



Report of the North West Provincial Investigative Hearing into

LACK OF SAFETY AND SECURITY MEASURES IN SCHOOLS FOR CHILDREN WITH DISABILITIES



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The Commission dedicates this report on safety measures in schools for children with disabilities in the North West province to the learners for whom this intervention comes too late.

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ACRONYMS & ABBREVIATIONS

CCL	Centre for Child Law
CYCC	Child and Youth Care Centre
DBE	Department of Basic Education
DBST	District-based Support Teams
DoH	Department of Health
DoJ	Department of Justice
DPW	Department of Public Works
DSD	Department of Social Development
EEA	Employment Equity Act
EELC	Equal Education Law Centre
LSEN	Learners with Special Educative Needs
LTSM	Learning Teaching and Support Materials
MEC	Member of the Executive Council
NEPA	National Education Policy Act
NLTP	National Learner Transport Policy
NW	North West
OHSA	Occupational Health and Safety Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PMC	Parliamentary Monitoring Committee
SACE	South African Council of Educators
SAHRC	South African Human Rights Commission
SANASE	South African Association of Special Educational Needs
SAPS	South African Police Services
SASA	South African Schools Act
SASSA	South African Social Security Agency
SASL	South African Sign Language
SBST	School Based Support Team
SCA	Supreme Court of Appeal
SMT	School Management Team
SIAS	Screening, Identification, Assessment and Support Policy
SGB	School Governing Body
SSRC	Special School as Resource Centre
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WPRPD	White Paper on the Rights of Persons with Disabilities

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FOREWORD.

The Commission recognises that South Africa's democratic Government, through the National Department of Basic Education, has made significant advances in vindicating the right to education. However, during the provincial Investigative Hearing the Commission heard and saw that a lethal form of discrimination against disabled learners persists in the North West education system. This discrimination takes the form of inadequate safety and security measures which endanger the lives and well-being of children with disabilities in the province on a daily basis.

South Africa has committed itself to the provision of quality, equitable, and inclusive education in its Constitution, in the Education White Paper 6, in the Screening, Identification, Assessment and Support policy, in the South African Schools Act, in the National Development Plan, through the ratification of the UN Convention on the Right of Persons with Disabilities and the UN Convention on the Rights of the Child, and through the adoption of the Sustainable Development Goals. However, despite the relevant laws, policies and guidelines, children with disabilities remain marginalised.

The systemic failures identified in this report demonstrate a lack of political will to dedicate resources to ensuring the implementation of sustainable solutions directed at ensuring student safety. Public schools for learners with special education needs (Special Schools) remain on the fringes of South Africa's education system, as evidenced by the poor budgeting, planning, and accountability measures that are currently in place. Insufficient commitment has been shown to ensuring the rights to education, dignity, equality and even life, of learners with disabilities in the province are protected and realised.

Inadequate safety and security measures in Special Schools not only pose a physical threat to learners, this omission also has further consequences, namely, it signals to learners with disabilities that they are not acknowledged or valued by South African society. Due to the legacy of apartheid, it is invariably poor black South African learners who are routinely deprived of a safe learning environment in the majority of instances. The report indicates that poor, black learners with disabilities are subjected to a compounded form of marginalisation. These glaring disparities serve to entrench and perpetuate apartheid-era differentiation in the South African education system. The Commission is aware of the realities of resource constraints and lack of capacity, but this cannot be used as a justification to fail to mitigate imminent risks which have already manifested at the expense of the lives of learners in Special Schools in the North West province.

EXECUTIVE SUMMARY.

South African society has a substantial interest in the safety and security of children with disabilities who are placed in the care of the Department of Basic Education, relevant provincial department of education, schools, and teachers who are charged with upholding their Constitutional rights. Any failure to adequately protect these rights infringe upon the dignity, safety and health (and consequently the best interests of) every learner attending a Special School in the NW province and the country.

In order to give effect to the provisions of the Constitution, the Department of Basic Education must ensure that South African schools adhere to basic safety standards. It is the fundamental right of each and every child to receive an education in a context of security and safety. Children with disabilities cannot therefore be compelled, in the course of receiving a compulsory education, to reside in unsound and unsafe hostel buildings. In view of events at the North West School for the Deaf where 3 children died and similar incidences in the NW province in the past, it is imperative that the Commission direct that safety measures be implemented by Special Schools in the NW province.

The Investigative Hearing revealed that residential hostels in Special Schools in the NW province are overwhelmingly unsafe structures that pose a danger to learners with disabilities. However, other aspects of the Special School environment also pose a danger to the mental and physical well-being of learners with disabilities attending residential Special Schools in the North West province. The risk of physical abuse, particularly sexual abuse, was a consistent theme identified in the submissions of Hearing participants which highlighted the State's systemic and consistent failure to ensure that teachers and staff are checked against the registers named in the Children's Act and the Sexual Offences Act, as required by law, prior to being hired to work directly with some of South Africa's most vulnerable learners.

What is the most obvious outcome of the Investigative Hearing is that the State has broadly failed to implement the policy of inclusive education. It is pertinent that the commitment to inclusive education contemplated by the CRPD emphasises the inclusion of learners with disabilities into local schools located in the communities in which they and their families live. Were the State to comply with these obligations, fewer children with disabilities would be compelled to endure long periods away from their families in environments where their safety and security is not prioritised for the sake of getting an adequate and basic education because they would attend schools in their own communities. Ultimately, the State should be moving away from the residential Special Schools model while also continuing to improve the conditions of those Special Schools that exist. The Hearing revealed that limited progress in respect of either is identifiable.

STRUCTURE OF THE REPORT

Section one of the Report provides a brief background to the Investigative Hearing setting out the rationale behind the Hearing and describing the procedure followed by the Commission. Section two sets out the applicable legal and policy framework. Section 3 provides a summary of the written and oral submissions made by the Hearing participants. Section 4 sets out the findings of the Commission, it identifies gaps and challenges in the current formulation of policy, legislation and practice. Section 5 of the Report concludes with applicable recommendations aimed at addressing the existing gaps and challenges with a view of enhancing access to education in the future.



1. INTRODUCTION AND BACKGROUND.

1.1 INTRODUCTION

The right to a basic education is a fundamental Constitutional right. All children have a right to access education. An inclusive education system should ensure that all learners are fully accommodated by schools and that all learners have equal access to a quality education. During the 2017/2018 financial year, the Commission took a strategic decision to focus on inclusive education and ways to eliminate the barriers to accessing education for learners with disabilities. This decision was based on research that indicated that over half a million learners with disabilities had no or limited access to education in South Africa.¹

However, in addition to barriers which prevent access to education, learners with disabilities that do have access to education also face significant challenges, including, lack of access to appropriate transport, lack of adequate or appropriate infrastructure or services within schools, lack of assistive devices, and even bullying, abuse and neglect at the hands of other learners or educators. The current lack of safety and security measures in schools for learners with disabilities in the North West province (NW province), which forms the subject topic of this Report, is a challenge that requires urgent intervention so that students are not compelled to learn and live in hazardous and life-threatening conditions.

The objectives of the Commission are to:

- identify the risks created by the lack of safety and security measures in Special Schools in the NW province;
- develop and monitor the implementation of recommendations crafted to mitigate the lack of safety and security measures in Special Schools in the NW province; and
- raise awareness and promote advocacy, provincially, of the human rights of learners with disabilities as well as the legal and constitutional obligations of relevant stakeholders.

An indirect benefit of the Hearing is to develop research and educational materials that may be used to advance the rights of learners with disabilities in future.

¹ Human Rights Watch, "Complicit in Exclusion" South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities" (2015). Available at: <https://www.hrw.org/report/2015/08/18/complicit-exclusion/south-africas-failure-guarantee-inclusive-education-children>

1.2 BACKGROUND

In 2015 the NW provincial office of the Commission initiated an own accord investigation into the deaths of three learners caused by a fire in the learners' hostel of the North West School for the Deaf.² The fire resulted in the deaths of three female learners aged 16, 17 and 18. It was also reported that twenty-three female learners sustained injuries whilst trying to escape the fire by jumping from the first floor to the ground floor of the building.³ The investigation established that, at the time of the fire, there were woefully inadequate safety and security measures in place to protect the learners:

- the two exit doors in the area of the hostel where the fire occurred were locked from the outside;
- only two fire extinguishers were in place for the entire hostel, it is not clear whether they were operational;
- there were no visual smoke alarms, panic alarms, alarm sprinkler system, strobe lights or any other alarm or warning device to accommodate people with hearing impairments;
- there was only one fire hose on the property which was not long enough to reach the rooms affected by the fire;
- there were no evacuation or emergency exit signs or lighting; and
- the School did not have any safety or evacuation plans and had not performed an evacuation drill in the previous five years.⁴

The Commission's investigation concluded that the respondents (namely, the North West School for the Deaf; the Head of Department, NW Department of Education; the Member of Executive Council for Education, NW Department of Education; and the Minister of Basic Education) had failed to comply with applicable legislation and policy. The horrific, tragic and senseless death of these learners demonstrates the serious dangers posed by inadequate and / or inappropriate safety and security measures in Special Schools in the NW province.

