mezmur (2007) 18.

<sup>57</sup> *Barriers survey* 33.

<sup>58</sup> Section 5(1) and (3)(a).

<sup>59</sup> *Juma Masjid Primary School* (fn 11 above) para 45.

<sup>60</sup> Beiter K *The Protection of the Right to Education by International Law* (2006) 479.

<sup>61</sup> *Juma Masjid Primary School* para 43.

<sup>62</sup> *Juma Masjid Primary School* para 38.

<sup>63</sup> Beiter (2006) 479.

<sup>64</sup> Section 5A(2)(a).

school.”<sup>65</sup> Learning and teaching support material encompasses “the availability of stationery and supplies, learning material, teaching material and equipment, science, technology, mathematics and life sciences apparatus, electronic equipment and school furniture and other school equipment.”<sup>66</sup>

The draft National Minimum Norms and Standards for School Infrastructure <sup>67</sup> (hereafter “draft Norms and Standards”) set out benchmarks relating to infrastructure and capacity in primary and secondary schools. For example, with regard to basic services, it requires the following in all schools: minimum water supply in terms of section 3 of the Water Services Act;<sup>68</sup> electricity “in some form” in accordance with the National Building Regulation;<sup>69</sup> “adequate sanitation facilities that promote health and hygiene standards that comply [with] the National Building Regulations and Water Service Act”<sup>70</sup> and “some form (wired or wireless) of connectivity for communication purpose [which may include] the telephone, fax, internet access, intercom reticulation/public address system.”<sup>71</sup> The draft policy further defines in detail the minimum standards required in all the other areas set out in section 5A of the Schools Act.

It should be pointed out that analysing the draft Norms and Standards in its entirety would be premature at this stage as it has no force and effect and may change in future. It was drafted and tabled in 2008 and to be “fully adopted by the end of 2009 and... implemented in a phased manner starting from 2010.”<sup>72</sup> The latter deadlines have come and gone.

### 3.2.1 *Current state of infrastructure in public schools*

The latest national report on school infrastructure, the National Education Infrastructure Management Systems [NEIMS] Report of 2009, reveals an abysmal state of affairs:

“[O]f the 24 460 public ordinary schools 3 600 have no electricity supply, while a further 800 had an unreliable electricity supply; 2 444 have no water supply, while a further 2563 have an unreliable water supply (the Eastern Cape and Kwazulu-Natal being the worst provinces); only 7 847 have municipal flush toilets, while 970 still do not have any ablution facilities and 11 231 still use pit-latrine toilets; only 8% of public ordinary schools have stocked and functioning libraries; 10% of public ordinary schools have stocked computer centers; and only 5% of public ordinary schools have stocked laboratories.”<sup>73</sup>

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<sup>65</sup> Section 5A(2)(b).

<sup>66</sup> Section 5A(2)(c).

<sup>67</sup> Government Gazette No 31616, Notice 1439 (21 November 2008).

<sup>68</sup> *National Minimum Norms and Standards for School Infrastructure* (2008) para 3.20.

<sup>69</sup> *National Minimum Norms and Standards for School Infrastructure* (2008) para 3.21.

<sup>70</sup> *National Minimum Norms and Standards for School Infrastructure* (2008) para 3.19

<sup>71</sup> *National Minimum Norms and Standards for School Infrastructure* (2008) para 3.22.

<sup>72</sup> *National Minimum Norms and Standards for School Infrastructure* (2008) para 1.7.

<sup>73</sup> As quoted in *Submission to Portfolio Committee on Basic Education – Comments on How to Improve Basic Education*, prepared by Equal Education, 5-6.

These figures are troublesome for the Department, especially in light of the Constitutional Court decision that the right to basic education (as an unqualified right) is “immediately realisable.”<sup>74</sup> This is contrary to government’s approach to basic education which to date has been one of progressive realisation. For example, the Department admits that it has approached the infrastructure problem in schools “without specific national or provincial policies”.<sup>75</sup> The absence of a clear policy framework in this regard clearly shows a lack of urgency required in terms of the realisation of the right to basic education.

Should the Norms and Standards on Infrastructure be formally adopted, learners in previously disadvantaged schools would have clearly defined benchmarks against which they can assess what they are entitled to as bearers of the right to basic education. Based upon the current draft Norms and Standards, government is clearly failing the majority of these learners. It is submitted that this may open a floodgate of legal action against the state and may be one of the reasons why the Norms and Standards for Infrastructure have not been adopted as official state policy.

