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**THE RIGHT TO EDUCATION**  
**SUBMISSION TO THE UNITED NATIONS**  
**UNIVERSAL PERIODIC REVIEW (4<sup>TH</sup> CYCLE)**  
**STATE UNDER REVIEW: SOUTH AFRICA**

**Submitted by:**

Legal Resources Centre (LRC)

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## **ABOUT THE LEGAL RESOURCES CENTRE**

1. The Legal Resources Centre (LRC) is a public interest non-profit law clinic in South Africa founded in 1979. The LRC uses the law as an instrument for justice for poor and marginalised persons. The LRC pursues equality, access to justice, and the recognition of constitutional rights for all through creative and effective solutions. To this end, we provide legal advice and legal representation that empowers our clients, take on strategic and impact litigation, and participate in multi-pronged advocacy and law reform.

### **A. INTRODUCTION**

2. Our submission focuses on the education and education-related issues in South Africa and the recommendations made in South Africa's most recent Universal Periodic Review (UPR) report.

### **B. EVALUATING THE IMPLEMENTATION OF PREVIOUS RECOMMENDATIONS**

3. The South African government have not fully complied and implemented the recommendations made in the previous UPR reporting cycle. The submission will detail the manner in which the government, and specifically the Department of Basic Education (DBE), has failed to address the shortcomings in realising the right to basic education.

#### Right to education - general

*Recommendations 139.185; 139.175; 139.183; 139.184*

4. On average, approximately 14 million learners are enrolled in school in South Africa annually. Learner attendance as a percentage of learner enrollment is consistently at around 97.5% since 2015. From data provided in the General Household Survey (GHS), released annually by the Department: Statistics South Africa, the older the student demographic, the higher the dropout rate.
5. GHS data from 2015 to date indicate that girls are more likely to drop out of school as a result of not having money for school fees or due to family

responsibilities, which include child-minding, pregnancy, or marriage. Girls bear the brunt of family responsibilities, being almost 20% more likely to dropout from school because of them than boys. In comparison, boys are more likely to drop out due to poor academic performance, the perception that education is useless, or because they are working at home, they have completed their education, or because of illness or disability.<sup>1</sup>

6. Beyond poverty and family responsibilities, girls are also limited by gender inequalities in curriculum content and teachers' behaviour based on negative stereotypes about girls' abilities to perform well, which not only discourages girls from pursuing further studies but also discourages them from pursuing careers in science, technology, engineering and mathematics (STEM) .<sup>2</sup>
7. Access to safe sanitation facilities and hygiene products also presents a barrier to access to education for girls. Research by Crankshaw et. al., published in 2020, found that 46% of the 505 girl learners aged 17 who were surveyed who had insufficient access to hygiene products over a three-month period, were more likely to be reported missing from school than those who had sufficient products.<sup>3</sup>
8. In light hereof, the LRC recommends that:
  - 8.1. Teacher training prioritises addressing negative stereotypes about girls' abilities;
  - 8.2. The curriculum is reviewed and amended to remove negative stereotypes about both girls' and boys', following an approach of equal abilities and removing content that promotes gender inequality and;
  - 8.3. The DBE adopt regulations that provide access to sanitary products for girl learners who do not have access and ensure the implementation of existing regulations on providing safe sanitation facilities and access to sufficient water on school premises.

*Recommendation 139.179*

9. The right to basic education includes the right of every learner to free and accessible learning mechanisms, which must also include access to the internet, data and the digital environment. This should be viewed in the context of the Committee on the Rights of the Child's emphasis on the importance of children's rights to the digital environment.<sup>4</sup>
10. The COVID-19 pandemic has shed light on South Africa's inability to provide internet access to most students nationwide, directly impacting their access to and quality of education. It is estimated that nearly 12 million children have been affected by the shutdown of schools to mitigate the spread of the COVID-19 virus.<sup>5</sup> The importance of accessible internet, both in terms of speed and capacity, has grown during the COVID-19 pandemic and can now be characterized as a lifeline for learners.
11. In its preamble, the DBE's 2013 Norms and Standards for Public School Infrastructure (Infrastructure regulations) acknowledges the painful legacy of apartheid and the consequent uneven development with regards to the provisioning of basic school infrastructure to all public schools.<sup>6</sup>
12. The Infrastructure regulations contain essential minimum standards and obligations in providing access to internet infrastructure which must be met. These regulations mandate the progressive development and implementation of internet access infrastructure in public schools.
13. The regulations provide that this should be phased in over a period of seven years from the date of publication of the regulations, which was in 2013.<sup>7</sup> Thus, the obligations set out in the regulations in relation to internet access had to be complied with by 2020. Despite this, it has become abundantly clear that the state is not close to complying with its obligations.
14. In light hereof, the LRC recommends that:
  - 14.1. Government fulfills their obligations to implement the obligations on providing digital infrastructure in schools imposed by the Norms and Standards for Public School Infrastructure and take active steps to meet the self-imposed deadlines for implementation.