At the time of the own accord investigation the Commission was also aware of previous incidents at Special Schools in the NW province where fires had damaged school property and / or resulted in the deaths of learners. This includes the Christiana School for the Blind, where three blind learners died as result of a fire in 2010 and the Hoër Volkskool Potchefstroom where a fire broke out at the male learners' hostel on 31 August 2015.⁵ The Commission was concerned both by the frequency of fatal incidents involving vulnerable learners and the DBE's apparent lack of decisive action to prevent these incidents.

On 12 June 2017 the Commission, represented by Commissioners AM Makwetla and BJ Malatji, visited Kutlwanong School for the Deaf in the NW province for the purposes of an inspection. During the visit it became apparent that there were a number of imminent safety and security issues. It is in this context that the Commission determined that the lack of adequate safety and security measures in schools for learners with disabilities constitutes a systemic problem in the NW province requiring broader intervention in the form of an Investigative Hearing in the province.

The main intention of hosting this Investigative Hearing is to protect against similar future tragedies by improving the safety and security conditions of Special Schools in the North West province.

² Investigative Report - North West School for the Deaf, January 2018. Available at: <https://www.sahrc.org.za/home/21/files/Investigative%20Report%20-%20North%20West%20School%20For%20The%20Deaf%20Final.pdf>.

See also: Genevieve Quintal 'Three burn to death at North West school for the deaf'. Available at: <https://www.news24.com/SouthAfrica/News/Three-burn-to-death-at-North-West-school-for-the-deaf-20150824>

³ Ibid.

⁴ Ibid.

⁵ Ibid.

1.3 MANDATE OF THE COMMISSION

The Commission is an independent institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (Constitution) to support constitutional democracy. Section 184(1) clearly outlines the broad mandate of the Commission, namely the Commission must:

- promote respect for human rights and a culture of human rights;
- promote the protection, development and attainment of human rights; and
- monitor and assess the observance of human rights in the Republic.

In terms of section 184(2) of the Constitution, the Commission is empowered to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to research; and to educate. Additional powers and functions are prescribed by the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act).⁶

1.4 COMPOSITION OF THE HEARING PANEL

The Hearing Panel (Panel) was composed of the following members:

- Angie Makwetla, Commissioner of the South African Human Rights Commission;
- Adv. Bokankatla Joseph Malatji, Commissioner of the South African Human Rights Commission; and
- Professor Ann Skelton, Director of the Centre for Child Law at the University of Pretoria, children's rights lawyer, United Nations Educational, Scientific and Cultural Organization (UNESCO) Chair in Education Law in Africa, and member of the United Nations Committee on the Rights of the Child (UNCRC).

1.5 NATURE AND STRUCTURE OF THE PROCEEDINGS

The proceedings were inquisitorial in nature. Respondents were invited to make written and oral submissions. Before the respondents made their submissions to the Commission, they were formally placed on record, by either taking the prescribed oath or affirming that their submissions were true and binding on their conscience. The submissions made by the respondents were in response to the questions posed in their respective invitations. After hearing the oral submissions, the panellists had an opportunity to ask further questions of clarity pertaining to the submissions.

1.6 PREVIOUS WORK OF THE COMMISSION

In 2006 the Commission published a report setting out findings and recommendations emanating from a public investigative hearing on the right to basic education (RBE Report).⁷ The RBE Report notes that children with disabilities, particularly in peri-urban areas, experience significant education exclusion.⁸ Not only were there too few Special Schools but also, where those schools did exist, the conditions were generally abysmal.⁹

The inclusivity of the education system, or rather the lack thereof, was also emphasised.¹⁰ The system of inclusive education was criticised as not being implemented sufficiently to address the needs of children with disabilities. Submissions received

⁶ Available here: https://www.gov.za/sites/default/files/gcis_document/201409/37253act40of2013sa-humanrightscm22jan2014.pdf.

⁷ Right to Basic Education Report, 2006. Available at: <https://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%202006.pdf>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

indicated that whilst there is policy that guides inclusive education in South Africa, this policy has not been translated into practice. Issues regarding the lack of infrastructure, which impact on access to education, were also raised, particularly within the context of addressing past inequalities. It was conceded by representatives of DBE that physical infrastructure constitutes a barrier for learners with physical disabilities.¹¹

The RBE Report also identified other key issues limiting learners' rights of access education, including, but not limited to:

- insufficient communication and planning between national, provincial and district spheres of government;
- the need for the DBE to undertake monitoring and evaluation and to implement comprehensive information recording and gathering systems;¹² and
- unacceptably high levels of violence, particularly sexual violence, occurring within South African schools which has a disproportionate impact on female learners.¹³

The Report concludes that the lived daily reality at school for many children in South Africa, particularly those children in rural and township schools, is incongruent with the legislation and the policies of the DBE.¹⁴ Those children who are most disadvantaged in enjoying the right to basic education lack the means and the social power to speak out and claim their rights.



2. LEGAL AND POLICY FRAMEWORK.

The rights of children with disabilities are enshrined under myriad international treaties, national legislation and policies. This section provides an overview of the legal and policy framework governing the right to education for learners with disabilities.

2.1 INTERNATIONAL OBLIGATIONS

2.1.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 26 of Universal Declaration of Human Rights provides that “[e]veryone has the right to education. Education shall be free, at least at the elementary and fundamental stages and elementary education shall be compulsory.” ‘Everyone’ includes persons and children with disabilities.

2.1.2 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

In 2015, the government of South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides, in Article 13, that state parties must provide free and compulsory primary education to all.¹⁵ State parties to the ICESCR are also required to ensure that secondary education is generally available and accessible to all and that higher education be equally accessible on the basis of capacity by the progressive introduction of free education.¹⁶

When South Africa ratified the ICESCR it included a declaration that it would “give progressive effect to the right to education, as provided for in Article 13 (2)(a) and Article 14, within the framework of its National Education Policy and available resources.¹⁷ The declaration made by South Africa when ratifying the ICESCR contradicts a decision of the Constitutional Court which held that:

“Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application...”¹⁸

¹⁵ International Covenant on Economic, Social and Cultural Rights (1966) 6 IML 360.

¹⁶ Ibid.

¹⁷ <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/14531/A-14531-South%20Africa-08000002803ff711.pdf>.

¹⁸ *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37.

2.1.3 CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

The Convention on the Rights of the Child (CRC) also guarantees the right to primary education, which it stipulates should be free.¹⁹ South Africa ratified the CRC in 1995. Further, Sustainable Development Goal four on quality education envisions that will, “[b]y 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations.”²⁰

2.1.4 CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

South Africa ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2007 and is therefore bound by Article 24 of the CRPD which provides that State Parties must ensure that “persons with disabilities are not excluded from the general education system on the basis of disability” and “can access an inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live.”²¹ It is pertinent that the commitment to inclusive education contemplated by the CRPD emphasises the inclusion of learners with disabilities into local schools located in the communities in which they live because, if implemented, this would result in fewer children with disabilities being compelled to staying in the residential hostels of distant Special Schools. The exclusion of learners with disabilities from mainstream education and local public schools is typically and arguably erroneously attributed to the learner’s disability rather than to the failure of the State to eliminate physical and social barriers to inclusivity.

In 2016, the Committee on the Rights of Persons with Disabilities (Committee) adopted General Comment 4²² in order to interpret the inclusive education provision of the CRPD. The Committee indicated that inclusive education must focus specifically “on the full and effective participation, accessibility, attendance and achievement of all students without discrimination”.²³ Inclusive education thus requires a systemic transformation of the general education system embodying changes and modification in the education content, teaching methods, approaches, structures and strategies.²⁴ State parties to the CRPD are thus required to “respect, protect and fulfil each of the essential features of the right to inclusive education: availability, accessibility, acceptability, adaptability.”²⁵

Article 2 of the CRPD³⁵ defines discrimination on the basis of disability as:

“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

Reasonable accommodation of persons with disabilities is deemed as the standard necessary to ensure the elimination of discrimination and the promotion of equality.²⁶ Reasonable accommodation in terms of the CRPD is defined as the “necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the equal enjoyment or exercise on an equal basis with others of all human rights and human freedoms.”²⁷

¹⁹ Article 28, G.A. Res. 44/25.

²⁰ <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-4-quality-education/targets/>.

²¹ Article 24(2)(a-b). Article 5 of the CRPD also articulates explicitly the recognition that all people, including people living with disabilities, are equal before and under the law, and requires State parties to the treaty to prohibit discrimination on the basis of disability. Further key principles of the CRPD, as set out in Article 3, is equality between men and women, participation and inclusion. These principles should guide how the DBE addresses the needs of children living with disabilities.

²² Committee on the Rights of Persons with Disabilities *General comment No. 4: Article 24: Right to Inclusive Education* (2016) CRPD/C/GC/4.