#### 4. THE SCHOOL FUNDING SYSTEM

The state is obliged to fund public schools from public revenue to ensure the redress of the inequalities in the education system.<sup>76</sup> The Norms and Standards for School Funding clarify the procedures to ensure the redress contemplated by the Schools Act.<sup>77</sup> State funding is divided into three categories.<sup>78</sup> Firstly, the bulk of funding (approximately 90 per cent) is spent on teachers’ salaries, the exact amount of which is connected to the qualifications and experience of teachers.<sup>79</sup> Since most suitably qualified teachers are at historically advantaged schools, a significant share of the state’s budget is allocated to these schools.<sup>80</sup>

The Department has attempted to redeploy well-qualified teachers to disadvantaged schools by instructing provincial departments to allocate between two and five per cent of such posts to poor schools.<sup>81</sup> However, it is doubtful whether this decision has had any significant effect on the difference in personnel funding among the public schools. Most provinces have only set aside two per cent of their posts for the redistribution.<sup>82</sup> Moreover, the South African Democratic Teachers’ Union (SADTU)

<sup>74</sup> *Juma Masjid Primary School* para 37.

<sup>75</sup> *National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning environment* (2010) 4.

<sup>76</sup> Preamble to the Schools Act.

<sup>77</sup> South African Schools Act 84 of 1996: Amended National Norms and Standards for School Funding Government Gazette No. 29179 (August 2006) (Hereafter “Norms and Standards for School Funding”).

<sup>78</sup> *Barriers Survey* (2006) 24.

<sup>79</sup> *Barriers Survey* (2006) 24.

<sup>80</sup> *Barriers Survey* (2006) 24.

<sup>81</sup> *Barriers Survey* (2006) 25.

<sup>82</sup> *Barriers Survey* (2006) 25.

suggests that the formula governing the selection of schools to benefit from this re-deployment is not favouring the poor schools.<sup>83</sup>

The second category of state funding is directed at the infrastructure of schools.<sup>84</sup> Since most previously disadvantaged schools are in a deplorable physical condition government allocates money for infrastructure almost exclusively to poor schools.<sup>85</sup>

The last category is non-personnel, non-capital expenditure (NPNC), more commonly known as “school allocation” money.<sup>86</sup> This expenditure is directed at the purchasing of capital equipment and consumables necessary for teaching and assessment in schools, including electricity, water, stationary, furniture, computers, photocopiers, teaching aids and so forth.<sup>87</sup> Schools pay for these from their NPNC expenditure and from money produced by charging school fees<sup>88</sup> and organising fund-raising activities.<sup>89</sup>

#### 4.1 National quintiles and “no-fee” schools

Schools are divided into national quintiles ranging from the poorest school to the least poor school.<sup>90</sup> At present, schools in quintile one (the poorest schools) receive an allocation of R905 per learner and in quintile 5 (the least poor schools) an amount of R156 per learner.<sup>91</sup> An adequacy benchmark is also determined nationally, which is considered as “the minimally adequate amount for a learner’s right to basic education to be realised.”<sup>92</sup> The adequacy benchmark for 2011 is R678, equalling the amount schools receive in quintile 3. Schools receiving this amount or more are declared “no fee” schools.<sup>93</sup> In effect this means that all schools in quintiles 1 to 3 are “no fee” schools.

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<sup>83</sup> *Barriers Survey* (2006) 25. In terms of this formula, learners are “weighted” according to factors such as “class size, the range of subjects offered, whether the school caters for disabled children, the number of different language streams in a school and the level of poverty in the community served by the school.” The higher the total weighting of the learners in a school, the more likely it is that the school will benefit from the re-deployment of teachers’ posts. According to SADTU, the more advantaged schools benefit from this formula since the level of poverty can be outweighed by the other factors from the formula.

<sup>84</sup> *Barriers Survey* (2006) 25.

<sup>85</sup> *Barriers Survey* (2006) 25.

<sup>86</sup> *Barriers Survey* (2006) 25.

<sup>87</sup> *Barriers Survey* (2006) 25-26.

<sup>88</sup> Section 39 (1) of the Schools Act provides:

“School fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending” the annual budget meeting of the school.

<sup>89</sup> *Barriers Survey* (2006) 26.