*Recommendation 139.181 and 139.182:*

15. School infrastructure is critical for the delivery of quality education as learning must take place in a safe and secure environment with adequate infrastructure. Learners in quintiles 1 – 3 are still prejudiced by poor school infrastructure despite the Infrastructure regulations coming into effect in 2013.
16. In the almost ten years since the regulations were enacted, Provincial Education Departments (PEDs) progress show that, despite some efforts to improve, there are still severe infrastructure backlogs that continue to negatively affect public schools across South Africa, particularly in poor rural schools.
17. As of 12 April 2021, across South Africa, there are (i) 90 schools without any electricity supply and 3343 schools with an unreliable electricity supply; (ii) 5836 schools with unreliable water supply; (iii) 2130 schools with only pit latrine sanitation facilities; (iv) 157 schools with no form of security; (v) 30% of schools with a library; (vi) 20% of schools with a laboratory; and (vii) 40% with some form of computer access.<sup>8</sup>
18. The data made available in the PEDs' progress reports is often out of date and, in most cases, does not provide a comprehensive description of the backlog and the plans in place to eliminate them. As a result, tracking and monitoring the most recent progress made in meeting infrastructure norms regulations is difficult.
19. In light hereof, the LRC recommends that:
  - 19.1. PEDs comply with their obligation to provide adequate and accurate data on progress toward meeting school infrastructure norms and standards and;
  - 19.2. The DBE and PEDs create and implement a rigorous intervention plan for provinces with severe infrastructure backlogs, including a sufficient budget to address the backlogs.

*Recommendation 139.177:*

20. Research in social sciences, neurosciences and psychology have shown the importance of early learning for later development.<sup>9</sup> Despite this, 46% of children aged 0-6 did not attend any education institution in 2018.<sup>10</sup>
21. Attendance at early childhood development (ECD) programmes or centres is not only important at a practical level to prepare young children for entering primary school, but also dramatically improves future generations chances of securing sustainable livelihoods due to better opportunities afforded to them through education.<sup>11</sup>
22. Currently, the state is in the process of transferring the administration and regulation of the ECD phase of learning from the Department of Social Development (DSD) to the DBE, thereby broadening the scope of formal education. This is a significant step because it dramatically improves the chances of ECD learning becoming part of the right to basic education and thereby becoming immediately realizable.
23. In light hereof, the LRC recommends that:
  - 23.1. The DBE provide sufficient financial and other resources to ensure that ECD education become an integral part of the right to basic education;
  - 23.2. The DBE facilitate the registration of ECD centers and;
  - 23.3. The DBE provide training to ECD practitioners on core aspects of ECD to prepare children for entering primary school.

Persons with disabilities: independence, inclusion

*Recommendation 139.187 and 139.88:*

24. In 2001, South Africa adopted White Paper 6 on building an inclusive education and training system for special needs education.<sup>12</sup> The 20-year implementation plan outlined in White Paper 6 came to an end in 2021. Although White Paper 6 had the potential to transform education for learners with disabilities, its implementation was severely hampered by the fact that it was never costed, there was a lack of funding, and no legislative framework to guide its implementation. Moreover, because White Paper 6 is a policy document it does not place binding legal

obligations on the state to ensure inclusive education to all learners as legislation would do.

25. The National Council of and for Persons with Disabilities (NCPD) and Human Rights Watch estimates that there are approximately 600 000 learners with disabilities that are not in schools.<sup>13</sup> This data has not been verified by the DBE, and there is no disaggregated data available on age, gender, disability, or region. The lack of disaggregated and reliable data on the number of learners with disabilities that are out of school hampers the state's ability to sufficiently plan and budget for these learners.
26. There has been litigation which affirms the rights of learners with disabilities to access appropriate education.<sup>14</sup>
27. In light of the above, it is our recommendation that:
  - 27.1. The state adopt legislation that sets out clear legal obligations to provide and advance inclusive education for learners with disabilities;
  - 27.2. The state collects accurate and verified data on the number of learners with disabilities that are out of school, disaggregated in terms of age, disability, gender, and region and;
  - 27.3. Inclusive education in South Africa be properly costed and budgeted to ensure available resources to support the implementation of legislation and policies;