²³ Ibid.

²⁴ Ibid 4.

²⁵ Ibid 13.

²⁶ Article 5(3).

²⁷ Article 2.

At the core of reasonable accommodation is the notion that any additional expenses incurred by the State are necessary to ensure people with disabilities are not relegated to the margins of society because they do not or cannot conform to certain social norms.²⁸ The CRPD includes positive and specific obligations for State parties which include the requirements that State parties must facilitate the learning of braille, the learning of sign languages, alternative modes of writing and speaking and employ and train teachers who are able to educate children with disabilities.²⁹ The UN Committee on the Rights of Persons with Disabilities explained the standard in the CRPD to mean that the duty to provide reasonable accommodation is enforceable from the moment an individual with an impairment needs it in a given situation...in order to enjoy his or her rights on an equal basis in a particular context.³⁰

2.2 DOMESTIC LAW AND POLICY

2.2.1 THE CONSTITUTION

Section 1 of the Constitution states that South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms”. Equality is a foundational value that includes the full and equal enjoyment of all rights and freedoms. In South Africa equality is a guaranteed and justiciable right³¹ that is dependent on both the State taking steps to promote equality through legislative and policy mechanisms and the implementation of those legislative and policy mechanisms.

The State has a duty, in terms of section 7(2) of the Constitution, to promote and fulfil the rights in the Bill of Rights. Rights set out therein which are relevant to the Investigative Hearing include the following:

- Section 9 records that disability is a prohibited ground for unfair discrimination. This is re-iterated by the Promotion of Equality and Prevention of Unfair Discrimination Act³² (PEPUDA) and the Employment Equity Act³³ (EEA), as amended.
- Section 10 states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” Section 10 therefore guarantees the right of children with disabilities to have their dignity respected and protected.
- Section 24(a) guarantees everyone the right to “an environment that is not harmful to their health or well-being.” It follows that all learners in South Africa have a constitutional right to receive education in a safe school environment.³⁴
- Section 28(1)(d) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation. In *Centre for Child Law v Minister of Justice and Constitutional Development and Others*³⁵ the Court held that:
- “The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children’s greater physical and psychological vulnerability... They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.”³⁶
- Section 28(2) articulates the injunction that the best interests of the child should be of paramount concern in all

²⁸ MEC v Pillay at paragraph 73.

²⁹ Article 24 (3-4).

³⁰ UN Committee on the Rights of Persons with Disabilities, General Comment No 2, para 26.

³¹ Section 9.

³² No. 4 of 2000.

³³ No. 55 of 1998.

³⁴ I.J. Prinsloo ‘How safe are South African schools?’ South African Journal of Education (2005) Vol 25(1) 5–10, at page 9. Available at: <https://www.ajol.info/index.php/saje/article/view/24963/20679>.

³⁵ 2009 (2) SACR 477 (CC)

³⁶ Para 26.

matters concerning the child.³⁷

- Section 29(1)³⁸ provides that “[e]veryone has the right to basic education”. Parliament enacted the South African Schools Act³⁹ (SASA) in 1996 and in this statute provided an interpretation of “basic education” as education which must be provided to all children between the age of 7 and 15.⁴⁰ The right to education in public schools should not be narrowly construed to mean actual teaching only, but extends more broadly to the environment in which teaching takes place. In its guidelines, UNESCO advocates to State Parties that “the whole... environment... guarantees their children equality in the entire process of their education.” An enabling environment includes levels of support and effective individualised measures to facilitate the effective education of children with disabilities.⁴¹ This approach was also confirmed by the Supreme Court of South Africa which stated that “[t]he right to basic education guarantees access thereto, which must include, where appropriate, access to hostels because of their importance in making basic education accessible.”⁴² The Court went on to say that “[t]he provision of hostels is thus an essential component for facilitating the right of access to education.”⁴³

If children with disabilities are systematically endangered within the Special School environment (particularly those accommodated in residential hostels) due to a lack of basic safety and security mechanisms designed to reasonably accommodate their specific disabilities this would, prima facie, constitute an infringement of a child’s right to dignity, equality, health, safety and security, a safe environment, and a basic education. Any routine and / or ongoing exposure of children with disabilities to hazards borne of inadequate safety and inappropriate security mechanisms would also arguably be a form of neglect that does not serve the best interests of the child as required by the Constitution. The failure to provide safety and security mechanisms that are specifically designed to reasonably accommodate particular disabilities in the event of an emergency may also be interpreted as a form of discrimination. This is discussed further in the next section of the report.

2.2.1.1 DOMESTIC LEGISLATION

2.2.1.1.1 *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)*

PEPUDA is a legislative measure designed to promote the achievement of equality and prevention of discrimination as envisaged under Section 9(2) of the Constitution. Section 1(viii) of PEPUDA defines discrimination as:

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly:

- imposes burdens, obligations or disadvantage on; or**
- withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”**

PEPUDA’s prohibition on unfair discrimination against any person includes acts or omissions by the State which result in unfair discrimination.⁴⁴ Section 9(c) of PEPUDA expressly prohibits unfair discrimination against people with disabilities, including the failure to take steps to reasonably accommodate the needs of such persons.⁴⁵ The question of fairness is

³⁷ See also Article 7 of the CRPD.

³⁸ Act 108 of 1996.

³⁹ Act 84 of 1996.

⁴⁰ Ibid, Section 3(1).

⁴¹ United Nations Committee on the Rights of Persons with Disabilities, General Comment No 2 (2014), Article 9: Accessibility, para 39, cited in the Human Rights Watch report, “Complicit in Exclusion” South Africa’s Failure to Guarantee an Inclusive Education for Children with Disabilities, August 2015, p 19.

⁴² MEC: Department of Education North West Province and Another v FEDSAS (021/2016) [2016] ZASCA 192 (1 December 2016) at para 10. Available here: <http://www.saflii.org/za/cases/ZASCA/2016/192.html>

⁴³ Ibid. Para 22.

⁴⁴ See Section 6.

⁴⁵ 9. Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including--

a rebuttable presumption, if the discrimination is found to be unfair then a determination must be made as to whether it is a justifiable limitation in terms of section 36 of the Constitution.⁴⁶ Section 14 of PEPUDA provides criteria for the determination of fairness or unfairness.⁴⁷ Section 25(1) of PEPUDA provides that the State must, where necessary and with the assistance of the relevant constitutional institutions:

- c. “Take measures to develop and implement programmes in order to promote equality; and**
- d. Where necessary or appropriate-**
 - i. enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of this Act;
 - i. develop codes of practice as contemplated in this Act in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation; and
 - i. provide assistance, advice and training on issues of equality.”⁴⁸ (Emphasis added)

In terms of PEPUDA, a failure to reasonably accommodate learners with disabilities at Special Schools in the context of an emergency through the implementation of relevant and even basic modifications (for example, wheelchair ramps and emergency lighting) would presumably be regarded as an omission which results in unfair discrimination on the ground of disability because:

- it would amount to the denial of a supporting or enabling facility necessary for the functioning of a person with disabilities in society;
- a contravention of the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; and
- would constitute a failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from

(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
 (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
 (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons. See also MEC for Education: Kwazulu-Natal and Others v Pillay CCT 51/06 (2007) ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99.
 (CC) at paragraph 72 and 77.

⁴⁶ Limitation of rights

36.(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

⁴⁷ Sections 14(2) and (3) state that:

In determining whether the respondent has proved that the discrimination is fair the following must be taken into account:

- (a) The context;
- (b) The factors referred to in Sub-section (3);
- (c) Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (1) The factors referred to in Sub-section (2)(b) include the following:
 - (a) Whether the discrimination impairs or is likely to impair human dignity;
 - (b) The impact or likely impact of the discrimination on the complainant;
 - (c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
 - (d) The nature and extent of the discrimination;
 - (e) Whether the discrimination is systemic in nature;
 - (f) Whether the discrimination has a legitimate purpose;
 - (g) Whether and to what extent the discrimination achieves its purpose;
 - (h) Whether there are less restrictive and less disadvantageous means to achieve the purpose;
 - (i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
 - i. address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - ii. accommodate diversity.”

⁴⁸ Section 25(1) of PEPUDA specifically entrenches the imperative for the State to take measures to develop and implement programmes in order to promote equality and develop guidelines, including codes in respect of reasonable accommodation.

enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

PEPUDA prohibits both direct and indirect discrimination and seeks to eliminate entrenched inequalities. Children with disabilities are part of a group that has been historically discriminated against and the State's failure to reasonably accommodate such children in Special Schools serves only to prolong that discrimination.