<sup>90</sup> Norms and Standards for School Funding (2006) para 87.

<sup>91</sup> According to para 101 of the Norms and Standards for Funding, the provincial education departments must assign to each school a poverty score that will enable them to sort schools from poorest to least poor. The determination of this score is based on the relative poverty of the community around the school, which in turn depends on the individual or household advantage or disadvantage with regard to income, wealth and/or level of education. The poverty score should be based on data collected from the national Census conducted by Statistics South Africa. Provincial departments are prohibited from relying on data provided by schools themselves.

<sup>92</sup> *Barriers Survey* (2006) 30.

<sup>93</sup> Norms and Standards for School Funding (2006) para 109.

School governing bodies in the latter quintiles are therefore prohibited from setting compulsory fees.<sup>94</sup>

A concern in this regard is that schools may receive the adequacy benchmark or in excess thereof, but this may not be enough to cater for all their expenditure needs. Macfarlane points out that the Education Department receives regular complaints from “no fee” schools claiming that they have less income since their declaration as “no fee” schools.<sup>95</sup> This may explain the practice of the latter schools to continue charging school fees despite their status as “no-fee” schools.<sup>96</sup>

## 4.2 Schools charging school fees

A school receiving less than the adequacy benchmark and has not been declared a “no fee” school may charge school fees.<sup>97</sup> In effect this means that all schools in quintiles 4 and 5 are charging fees. Section 39 of the Schools Act provides:

“(1)...[S]chool fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the [annual budget meeting].

(2) [This resolution] must provide for:

(a) the amount of fees to be charged...”

Firstly, it is noted that parents have the discretion to determine whether school fees will be charged and the exact amount to be charged. Government explains the reasoning behind this as follows:

“The [Schools Act] imposes a responsibility on all public school governing bodies<sup>98</sup> to do their utmost to improve the quality of education in their schools by raising additional resources to supplement those which the state provides from public funds (section 36). All parents, but particularly those who are less poor or who have good incomes, are thereby encouraged to increase their own direct financial and other contributions to the quality of their children’s education in public schools. The Act does not interfere unreasonably with parents’ discretion under the law as to how to spend their own resources on their children’s education”.<sup>99</sup>

This statement acknowledges that the state is aware that its own funding towards schools may not be enough to provide for an acceptable standard of education. Therefore, parents’ contributions through school fees or fund raising activities should make up for a shortfall in state funding. This illustrates the state’s short-sightedness with regard to the existing disparity in the education system. Given the discretion of

<sup>94</sup> Norms and Standards for School Funding (2006) para 43.

<sup>95</sup> See Macfarlane “Free education in sharp focus” in <http://www.mg.co.za/article/2007-06-01-free-education-in-sharp-focus> (accessed 1 July 2008). See also <http://www.intranews.co.za/clippings/No-fee%20schools%20forced%20to%20charge.pdf> (accessed 28 September 2011).

<sup>96</sup> Macfarlane (2007) 1.

<sup>97</sup> Norms and Standards for School Funding (2006) para 156.

<sup>98</sup> The school governing bodies exercise various functions at a school, including administering and allocating school fees. See ss 16-21 of the Schools Act.

<sup>99</sup> Norms and Standards for School Funding (2006) para 37.

parents, the amount of school fees to be charged depends on the economic status of the parent community the school serves. Thus, the more affluent the parent community the higher the school fees that will be charged, and *vice versa*.

Although poor schools may receive a larger amount in school allocation money than advantaged schools, the parent communities serving the former schools are not financially able to increase the amount of fees charged if there is a shortfall in the state funding. However, schools serving affluent communities are in a position to increase their budgets despite receiving a lesser allocation from government. The following hypothetical table illustrates that, despite government’s policies of redress in education, the existing inequality in the education system may be perpetuated by the present school funding system:

| <b>Budgets in rich and poor schools</b>   |                                  |                                 |
|---|----------------------------------|---------------------------------|
| (It is assumed that both schools have 1 000 learners; the poor school charges R50 per learner per year, despite its “no-fee” status, and the rich school R20 000 per learner per year.) |                                  |                                 |
| <b>Funding Source</b>   | <b>Poor school ( quintile 1)</b> | <b>Rich School (quintile 5)</b> |
| School allocation (NPNC)  | R905 000                         | R156 000                        |
| School fees   | R50 000                          | R20 000 000                     |
| <b>TOTAL BUDGET</b>   | <b>R 955 000</b>                 | <b>R20 156 000</b>              |