#### Children: definition; general principles; protection

*Recommendations 139.237; 139.238; 139.239; 139.240*

28. The Convention on the Rights of the Child extends the right to basic education to all children, irrespective of their nationality or birth registration. Despite this guarantee, this right has not always been extended to all children in South Africa.
29. In 2019, the High Court in *Centre for Child Law and Others v Minister of Basic Education and Others ("Phakamisa")*<sup>15</sup>, where the LRC represented the applicants, confirmed that Section 29(1) of the Constitution read with the CRC, guarantees all children, irrespective of their nationality or their

documentary status, a right to education. It was further found that the state has an obligation to provide education to all undocumented learners and that the failure to do so violated learners' rights to basic education, equality, and dignity, and is not in their best interest.

30. Challenges remain in ensuring the implementation of the judgment. Many schools across the country are not complying with the judgement or Circular 1 of 2020 which has been published by the DBE to inform schools of the judgement and their obligation to admit learners regardless of their documentation or status. Thus, many schools still insist on receiving birth certificates, or passports and permits, when learners seek admission.
31. There is also a gap in the law, as well as in the implementation of existing laws, that govern birth registration of children born to refugees, asylum seekers, and undocumented persons. The right to birth registration is a fundamental right, quintessential to ensuring the safety and future of a child. Birth registration is not only a critical step in establishing the legal record of every child, but also ensures that children can access essential services such as education, healthcare, and social assistance, and that the state can plan for all those born within South Africa's borders.
32. Although the law allows all children born in South Africa to have their births registered and receive a birth certificate, three categories of parents face significant challenges in registering their children's births due to cumbersome and inconsistent application of requirements. The categories of parents affected are: (i) undocumented South Africans; (ii) asylum seekers and recognised refugees with expired documentation; and (iii) unmarried fathers who are refugees and asylum seekers with valid documentation.
33. In light hereof, the LRC recommends that:
  - 33.1. National and provincial education departments, as well as district offices, take greater steps to inform schools of the *Phakamisa* judgment and provide training on how learners without documentation should be admitted to schools;



- 33.2. Schools review their admission policies in line with the findings of the judgment so as to allow for undocumented learners to be admitted;
- 33.3. All children born in South Africa should have their births registered and be entered into the population register regardless of immigration status or documentation status of their parents and;
- 33.4. The arbitrary laws and regulations that exclude children born to non-nationals and undocumented parents must be declared unconstitutional and invalid.

#### Access to sexual and reproductive health and services

##### *Recommendation 139.172*

34. The DBE in 2015 developed Scripted Lesson Plans on Comprehensive Sexuality Education (CSE) for learners from Grades 4 to 12. In 2020, it was reported that CSE is being piloted in 1 572 schools across the Free State, KwaZulu-Natal, Mpumalanga, and the Western Cape provinces.<sup>16</sup> To date, CSE has not been rolled out in all schools in South Africa.
35. CSE seeks to teach learners about their bodies, consent, navigating and challenging gender norms, and what constitutes sexual assault in an age-appropriate and incremental manner. CSE can also assist in addressing the preconceptions of teachers about gender roles, as educators are guided by scripted lessons plans that empower them to discuss topics that could otherwise be found to be uncomfortable and might be avoided due to their discomfort with the subject.
36. South Africa has seen a sharp rise in teenage pregnancies. In 2021, the Basic Education Committee announced that, in general, 30% of girls between the ages of 10 and 19 fall pregnant and that 1 out of 3 of these girls do not return to school.<sup>17</sup> Given that teenage pregnancies have increased since the start of the national lockdown in March 2020, it is anticipated that this number will increase in the coming years.
37. In light hereof, the LRC recommends that:
  - 37.1. The DBE roll out CSE in all schools to ensure learners receive adequate education on their sexual and reproductive rights.

## Discrimination against women

*Recommendation 139.198; 139.227; 139.195 and 139.201*

38. In South Africa, the legislative framework that promotes the right to access basic education provides that educators have an obligation and a legal duty to protect learners while in their care and to conduct themselves in a manner that is in the child's best interest. This requires them to refrain from harming learners in any way, including sexual misconduct against learners.
39. Educator sexual misconduct has wide-ranging consequences for learners' physical and psychological wellbeing, school performance and attendance. Schools are one of the places where learners are most vulnerable and thus need to be adequately protected from any form of abuse, including sexual violence and sexual harassment.
40. In August 2021, South African Council of Educators (SACE) reported on sexual harassment, sexual abuse, rape, and improper relationships, including sexual relationships, indicating that a total of 585 cases have been reported over the last 5 years. Considering the SACE report, educator sexual misconduct is on the rise. Of particular concern is the revelation that some educators were reported for using their position of power over learners to coerce them into having sexual relations with them for higher marks or for the pupil to progress to the next grade.
41. The laws and policies that regulate sexual misconduct committed by educators against learners are inadequate and are disconnected from the realities faced by learners daily at the hands of educators.
42. In light hereof, the LRC recommends that:
  - 42.1. The DBE and other relevant departments consolidate legislation, policies, and regulations to establish a comprehensive approach for addressing school gender-based violence and educator sexual misconduct that not only prevents teachers and other staff members who commit these crimes from working with children in the future, but that also prevents these crimes from happening.