2.2.1.1.2 *South African Schools Act, 84 of 1996 (SASA)*

Section 12 of SASA requires the State to ensure the provision of public schools to the public, this may include the provision of hostels for the residential accommodation of learners where applicable.⁴⁹ Public schools includes, amongst others, 'ordinary public schools' and 'public school for learners with special education needs' (Special Schools).⁵⁰ Section 12(4) of SASA obliges MECs in a province to ensure that education for learners with special needs be provided, where reasonably practicable, at ordinary public schools, and to provide relevant educational support for such learners. Further, section 12(5) requires that the infrastructure at public schools be accessible to learners with physical disabilities. However, as per section 20, it is the SGB which has the primary duty to administer and control the school's property, and buildings and grounds occupied by the school, including school hostels.⁵¹

Section 60 of the Act explicitly sets out the State's responsibility for learner safety and security, stating that "[t]he State is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such a public school would have been liable but for the provisions of this section."⁵²

Section 5A of the Act⁵³, as read together with section 58C of SASA, empowers the Minister to make regulations prescribing minimum uniform norms and standards for public school infrastructure and specifies what the regulations must contain. These Regulations (Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure) are discussed in more detail below.

Section 58C also imposes mechanisms to ensure that provincial departments of basic education comply with the norms prescribed under Section 5A by requiring MECs to annually report to the Minister on provincial progress as regards levels of infrastructure in accordance with the Intergovernmental Relations Framework Act.⁵⁴ In addition, section 58C provides that Heads of Department (HODs) must comply with norms and standards by identifying resources, identifying risk areas for compliance, developing a compliance plan for the province, developing protocols with schools on how to comply with the norms and standards and manage risk areas, and by reporting to the MEC on the state of compliance.

⁴⁹ Section 12(2).

⁵⁰ Section 12(3).

⁵¹ To the extent that the exercise of that power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy.

⁵² Section 60(1).

⁵³ Section 5A was introduced into SASA by the Education Laws Amendment Act 31 of 2007 and amended by the Basic Education Laws Amendment Act 15 of 2011.

⁵⁴ No 13 of 2005. Section 35(1) of the IGRF Act provides that "[w]here the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of State in different governments, those organs of State must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol."

2.2.1.1.3 Regulations Relating to Minimum Uniform Norms and Standards For Public School Infrastructure (Infrastructure Norms and Standards)⁵⁵

These legally-binding standards set a standard against which provincial departments of education may be held accountable. The Infrastructure Norms and Standards apply to all public schools in South Africa and, as per the provisions of SASA, this would include residential hostels that form part of public schools as defined.⁵⁶ The Regulations clearly state that “School design must make as much provision for the specific needs of learners, educators and administrative staff with disabilities as for the needs of their able colleagues”.⁵⁷

The objectives of the Infrastructure Norms and Standards are to:

- provide minimum uniform norms and standards for public school infrastructure
- ensure that there is compliance with the minimum uniform norms and standards in the design and construction of new schools and additions, alterations and improvements to schools which exist when these regulations are published and
- provide for timeframes within which school infrastructure backlogs must be eradicated.⁵⁸

The Infrastructure Norms and Standards define the infrastructural conditions of a South African public school. They stipulate the basic level of infrastructure that every public school must meet, it is thus legally required that every school have water, electricity, internet, working toilets, safe classrooms with a maximum of 40 learners, security, and, thereafter, libraries, laboratories and sports facilities.

Regulation 6 requires all schools to adhere to the requirements and principles of Universal Design.⁵⁹ This applies to all buildings, access ways, indoor and outdoor facilities as well as signage, communication and other services in new schools and to additions, alterations and improvements to existing schools. Further, in terms of Regulation 6(2) Special Schools must comply with the requirements related to the nature of the specialised support programme offered at the school, and the level of support required at that particular school.

There is further emphasis on Special Schools in Regulation 6(3)(a) which requires that such must be fully accessible, and such access includes ramps, handrails and space for manoeuvrability for all learners and educators. The minimum Universal Design requirements must include, but not be limited to, the following:

- clear floor area in passages, walkways and points of ingress for people using wheelchairs and other mobility devices and aids
- parking for persons with disabilities to be located as close as possible to entrance areas
- ramps and handrails with regulated gradients, heights and spacing

⁵⁵ (GN R920, Gazette 37081). Published under Government Notice R920 in Government Gazette 37081 of 29 November 2013. Available here: <https://www.equaleducation.org.za/wp-content/uploads/content/2015/02/12/RegsMinimumNormsandStandardsforSchoolInfrastructure.pdf>. The publication of these Norms and Standards can be attributed to a protracted legal battle between DBE and Equal Education. An overview and history of this issue is available here: <https://equaleducation.org.za/campaigns/school-infrastructure/>.

⁵⁶ While the Commission is of the view that the Norms and Standards clearly apply to public school hostels in terms of section 12(2) of SASA, it is noted that the fact that neither SASA nor the Norms and Standards *explicitly* state that they apply to residential hostels. Nor do the Norms and Standards appear to have been drafted with that purpose in mind. This omission is part of the broader issue and there is clearly a need for the State to develop a document specifically designed to address the crisis in Special School hostels.

⁵⁷ Regulation 18.

⁵⁸ Regulation 2.

⁵⁹ Universal Design is defined in Article 2 of the CRPD as follows: “Universal design” means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. “Universal design” shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

- toilets for the disabled must meet the requirements of the National Building Regulations
- all schools must be provided with adequate notice boards which are accessible for all users in the school building and which contain signage that is visible and legible
- tactile signage should be provided for learners and educators with impaired vision
- visual aids should be provided for communication with learners and educators who are deaf or hearing impaired and
- all other aspects of Universal Design must be compliant with the relevant requirements of the National Building Regulations and SANS 10400.

In terms of the Infrastructure Norms and Standards, adherence to the principles of Universal Design to accommodate learners with disabilities, must be met by 31 December 2030. By this deadline, all Special Schools must also 'be fully accessible'. Ensuring accessibility would entail the provisioning of infrastructure that would also serve to increase safety and security, such as ramps, clear floor passages, and walkways for wheelchairs. There is a clear overlap between the provisioning of appropriate infrastructure and ensuring the safety of children with disabilities. However, where the lack of full accessibility compromises the right to basic education, it is unjustifiable to expect learners with disabilities to wait until 2030 for the State to adhere to the principles of universal design. It bears repeating at this juncture that, as noted above, the Constitutional Court has indicated that the right to basic education is immediately realisable and is not subject to any internal qualifier.⁶⁰

Regulation 17 pertains to perimeter security and school safety and provides that:

1. Every school site, which includes all school outbuildings and sporting and recreational facilities, must be surrounded by appropriate fencing to a minimum height of at least 1,8 meters.
2. School buildings must have at least one form of safety and security measure, such as the following:
 - c. Burglar proofing to all opening window sections on all ground floor buildings that are accessed by learners and educators
 - d. a security guard arrangement or
 - e. an alarm system linked to a rapid armed response, where available.

Further, sub-regulation 17(3) provides that "[s]chool buildings and other school facilities must comply with fire regulations in terms of the National Building Regulations and SANS 10400".⁶¹

In relation to public schools already in existence when the Infrastructure Norms and Standards were published, the Infrastructure Norms and Standards appear to require (subject to regulation 4(5))⁶² that the provisions relating to the power supply,⁶³ a sufficient water supply,⁶⁴ sanitation facilities,⁶⁵ wireless connectivity,⁶⁶ and appropriate fencing to a minimum height of 1.8m,⁶⁷ be phased in over a period of seven years from the date of their publication (namely 29 November 2013). It is not clear whether the DBE will be in a position to meet the proposed 7-year deadline of 29 November 2020 for electricity, water, sanitation, classrooms, perimeter security, and electronic connectivity.

⁶⁰ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) para 37.

⁶¹ See National Building Regulations, SANS 10400 and the Occupational Health and Safety Act, 1993 (Act No 85 of 1993).

⁶² "(a) The implementation of the norms and standards contained in these regulations is, where applicable, subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and the making available of such infrastructure. (b) The Department of Basic Education must, as far as practicable, facilitate and co-ordinate the responsibilities of the government agencies and entities contemplated in paragraph (a)".

⁶³ Regulation 10.

⁶⁴ Regulation 11.

⁶⁵ Regulation 12.

⁶⁶ Regulation 16.

⁶⁷ Regulation 17.

The Infrastructure Norms and Standards have recently been the subject of litigation involving the DBE.⁶⁸ This litigation, to the extent that it has a bearing on this investigation, will be discussed in greater detail in the next section entitled ‘Case Law’ below. For the purposes of this section it is sufficient to state that during that case the parties agreed that the right to basic education is affected by the Infrastructure Norms and Standards and that the provision of basic school infrastructure is an integral component of this right.⁶⁹ It therefore follows that, in the context of Special Schools, ‘basic school infrastructure’ should be interpreted to include accessible and inclusive infrastructure adapted for the specific needs of learners with disabilities.

Finally, while the Commission is of the view that the Infrastructure Norms and Standards are applicable to Special School hostels in terms of section 12(2) of SASA, the Commission also acknowledges that neither SASA nor the Infrastructure Norms and Standards explicitly state that they apply to residential hostels. Nor do the Infrastructure Norms and Standards appear to have been drafted with that specific purpose in mind. This omission is part of the broader issue and there is clearly a need for the State to develop a document specifically designed to address the crisis in Special School hostels.