#### 4.2.1 *The illusion of choice: feeder zones*

The National Education Policy Act (NEPA)<sup>100</sup> provides that a learner living within the feeder zone of a particular school is given preference to be placed at that school.<sup>101</sup> Although learners outside a feeder zone may still apply to that school, “access to [the] chosen school cannot be guaranteed.”<sup>102</sup> Restricting access to “outsiders” seems like a standard measure to control learner numbers.<sup>103</sup> Furthermore, these learners are “not precluded from seeking admission at whichever school” they choose.<sup>104</sup>

In theory (and ideally), parents have a choice to seek admission at a school which they regard as being able to provide the best quality of education to their children. In practice, however, the choice that NEPA presents to (some) parents is an illusion. It is submitted that the bottom line for school governing bodies is not feeder zones but school fees. School governing bodies will admit as many learners within *and outside* the feeder zone as they can accommodate, provided that parents can afford the required school fees.<sup>105</sup>

<sup>100</sup> Act 27 of 1996.

<sup>101</sup> NEPA Admission Regulations (1998), Regulation 34(a).

<sup>102</sup> Regulation 34(b).

<sup>103</sup> Woolman S & Fleisch B *The constitution in the classroom: Law and education in South Africa 1994-2008* (2009) 27.

<sup>104</sup> Regulation 34(b).

<sup>105</sup> Woolman & Fleisch (2009) 29.

This means that an indigent parent may desire to send her child to a well-resourced, well-performing school, but the amount of school fees charged there will force her to choose the poorly resourced “no-fee” school. In this regard the laws and policies governing the funding of public schools perpetuate the entrenched inequality in our education system despite the legislative guarantee of “parental choice”.

#### **4.3 Does the school funding system unfairly discriminate against black and/or poor learners?**

Section 9 (3) of the Constitution provides:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.

Section 5(1) of the Schools Act provides:

“A public school must admit learners and serve their educational requirements without unfairly discriminating in any way”.

Section 5(3) of the Schools Act provides:

“No learner may be refused admission to a public school on the 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”.

Unfair discrimination “principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.”<sup>106</sup> Dignity is therefore of fundamental importance in understanding unfair discrimination.<sup>107</sup> Unfair discrimination amounts to differential treatment that is hurtful and demeaning.<sup>108</sup> It takes place when “law or conduct, for no good reason treats some people as inferior or incapable or less deserving of respect than others.”<sup>109</sup> It also takes place “when law or conduct perpetuates or does nothing to remedy existing patterns of disadvantage.”<sup>110</sup>

In *Khosa v Minister of Social Development*<sup>111</sup> Mokgoro J found that the applicants (permanent residents) formed part of a vulnerable group that were worthy of constitutional protection.<sup>112</sup> She held that, because permanent residents contribute to the welfare system through the payment of taxes but are nevertheless excluded from claiming social assistance, the impression was created that they “are in some

<sup>106</sup> *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) para 31; see also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) paras 41-43.

<sup>107</sup> Currie I & De Waal J *The New Constitutional and Administrative Law, Volume 1* (2001) 244.

<sup>108</sup> Currie and De Waal (2001) 244.

<sup>109</sup> Currie and De Waal (2001) 244.

<sup>110</sup> Currie and De Waal (2001) 244.

<sup>111</sup> 2004 (6) SA 505 (CC); 2004(6) BCLR 569 (CC).

<sup>112</sup> *Khosa* para 74.

way inferior to citizens and less worthy of social assistance."<sup>113</sup> She found that “decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.”<sup>114</sup> This suggests that, if vulnerable groups do not have the same access to public benefits as their well-off counterparts, they are not treated as equal members of society. Such a situation is untenable in a constitutional democracy committed to equality, dignity and freedom.

The Constitutional Court, in *Harksen v Lane NO*,<sup>115</sup> adopted a test to determine unfair discrimination in laws of general application. This enquiry establishes, firstly, whether there is a rational connection between the differentiating law and a legitimate government purpose. If the test of rationality is met, there is no violation of the requirement of equal treatment laid down in section 9(1) of the Constitution. Even then, the differentiation may be unfairly discriminatory. Unfair discrimination is determined as follows:

“If differentiation is on a specified ground [in section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

“If the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation”.<sup>116</sup>

The Court distinguished the following factors in determining whether such a discriminatory provision has impacted unfairly on the complainants:

“(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;

“(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . .

“(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature”.<sup>117</sup>

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<sup>113</sup> *Khosa* para 74.

<sup>114</sup> *Khosa* para 74.

<sup>115</sup> 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

<sup>116</sup> Curie and De Waal (2001) 349-350, paraphrasing *Harksen v Lane* (fn 115 above) at para 53.

<sup>117</sup> *Harksen v Lane* para 51.

The Department has noted that section 39 of the Schools Act serve the following objectives:

“(a) It provides a mechanism to government to raise revenue from parents who are economically able to make such a contribution, “which in turn provides fiscal space for the state to implement preferential funding for poor schools.

“(b) It encourages parents to participate in the governance of schools; and

“(c) It promotes accountability of schools to the parent communities”.<sup>118</sup>

Undoubtedly, these purposes constitute legitimate government purposes. In terms of the *Harksen* enquiry, there is therefore no violation of section 9(1) of the Constitution because the school fee system is rationally connected to legitimate government purposes. The next step of the enquiry is to determine whether there is a violation of section 9(3), firstly on account of race and, secondly, on account of economic status.

#### 4.3.1 Race

With some exceptions, race is still one of the determining factors of the choice of school a learner attends.<sup>119</sup> Most learners attend schools that they would have been compelled to attend in the past on account of their race.<sup>120</sup> Because of former apartheid laws,<sup>121</sup> the geographical location of a school is closely linked to the wealth of the community. Thus, former black schools are located in predominantly impoverished communities whereas former white schools are overwhelmingly located in relatively advantaged or rich communities.

Because the state allocation to a school is determined by the wealth or poverty of the community around the school,<sup>122</sup> it is evident that former black schools will be located in the poorest quintiles whereas former white schools will tend to be located in less poor quintiles. Because of the close correlation between race and geographical location, thus, section 39 of the Schools Act indirectly differentiates between learners on the basis of race. In *Pretoria City Council v Walker*<sup>123</sup> the Constitutional Court held that indirect discrimination occurs where “conduct may appear to be neutral” but the consequences thereof results in discrimination.<sup>124</sup> Although section 39 of the Schools Act formally differentiates on the basis of geographical location (a seemingly neutral

<sup>118</sup> Norms and Standards for School Funding (2006) para 152.

<sup>119</sup> Fiske EB & Ladd HF ‘Financing Schools in Post-Apartheid South Africa: Initial Steps toward Fiscal Equity’ prepared for International Conference on Education and Decentralisation: African Experiences and Comparative Analysis, Johannesburg, 10-14 June 2002.

<sup>120</sup> Fiske and Ladd (2002) found that 79% of black learners remained in the former DET (Department of Education and Training) schools, 94% of former coloured learners remain in the former HOR (House of Representatives) schools and 100% of white learners remain in the former HOA (House of Assembly) schools.

<sup>121</sup> In *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) Langa J remarked at para 32: “The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory.”

<sup>122</sup> Norms and Standards for School Funding (2006) paras 87 and 101.

<sup>123</sup> 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

<sup>124</sup> Para 32.

ground), the effect of the discretion given to parents is that most black learners receive a far smaller contribution from their community in terms of school fees than most of their white counterparts on account of the geographical location of the school.<sup>125</sup>

As a result, most black learners are still attending schools lacking the most basic resources and qualified teachers because these schools are unable to recruit additional teachers on governing body contracts, remunerating them from school fees.<sup>126</sup> In contrast, most white learners are benefiting from the same system which guarantees them highly qualified teachers and schools which can boast with “state of the art computers, cutting edge laboratories and first rate textbooks.”<sup>127</sup>

The discretion imposed on parents in terms of section 39 perpetuates this state of affairs. Where public funding is inadequate, the state expects black learners to “get by” on the limited resources available to them. Moreover, because of the state’s failed policy to redeploy well-qualified teachers to the former disadvantaged schools, black learners are deprived of the same standard of teaching as is found in former white schools. The effect of section 39 is to convey a message to black learners that they are inferior and not entitled to be educated under the same conditions and entitled to the same standard of education as their white counterparts. There can be no doubt that the fundamental dignity of black learners is severely impaired.