## C. Conclusion

43. We trust that you will find this submission useful. Should you have any comments or questions, please do not hesitate to contact Amy-Leigh Payne at [amyleigh@lrc.org.za](mailto:amyleigh@lrc.org.za).

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ENDS

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<sup>1</sup> STATSSA "General Household Survey" (2015-2020), <http://www.statssa.gov.za/>.

<sup>2</sup> J Rarieya, N Sanger, B Moolman "Gender inequalities in education in South Africa" (2014) <http://www.hsrc.ac.za/uploads/pageContent/4991/Gender%20inequalities%20in%20education%20in%20South%20Africa.pdf>.

<sup>3</sup> T L Crankshaw, M Strauss, B Gumede "Menstrual health management and schooling experience amongst female learners in Gauteng, South Africa: a mixed method study" (2020), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-020-0896-1>.

<sup>4</sup> E Lievens, S Livingstone, S McLaughlin, B O'Neill, V Verdoodt "Children's Rights and Digital Technologies" (2019) *International Human Rights of Children* 487-513; CRC Committee "General Comment 25: Children's rights in relation to the digital environment" (21 March 2021) CRC/C/GC/25.

<sup>5</sup> University of Chicago Law School - Global Human Rights Clinic "Access Denied: Internet Access and the Right to Education in South Africa" (2020), [https://chicagounbound.uchicago.edu/ghrc/1?utm\\_source=chicagounbound.uchicago.edu%2Fghrc%2F1&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://chicagounbound.uchicago.edu/ghrc/1?utm_source=chicagounbound.uchicago.edu%2Fghrc%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages).

<sup>6</sup> Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (GG 37081; GR 920) of 29 November 2013.

<sup>7</sup> Regulation 4(1)(b)(ii).

<sup>8</sup> DBE "National Education Infrastructure Management System Report as at 12 April 2021" (2021), <https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20STANDARD%20REPORT%202021.pdf?ver=2021-05-20-094532-570>

<sup>9</sup> B Daelmans, G L Darntadt, J Lombardi, M M Black, P R Britto, S Iye, T Dua, Z A Bhutta, L M Richter "Early childhood development: the foundation of sustainable development (2016), [https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(16\)31659-2.pdf](https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(16)31659-2.pdf).

<sup>10</sup> STATSSA "Education Series Volume VII" (2018), "Children's education and well-being in South Africa, 2018" <http://www.statssa.gov.za/publications/92-01-07/92-01-072018.pdf>.

<sup>11</sup> 76.

<sup>12</sup> DBE "Education White Paper 6: Building an inclusive education and training system" (2001), <https://www.education.gov.za/Portals/0/Documents/Legislation/White%20paper/Education%20%20White%20Paper%206.pdf?ver=2008-03-05-104651-000>.

<sup>13</sup> Y Tswana "About 600 000 children with disabilities have never been to school" (3 June 2019), <https://www.iol.co.za/capetimes/news/about-600-000-children-with-disabilities-have-never-been-to-school-24870542>; HRW "South Africa: Children with disabilities shortchanged" (2019), <https://www.hrw.org/news/2019/05/24/south-africa-children-disabilities-shortchanged#:~:text=An%20estimated%20600%2C000%20children%20with,were%20in%20%E2%80%9Cordinary%E2%80%9D%20schools>.

<sup>14</sup> *Western Cape Forum for learners with Intellectual Disability v Government of RSA* 2011 5 SA 87 (WCC); *Blind v Minister of Basic Education* 72622/17; *Equal Education v MEC of*

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<sup>15</sup> 2020 (3) SA 141 (EGG).

<sup>16</sup> Question NW1969 to the Minister of Basic Education (1 September 2020) available at: <https://pmg.org.za/committee-question/14490/>.

<sup>17</sup> DBE 'Teenage Pregnancy & Comprehensive Sexuality Education' (7 September 2021) <https://pmg.org.za/committee-meeting/33580/> (accessed 20-09-2021).