2.2.1.1.4 The Amended Regulations for Safety Measures at Public Schools⁷⁰

In terms of section 61 of SASA, the national Minister of Education “may make regulations on any matter which must or may be prescribed by regulation under this Act (the Schools Act) and any matter which may be necessary or expedient to prescribe in order to achieve the objects of this Act.” These Regulations seek to regulate, inter alia, educator supervision and the educator-learner ratio,⁷¹ the school’s responsibilities with regard to learners requiring special medical attention,⁷² procedures for contacting parents in an emergency,⁷³ the procedure for reporting accidents or incidents,⁷⁴ and specific measures to ensure the safety of learners at school with regard to the event of a fire or the discovery of suspected explosive devices.⁷⁵

In respect of the latter issue, the focus of the Amended Regulations is on the emergency and fire drills and policy. Section 8F states that all public schools must establish and clearly display emergency evacuation procedures and must install and regularly inspect sufficient fire extinguishers and a fire alarm system. Schools are also required to train both staff and older learners to use fire extinguishers. It follows that in the context of Special Schools the provision of a fire alarm system should be interpreted to mean an alarm system that is adapted to the specific needs of the learners enrolled in that school.

2.2.1.1.5 National Building Regulations And Building Standards Act⁷⁶

The legislative framework governing the built environment in South Africa has three interdependent mechanisms: the National Building Standards Act, the National Building Regulations, and the South African Bureau of Standards SANS 10400.⁷⁷ The Building Standards Act is the enabling Act under which the National Building Regulations are enacted. It provides a framework within which the Regulations can be administered, monitored and enforced. The Act and Regulations must therefore be read together. The National Building Regulations, enacted by the Minister of Public Works in terms of Section 17(1) of the Building Standards Act, aim to ensure that buildings are designed and built to be safe, healthy and convenient for users.

⁶⁸ *Equal Education and Another v Minister of Basic Education and Others* [2018] 3 All SA 705 (ECB). Available here: <http://www.saflii.org/za/cases/ZAE-CBHC/2018/6.html>.

⁶⁹ Para 47.

⁷⁰ Regulation 1128 of 2006.

⁷¹ 8A(2)(b) to (e).

⁷² Section 8A(7)(a) to (e).

⁷³ Section 8A(8)(a) and (b).

⁷⁴ Section 8B(2) to (4).

⁷⁵ Section 8F(1) to (4).

⁷⁶ 103 Of 1977.

⁷⁷ Available here: https://www.jica.go.jp/southafrica/english/activities/c8h0vm00005sup5w-att/activities01_02.pdf.

The SANS 10400 is a non-statutory set of guidelines giving technical information for the practical application of the National Building Regulations. The legislation governing accessibility of the built environment has primarily relied on the application of one aspect of the Regulations, Part S, which was introduced to address the needs of people with disabilities. It requires, inter alia, that any entrance or route used as part of an escape route in order to comply with the requirements of part T of the National Building Regulations is also accessible to persons with disabilities.

2.2.1.1.6 Occupational Health and Safety Act⁷⁸ (OHSA)

The State also has a duty of care towards the teachers and hostel parents who work at Special Schools in the NW province. Section 8(1) of the OHSA places a duty on employers to provide and maintain a safe working environment. Section 8(1) provides that '[e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'. The State (through the North West Provincial Department of Education), in its capacity as an employer, has an obligation to ensure that teachers are able to work under safe conditions that do not pose a substantial risk to their safety. Further, regulation 18(14) of OHSA requires that the design of all new schools and additions, alterations and improvements to schools must comply with all relevant laws including the national Building Regulations, SANS 10-400 or the OHSA.

2.2.1.1.7 Public Service Regulations (PS Regulations)

The PS Regulations, promulgated in terms of section 41 of the Public Service Act,⁷⁹ provide that "[a] head of department shall establish and maintain a safe and healthy work environment for employees of the department."⁸⁰ It follows that the State, in its capacity as an employer, has an obligation to ensure that teachers and hostel parents are able to work under safe conditions that do not pose a substantial risk to their safety.

2.2.2 CASE LAW

The Constitutional Court, in *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others*⁸¹ has drawn attention to the problem of the apartheid legacy of racially disparate school infrastructure facilities:

"The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."⁸² (Emphasis added)

In *Basic Education for All and Others v Minister of Basic Education and Others*⁸³ the Court held it was the State's obligation to budget for the right to access basic education. This includes the government's obligation to facilitate inclusive education for people with disabilities by ensuring sufficient allocation of technical, human and financial resources for their implementation. In the same year the Eastern Cape Local Division of the High Court issued a precedent setting decision in 2014, which held that the State's obligation to provide basic education extends beyond making places available at schools and includes the provision of learner teacher support materials, classrooms and appropriate facilities for learners.⁸⁴

⁷⁸ 85 of 1993. As amended by the Occupational Health and Safety Amendment Act, No 181 of 1993.

⁷⁹ 103 of 1994 (Govt Gazette 21951).

⁸⁰ Ibid at Part VI of section D.

⁸¹ (CCT 29/10) [2011] ZACC 13.

⁸² Ibid at para 42.

⁸³ 2014 (9) BCLR 1039 (GP).

⁸⁴ *Madzodzo and Others v. Minister of Basic Education and Others* 2014 (3) SA 441 para 20.

Equal Education and Another v Minister of Basic Education and Others⁸⁵

In a recent and pertinent court decision in the Bhisho High Court, Equal Education successfully challenged several sections of the Infrastructure Norms and Standards which were declared inconsistent with the Constitution and SASA, and therefore unlawful and invalid. The main challenge concerned sub-regulation 4(5)(a) which made compliance with the minimum benchmarks “subject to the resources and co-operation of other government agencies”. It was argued that this effectively created a legal loophole for DBE to indefinitely avoid its obligations to provide safe and adequate school infrastructure in terms of the Infrastructure Norms and Standards.

The Court agreed that the qualification set out in sub-regulation 4(5)(a) compromises the constitutional value of accountability because, were it to be allowed to stand, there is no way that the Government could be held accountable for the discharge of its duty to provide basic school infrastructure. Therefore, because the provision of basic infrastructure is indisputably integral component of the right to basic education, it means Government cannot be held to account.⁸⁶

The further contention of Equal Education was that the Infrastructure Norms and Standards undermine the right of learners to a basic education, equality and dignity and of teachers to a safe working environment; equality and dignity. They are arbitrary in that they operate only in relation to schools which are built entirely of unsuitable and unsafe structures and are not aimed at replacing unsafe structures wherever they are found to exist. The applicant posited that there is no reason, let alone a justifiable or sufficient reason, for the failure to address unsafe structures which are found at schools.

The Court noted that the Minister did not present any information to counter testimony demonstrating that dangerous and unsafe conditions were not only limited to the schools that the Minister had prioritised in her regulations and that the learners and educators who used these structures confront the risk of injuries and death on a daily basis.⁸⁷ Nor did the Minister put forward any rational basis for the distinction between schools she had drawn between schools. The Court emphasised that the fact of the matter is that an unsafe structure poses the same risk to learners and teachers whether there are also some safe structures at the school.⁸⁸

“The crude and naked facts staring us [*sic*] are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is fate that also stares the educators and other caregivers in the schools in the face.”⁸⁹

It was acknowledged by the Minister and the Court that infrastructure is a facet of the right to basic education and that the right to education is an immediately realizable right and not progressively realizable.⁹⁰ The Court held that the glaring disparities in education infrastructure occasioned by apartheid would not be closed in circumstances in which the Minister adopts the stance that she cannot make any commitments regarding the Infrastructure Norms and Standards.⁹¹ Nor could budgetary restrictions be relied upon as a justification for a failure to provide essential infrastructure.⁹² In October 2018, the Constitutional Court dismissed the Department of Basic Education’s application for leave to appeal the judgment on the basis that it had no prospects of success.

⁸⁵ [2018] 3 All SA 705 (ECB). Available here: <http://www.saflii.org/za/cases/ZAECBHC/2018/6.html>.

⁸⁶ Ibid at para 182.

⁸⁷ Para 189.

⁸⁸ Para 192.

⁸⁹ Para 194.

⁹⁰ Para 72.

⁹¹ Para 196.

⁹² Para 197.