#### 4.3.2 *Socio- economic status*

Socio-economic status is not a listed ground of prohibited discrimination; however, discrimination on an unlisted ground may be found to be unfair if it “[has] the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”<sup>128</sup> as the listed grounds. The Equality Act<sup>129</sup> defines “socio-economic status” as “[including] a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or low-level education qualifications.”<sup>130</sup> According to the Vienna Declaration<sup>131</sup> the exclusion of people with a low socio-economic status from social services is an infringement of their inherent dignity.<sup>132</sup>

The Human Rights Commission reveals that many learners are denied access to

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<sup>125</sup> I do take into account that there may be white learners in poor quintiles and black learners in the least poor quintiles. However, I am concerned here with establishing unfair discrimination against the overwhelming majority of black learners.

<sup>126</sup> Norms and Standards for School Funding (2006) para 38.

<sup>127</sup> Roithmayr (2003) 411.

<sup>128</sup> *Harksen v Lane* para 53.

<sup>129</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, giving effect to s 9(4) of the Constitution outside the employment context.

<sup>130</sup> See the definition section of the Equality Act.

<sup>131</sup> Vienna Declaration and Programme of Action, Adopted 25 June 1993 by the World Conference on Human Rights.

<sup>132</sup> Section 25 of the Vienna Declaration.

basic education because of an inability to pay school fees.<sup>133</sup> Considering the cycle of poverty in which most South Africans are trapped,<sup>134</sup> it is safe to argue that most citizens are dependent on the state for the delivery of basic education. Undoubtedly the payment of school fees is a barrier for many parents.<sup>135</sup> Although South Africa has a high enrolment rate at schools, the drop-out rate of learners is alarming.<sup>136</sup> The Centre for Applied Legal Studies at Wits University (CALs) reveals that one of the main reasons for non-attendance at schools is inability to pay school fees.<sup>137</sup>

However, school fees are not the only barrier to basic education. Other access costs such as transport costs and costs related to school uniforms and textbooks also act as barriers to education. The CALs survey found that in poor communities a significant amount of average income was spent on educational costs, including school fees, school transport costs, textbooks, uniforms and stationery.<sup>138</sup>

The South African Human Rights commission reports that discriminatory practices occur regularly against learners whose school fees are not paid. These include schools sending learners home and withholding their school records until their fees are paid.<sup>139</sup> These practices persist despite amendments to the Schools Act which explicitly outlaw the more malicious forms of discrimination against learners. In terms of the section 41(5) of the Education Laws Amendment Act,

“ 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”.

In sum, the treatment of learners whose parents are unable to pay school fees is hurtful and demeaning. Despite anti-discriminatory laws, these learners are treated as inferior and unworthy of the same respect and concern shown to learners whose parents are able to pay their school fees.

## 5 CONCLUSION

Our transformative Constitution has ushered in a new era in which all South Africans are entitled to equal opportunities, including the attainment of basic education. However, this article has revealed that the current school funding system has

<sup>133</sup> *South African Human Rights Commission: Report of the Public Hearing on the Right to Basic Education* (2006) 20. (Hereafter referred to as the “SAHRC Report on Basic Education”)

<sup>134</sup> *National Development Plan* 337.

<sup>135</sup> *SAHRC Report on Basic Education* (2006) 23.

<sup>136</sup> *SAHRC Report on Basic Education* (2006) 23. The South African Human Rights Commission reports that South Africa has an average enrolment rate of 98% in grade 1. However, the drop-out rate between grade 1 and 3 is 26% and between grade 9 and 10, 19.6%.

<sup>137</sup> *Barriers Survey* (2006) 33.

<sup>138</sup> *Barriers Survey* (2006) 33. CALs found that in communities where the average income was R877 per month, 32% of the household income was spent on educational costs.

<sup>139</sup> *Barriers Survey* (2006) 33.

perpetuated entrenched inequality in our schools and barred access to many black and/or poor learners to exercise their constitutional right to a basic education. Although the state must be commended for the steps taken to redress the present state of inequality, a radical review of the laws and policies governing school funding is required. In this regard it is submitted that the power vested in school governing bodies and parents to determine school fees has to be reassessed. This competency allows for former Model C schools to maintain their position of historical privilege despite operating in the same public school system as the former disadvantaged schools. Although parents are entitled to have a say in their children's education, the state still carries the primary obligation to ensure the provision of basic education to all learners on an equal basis.

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