MEC: Department of Education Northwest Province v FEDSAS⁹³

The specific obligations of the State in respect of the right to education specifically in the context of residential school hostels specifically was recently articulated by the SCA as follows:

“The constitutional right to education in s 29(1) and the best interests of the child learner provided for in s 28(2) of the Constitution must be promoted and protected. These provisions envisage that the right to education goes substantially further than the provision of classrooms. In a country as large as ours, with scattered population in rural areas, access to education must necessarily include the provision of hostels to enable learners living far from schools to obtain an education. Legislation which gives effect to the right to education requires a generous interpretation. The provision of hostels is thus an essential component for facilitating the right of access to education.” (Emphasis added)

This brief review of applicable case law set out above is included for the purposes of establishing that:

- racially disparate school infrastructure facilities are a legacy of apartheid, black children with disabilities therefore experience a compounded form of marginalisation;
- the State’s obligation to provide basic education extends beyond making places available at schools and includes the provision of learner teacher support materials, classrooms and appropriate facilities for learners;
- it is the State’s obligation to budget for the right to access basic education, this includes the government’s obligation to facilitate inclusive education for people with disabilities by ensuring sufficient allocation of technical, human and financial resources for their implementation; and
- providing adequate school infrastructure is necessary to fulfil the right to basic education; and
- budgetary constraints cannot be relied upon as a justification for a failure to provide essential infrastructure, particularly where existing infrastructure poses a risk to the health and well-being of learners and teachers.

2.2.3 DOMESTIC POLICIES**2.2.3.1 EDUCATION WHITE PAPER 6 (SPECIAL NEEDS EDUCATION BUILDING AN INCLUSIVE EDUCATION AND TRAINING SYSTEM)⁹⁴ (WHITE PAPER 6)**

This broad statement of government policy published in 2001 describes the DBE’s intention to implement inclusive education at all levels of the schooling system by 2021 and outlines the South African Government’s strategy in respect of the education of learners with disabilities and embodies the principles of inclusive education outlined in Article 24(2)(b) of the CRPD.. The proposed inclusive system is intended to facilitate the inclusion of vulnerable learners and reduce the barriers to learning through targeted support structures and mechanisms aimed at improving the retention of learners in the education system, particularly learners who are prone to dropping out.

2.2.3.2 GUIDELINES RELATING TO PLANNING FOR PUBLIC SCHOOL INFRASTRUCTURE⁹⁵

These Guidelines apply to public schools, it is stated that they will be implemented progressively and within the scope of the available resources.⁹⁶ The measures contained in the Guidelines are intended to be applied to existing education facilities.⁹⁷ The Guidelines advise that:

⁹³ (021/2016) [2016] ZASCA192 at para 21.

⁹⁴ Available here: https://www.vvob.be/files/publicaties/rsa_education_white_paper_6.pdf.

⁹⁵ Available here: https://www.gov.za/sites/default/files/gcis_document/201409/planning-public-infrastructure.pdf

⁹⁶ Ibid. 2.1 at page 5.

⁹⁷ Ibid. 3.2 at page 5.

- school buildings and other school facilities will conform to all laws relating to fire protection;⁹⁸
- fire extinguishers should be provided at a ratio of at least one extinguisher per every 150m²;⁹⁹
- the provisioning, maintenance and replacement of fire extinguishers must conform to national guidelines;¹⁰⁰
- school facilities should be suited to the needs and requirements of learners with a disability;¹⁰¹
- schools should facilitate access and functionality in accordance with the principles embedded in White Paper 6 on Inclusive Education, and should also be in line with universal access guidelines;¹⁰² and
- sporting facilities should be accessible to learners with disabilities in order to ensure their meaningful use of such facilities.¹⁰³

2.2.3.3 DISABILITY POLICY GUIDELINES¹⁰⁴

Domestic policies such as the Department of Public Works' Disability Policy Guidelines emphasise the need for an enabling environment to facilitate the progressive realisation of access to services and infrastructure by persons with disabilities.

2.2.3.4 DISABILITY RIGHTS CHARTER OF SOUTH AFRICA¹⁰⁵

The Disability Rights Charter states the quality of the all new environments "shall be accessible and safe to disabled people and all reasonable steps shall be taken to make existing built environments accessible and safe."¹⁰⁶

2.2.3.5 WHITE PAPER ON THE RIGHTS OF PERSONS WITH DISABILITIES (WPRPD)¹⁰⁷

Cabinet approved the WPRPD in December 2015. The WPRPD places emphasis on a rights-based approach to disability, with provisions for the protection as well as the promotion of the rights of people with disabilities. Cabinet also approved a set of targets, an 'Implementation Matrix', for the period 2015-2030. This contains measures of compliance, with the first set of targets having a deadline of 2019.¹⁰⁸ The Department of Social Development (DSD) is the custodian of the WPRPD. However, DBE is the 'lead agency' or one of a number of 'lead agencies' in respect of certain policy directives set out in the Implementation Matrix in the WPRPD.

2.2.3.6 THE NATIONAL POLICY FOR AN EQUITABLE PROVISION OF AN ENABLING SCHOOL PHYSICAL TEACHING AND LEARNING ENVIRONMENT (NPEP)¹⁰⁹

The NPEP is the DBE's national policy on school infrastructure. It emphasises the negative effects of a poor schooling environment on learners, including irregular attendance and higher drop-out rates.¹¹⁰ NPEP also recognises the detrimental effects of inadequate school infrastructure on teachers, citing attrition, high turnover and teacher absenteeism as consequences flowing from these conditions.¹¹¹

⁹⁸ Ibid. 12.4 at page 11.

⁹⁹ Ibid. 12.5 at page 11.

¹⁰⁰ Ibid. 12.7 at page 11.

¹⁰¹ Ibid. 16.1 at page 12.

¹⁰² Ibid. 16.2 at page 12.

¹⁰³ Ibid. 17.5 at page 13.

¹⁰⁴ Available here: http://www.publicworks.gov.za/PDFs/documents/WhitePapers/Disability_Policy_Guideline.pdf

¹⁰⁵ Available here: <https://www.safmh.org.za/documents/policies-and-legislations/Disability%20Rights%20Charter.pdf>

¹⁰⁶ Ibid.

¹⁰⁷ Department of Social Development. (2015). White Paper on the Rights of Persons with Disabilities. http://www.dsd.gov.za/index.php?option=com_docman&task=doc_download&gid=653&Itemid=39

¹⁰⁸ Department of Social Development. (2015). Implementation Matrix for the WPRPD. http://www.dsd.gov.za/index.php?option=com_docman&task=doc_download&gid=654&Itemid=39

¹⁰⁹ Available here: <https://www.education.gov.za/Portals/0/Documents/Policies/SystemPlanning/NatPol%20EquitableProvision.pdf?ver=2010-08-06-135050-120>

¹¹⁰ Ibid.

¹¹¹ Ibid

2.2.3.7 GUIDELINES TO ENSURE QUALITY EDUCATION AND SUPPORT IN SPECIAL SCHOOLS¹¹²

These Guidelines make reference to the Commission's public hearings into basic education in 2004 and the subsequent report, emphasising that the report had shown how "[h]istorically, inequity in the provision of quality education and support was most evident in the "Special Needs sector".¹¹³ The Guidelines also indicate that the Commission's report emphasised the exclusion of learners with special needs, the poor conditions of Special Schools and the lack of qualified personnel and specialists support personnel. They set out the minimum standards that are required for any special school to function adequately and provide quality education, care and support to learners enrolled in these schools.¹¹⁴ The document also outlines guidelines for a functional 'Special School as Resource Centre (SSRC)'.¹¹⁵ The guidelines are intended to guide DBE at all levels in resourcing, supporting and monitoring Special Schools and SSRC.¹¹⁶

The Guidelines are divided into two sections:

1. section 1 provides guidelines for Special Schools to ensure that they are all fully functional and provide quality education and support to learners who require a high level of support and are enrolled in these schools. The DBE must ensure that a special school meets most of the standards described in these guidelines before the school begins preparations to function as a SSRC; and
2. section 2 provides guidelines for a functional SSRC.

The Guidelines state that it is imperative that Special Schools are familiar with all the relevant legislation, policies and guidelines and must have copies in their schools for reference purposes.¹¹⁷ The Guidelines also restate that certain key role players have the following obligations in respect of Special Schools:

1. DBE

- a. At national, provincial and district levels the DBE has an obligation to monitor all special schools on a regular basis and provide the necessary support.
- b. All aspects of education provision must be monitored, these include, but are not limited to:
 - i. school governance and management;
 - ii. curriculum planning and delivery;
 - iii. infrastructure provisioning; and
 - iv. human resource management and transport.
- c. Special schools must not be seen as the sole responsibility of officials from the Inclusive/Special Needs Education sections of DBE.
- d. The DBE must keep all the special schools' records required by the education system for planning, monitoring and reporting purposes.

2. Provincial Departments of Education

Must establish and develop skills of DBSTs to support the implementation of White Paper 6.¹¹⁸

¹¹² Available here: http://www.enspired.net/sites/default/files/uploaded-files/guidelines_ie_sp_schools_revised2014.pdf

¹¹³ Ibid at page 1.

¹¹⁴ Page 2.

¹¹⁵ Page 2.

¹¹⁶ Page 2.

¹¹⁷ Para 2.1.4, page 4.

¹¹⁸ Para 2.1.12, page 5.

3. Districts

- a. When signing the annual progression and promotion schedules, the relevant district officials must ensure that all learners at special schools are benefiting educationally.
- b. As DBSTs¹¹⁹ are introduced, districts must ensure that these teams are fully functional in accordance with the Framework for the Establishment of DBSTs.¹²⁰
- c. These teams must liaise with other Government Departments, such as DoH and DSD, to provide the required support to schools.¹²¹
- d. Special schools that have been identified as SSRCs must operate under the auspices of the DBST and provide support to other schools.¹²² This should be managed via a DBST management committee. Principals of all SSRCs in the district must be represented on this committee. Their responsibility, inter alia, is to manage the balance between ensuring that quality teaching, learning and support takes place at their schools, whilst ensuring that personnel at SSRCs provide adequate support as an arm of the DBST.¹²³

In terms of the Guidelines “[t]he principal, supported by the Members of School Management Team (SMT) should ensure effective curriculum management.”¹²⁴ This includes, but is not limited to:

- a. Ensuring there is adequate and appropriately qualified teaching and professional personnel to deliver the curriculum;
- b. Ensuring the availability of adequate and appropriate learning and teaching support material. These should be provided for all learners in an appropriate and relevant format, depending on the learners’ needs;
- c. Providing adequate and appropriate assistive devices and technology and ensuring that these are effectively integrated in the teaching and learning process;
- d. Effectively managing, retrieving, storing and maintaining Learning and Teaching and Support Materials (LTSM), assistive devices and technology;
- e. Managing timetabling and adherence to tuition time (also introducing periods for mastering of specific skills such as Braille, orientation and mobility, South African Sign Language (SASL), Augmentative and Alternative Communication (AAC), computyping, etc.);
- f. Ensuring there are support structures, resources and systems (e.g. a SBST, database of community and other resources and clear protocols and referral systems for personnel and students on how to utilise these). Community resources include social welfare services, primary health clinics, mental health drop in centres, support services at Higher Education Institutions, programmes run by non-governmental and disabled people organisations, teacher centres, etc.¹²⁵

In terms of monitoring and supporting curriculum delivery the Guidelines state that the same curriculum support and monitoring that is provided by the National, Provincial (district and school level) Department of Education in ordinary schools should be provided to Special Schools.¹²⁶ The monitoring and supporting of the curriculum in Special Schools must not be the responsibility of the DBE section that deals with inclusive education or special needs education alone.¹²⁷ Therefore it is important that support personnel such as curriculum advisors and circuit managers should have the knowledge and skills to support special schools.¹²⁸

¹¹⁹ DBSTs are trans-disciplinary teams that have representation from several units in the district, such as ECD, Curriculum, Institutional Development/Education Management and Governance, ABET, Teacher Development and Inclusive Education.

¹²⁰ 2.1.13

¹²¹ Page 5

¹²² 2.1.14

¹²³ Page 5.

¹²⁴ Para 2.2.3(iii), page 8.

¹²⁵ Ibid. page 8-9.

¹²⁶ Para 2.2.4, page 10.

¹²⁷ Ibid.

¹²⁸ Ibid.

2.2.3.8 REVISED SCREENING, IDENTIFICATION, ASSESSMENT AND SUPPORT POLICY (SIAS)¹²⁹

The revised SIAS was approved and adopted on 19 December 2014. It is intended to provide for the standardisation of procedures and processes to identify and assess all learners requiring additional support. In terms of the SIAS policy DBE is legally required to produce norms and stands for funding inclusive education or norms and standards for post provisioning in special and full-service schools.¹³⁰

2.2.3.9 THE NATIONAL LEARNER TRANSPORT POLICY (“NLTP”)¹³¹

This policy states that when identifying beneficiaries of subsidized learner transport services, priority must be given to learners with disabilities, taking into consideration the nature of the disability. It specifies that transport used for persons with disabilities must adhere to the requirements and principles of Universal Design and take cognisance of the needs of learners with disabilities. However, the policy fails to disclose how this will be achieved, nor have any guidelines for its full operation been developed.

2.3 COMPARATIVE CASE LAW

Avinash Mehrota v Union of India and Others¹³²

This case concerned the systemic lack of safety in Indian schools following a fire in a school that led to the death of 93 children due to inadequate school infrastructure and the absence of safety mechanisms to ensure the safety of the children in the event of an emergency.¹³³ The question before the Court was whether there is a fundamental right to receive education free from security and safety risks, and whether the State is obliged to ensure minimum safety standards in schools.¹³⁴ The petitioners relied on the right to education and to life, both of which are guaranteed in the Constitution of India.¹³⁵

In making its decision, the Supreme Court of India interpreted the right to education to include the right to the provision of a safe environment in schools, and imposed an obligation on schools to comply with certain fire safety precautions.¹³⁶ The Court held that the State’s duty to vindicate the fundamental right to education is not be discharged through the provision of an unsafe school. It is incumbent on the State to ensure that children suffer no harm in exercising their right to education and, accordingly, must ensure that schools provide safe facilities as part of a compulsory education.¹³⁷ In making its finding the court held that:

“we must hold that educating a child requires more than a teacher and a blackboard, or a classroom and a book. The right to education requires that a child study in a quality school, and a quality school certainly should pose no threat to a child’s safety.”¹³⁸

The relevant State stakeholders were directed to ensure that schools adhere to basic safety standards and that school buildings are safe and secure according to the safety norms prescribed by the National Building Code and affidavits of

¹²⁹ <https://www.education.gov.za/Portals/0/Documents/Policies/SIAS%20Final%2019%20December%202014.pdf?ver=2015-02-24-131207-203>

¹³⁰ Silomo Khumalo and Tim Fish Hodgson ‘The Right to Basic Education for Children with Disabilities’. Available here: <http://section27.org.za/wp-content/uploads/2017/02/Chapter-5.pdf>

¹³¹ Published on 23 October 2015, GGN 39314. National Learner Transport Policy, Government Gazette 39314, No. 997, 23 October 2015, page 25, No. 3, 9.

¹³² Writ Petition (Civil) No.483 of 2004, (2009) 6 SCC 398. Available at: <https://www.casemine.com/judgement/in/5609aebde4b01497114149a8#16>

¹³³ Ibid at para 40.

¹³⁴ Ibid at para 2.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid. At para 20.

compliance were required to be filed by authorities concerned.¹³⁹ With respect to the obligations of the State the Court indicated that:

“Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. Likewise, the State’s reciprocal duty to parents begins with the provision of a free education, and it extends to the State’s regulatory power. No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty. States thus bear the additional burden of regulation, ensuring that schools provide safe facilities as part of a compulsory education.”¹⁴⁰

2.4 CONCLUSION OF LEGAL AND POLICY FRAMEWORK

It is clear from the review of the relevant legal and policy framework above that there are several underlying causes of the absence of strictly enforced minimum safety standards in Special Schools in the NW province:

- The State’s refusal to acknowledge that the right to education incorporates the provision of safe schools and act accordingly from that premise is hampering progress in this area;
- State failure to act on its stated commitment to inclusive education. Were the South African education system be transformed into an inclusive one as intended fewer children would have to be housed in inadequate and aging hostel infrastructure at distant Special Schools because they would attend their local schools closer to their homes. Moving away from reliance on Special Schools (and therefore residential hostels) would significantly reduce the risks faced by learners with disabilities;
- However, it is clear that during any such transition of the nature contemplated above, it will still be necessary to improve the conditions of Special Schools with residential hostels that still exist. To do so it is necessary for the State to develop and implement a legally binding framework which explicitly regulates Special Schools and specifically sets out minimum safety standards for any hostel, residential facilities, or buildings used to accommodate the learners enrolled at that school;
- There are numerous documents which have been developed to ensure the safety of learners across South Africa and minimum safety and security standards, unfortunately these primarily take the form of guidelines which are not legally binding and do not create explicit obligations on relevant stakeholders to ensure that learners (particularly vulnerable learners) are protected within the school environment; and
- The relevant stakeholders must ensure that ongoing monitoring of compliance is undertaken, coupled with accountability mechanisms for non-compliance;
- that it cooperates with other State departments to ensure basic safety and security mechanisms are in place.



¹³⁹ Ibid.

¹⁴⁰ Ibid. At para 31.

3. WRITTEN AND ORAL SUBMISSION SUMMARIES.

3.1 PARENTS FOR CHILDREN WITH SPECIAL EDUCATIONAL NEEDS (PACSEN)

PACSEN submitted that minimum safety and fire standards in Special Needs School have not been enforced by DBE in the NW province and other provinces in the country. Such standards have only been implemented in instances in which the management staff and SGB of certain Special Schools have drawn up and implemented their own safety policies for the schools and the hostels. However, many Special Schools lack the financial resources and know-how to do so themselves. Therefore, school staff must receive the necessary training to ensure the safety of learners, particularly in the event of a fire, taking into account the particular disability of the learner. In terms of obtaining the correct equipment the State has often not provided the correct subsidy to ensure that such items are available. It must be taken into consideration that many of the schools operate in old buildings, this must be noted when evacuation procedures are designed in emergencies.

Specific challenges identified by PACSEN include the following:

1. Accessibility
2. Special Schools are still not accessible to learners with disabilities.
3. Staff upskilling and training must be prioritised
4. Legislation and policy measures will only work if staff are provided with adequate training which allows them to understand their responsibilities as they relate to the safety of learners with disabilities in their care. Often hostel staff will qualify as sisters but after that they do not receive any further training but Special Schools really require someone who knows how to run a hostel that ensures round the clock supervision. The low salaries paid to hostel staff is also a barrier to attracting and retaining skilled employees.
5. Lack of stimulation
6. The learners spend the majority of their time on the school premises but they often do not have any toys or any form of stimulation.
7. Range of disabilities
8. Some of children with disabilities are independent and can assist themselves, however, others need additional support, assistance and supervision, particularly in the event of an emergency. No matter what the barriers are every learner must be taught what to do in case of emergency and regular emergency and evacuation drills must be conducted.
9. Aging and inappropriate school infrastructure
10. The infrastructure of the school building especially must be taken into consideration as much of the school infrastructure is significantly aged. This needs to be taken into consideration for evacuation during emergencies.
11. Lack of cooperation among stakeholders

12. The schools that represent the NW province of Education on a Local Level need to have an ongoing relationship with local municipalities and South African Local Government Association (SALGA) in their region. All the schools in the province need to be notified and informed and that they need to develop a relationship with all local emergency service providers.
13. Consistent internal monitoring processes
14. Senior staff members who work in Special Schools need to be appointed to provide feedback to the management body of the school on the hostel on a weekly basis.
15. Policy and legislative gaps
16. In the long-term DBE needs to draft and implement the correct law and policy for Special Schools. There are Guidelines in place that regulate boarding facilities in public ordinary schools.¹⁴¹ However, these Guidelines explicitly state that they do not apply to boarding facilities at Special Schools.¹⁴² An organisation called South African Association of Special Educational Needs (SANASE) produced a draft document which was accepted by DBE in 2005 but the document is yet to be published by DBE. As a general proposition there isn't sufficient law and policy in place to protect learners with disabilities and DBE need to take steps to address these legislative and policy gaps. Further, policies are not as effective as legally binding norms and standards.

3.2 INCLUSIVE EDUCATION

Inclusive Education noted the intersectional nature of the challenges faced by black children with disabilities and also pointed out that a rural child with a disability was further discriminated against through inadequate resourcing and under provision of schooling and infrastructure in their communities. It was submitted that Special Schools have not been prioritised by DBE, they are supposed to have multi-disciplinary staff and provide quality education to children with disabilities, but this is sadly not the case and children remain marginalised because reasonable accommodation has not been provided or budgeted for.

Inclusive Education submitted that the underlying causes of the systemic failure to adhere to the minimum safety and fire standards in Special Schools in the NW province include the following:

1. Post provisioning

There is inadequate provision made in the legal and / or policy framework relating to post provisioning in special schools and special school hostels. The policy does not take into account the need for 24 (twenty-four) hour supervision of learners in special school hostels. Such supervision is more demanding and requires more specialised skills. No norms and standards which relate to post provisioning of special school hostel staff have been drafted. The Draft Guidelines for Resourcing Inclusive Education do not make sufficient or detailed provision for special school hostel staff taking into account the different learner needs.

2. Staff skills and qualifications

There are no norms and standards setting out the minimum qualifications and required experience of special school hostel and support staff. Adequate staff development plans are not in place to ensure staff develop the necessary skills to ensure learner safety and security taking into account specific learner needs. Teachers often double up as hostel parents, however, they don't necessarily have the skills to care for learners with varying disabilities. Alternatively, where teachers don't fulfil the role of hostel parents, it's often played by parents of learners or underpaid volunteers from the community who also lack any kind of qualification, training or specific skills.

¹⁴¹ Guidelines for the provision of boarding facilities in public ordinary schools. Available at: <https://www.gov.za/sites/www.gov.za/files/Boarding%20Facilities.pdf>.

¹⁴² See point 6.1.

3. School safety policies and procedures

Safety policies and procedures are not widely known by staff or learners because they are not prioritised by school management or monitored by district officials. Schools do not have regular safety drills or clear procedures in case of emergencies. Provincial and district DBE officials are not held accountable for compliance with safety policies in special schools. No official action or performance plans contain any indicators relating to special school safety and security.

4. Infrastructure and equipment safety compliance

Some of the reasons that schools fail to comply include the following:

- a. compliance is not monitored by the DBE;
- b. schools lack the funds to implement all necessary infrastructure adaptations;
- c. provincial budgets do not prioritise funding for special school safety and security; and
- d. schools are often overwhelmed and under resourced and safety and security measures are consequently simply not prioritised.¹⁴³

5. Legislative and policy gaps

Despite the international obligations imposed on South Africa by the various treaties it has ratified, there is no adequate domestication of these provisions in our legal and policy framework to protect learners in Special Schools. The Constitution protects a wide range of human rights, however, more detailed provisions which actually seek to give effect to these rights in the context of learners with disabilities are not in place. There are piecemeal and fragmented provisions across a number of laws and policies but these do not afford adequate protection.

Further, there is no comprehensive guideline, policy, or legislation which makes specific provision for hostels in the environment of a Special School. Appropriate norms and standards for special school hostels simply do not exist. The Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres, 2014¹⁴⁴ provide some broad guidance as to the functioning of hostels but not detailed specifics. Special School hostels must otherwise comply with the provisions for ordinary school hostels which are entirely inadequate. Nor does the Children's Act, 38 of 2005 (the Children's Act) afford protection as special needs school hostels are not deemed to be "child and youth centres" in terms of the Act.

The minimum uniform norms and standards for public school infrastructure contains insufficient provision for Special Schools and timeframes for compliance with "universal design" is 2030, this is unacceptable. Current school infrastructure budget cuts will surely also be felt more keenly by Special Schools.

The SIAS policy outlines in quite broad strokes how you would determine the level of support need of an individual learner, but it doesn't go into any specifics around how that support could be provided, and it's quite silent on special school hostel post-provisioning, as the norms and standards that were meant to be adopted with the policy, are now just guidelines. So there is no comprehensive and binding norms and standards or regulations.

6. Lack of internal skills and capacity at DBE

Most district officials do not have the skill to assess the needs of learners in Special Schools and so tend not to offer support or monitoring to Special Schools at all. Further, reasonable accommodations and the obligations around providing reasonable accommodations are not properly understood by relevant officials, nor are they implemented. Often it is said that they are too expensive, but the failure to provide reasonable accommodation amounts to discrimination.

¹⁴³ Inclusive Education did however note that, despite these challenges, the failure to implement basic fire safety measures (fire extinguishers, fire blankets, and fire escapes) is inexcusable and can only be regarded as gross negligence.

¹⁴⁴ http://www.enspired.net/sites/default/files/uploaded-files/guidelines_ie_sp_schools_revised2014.pdf.

7. Lack of political will

Special schools are still relegated to the fringes of the education system. Budgeting, planning, accountability measures and the provision of quality education for learners with disabilities have not been regarded as a priority. Despite numerous reports and cases dealing with the poor conditions in special schools, abuse and neglect, the DBE shows no commitment to ensuring the right to education, dignity, equality and even the right to life of learners with disabilities are protected and realised. Nor have measures been taken to hold provincial and district officials accountable for the shortcomings in Special Schools. This, coupled with a lack of specialised knowledge and skills in the DBE to ensure compliance, results in the extreme neglect of special schools and their learners. Inclusive Education indicated in their submission that the NW Department of Education and the relevant local municipalities had not, to their knowledge, taken any steps to address these challenges.

Inclusive Education also directed the Commission to the issue of sexual abuse of children with disabilities in hostels. Inclusive Education also noted that while the Commission's hearing were focused on the NW province, the issues raised apply across all provinces in South Africa. Therefore this issue must be addressed at a national level and adequate accountability measures that extend to all provinces must be put in place as a matter of urgency.

3.3 **PARLIAMENTARY MONITORING COMMITTEE (PMC)**

The PMC play an oversight role in respect of DBE. It was emphasised that the PMC does not supervise DBE, DBE accounts to the PMC. The PMC submitted that it ensures that issues that affect Special Schools are included in the Annual Performance Plan targets for the provincial Departments of Education and are also covered in the quarterly reports they submit. The PMC submitted that, although all is not well in mainstream schools (particularly around inclusivity), there is much that still needs to be done in respect of Special Schools.

Similarly to Inclusive Education the PMC indicated that they were particularly concerned with detecting and preventing abuse in Special Schools. The PMC indicated that they were disappointed in the lack of vetting of teachers given that they are routinely implicated in the sexual and physical abuse of learners. Particularly learners with disabilities who are rendered even more vulnerable to sexual predation due to the additional burdens of stigma and discrimination.

The PMC emphasised that basic issues of safety and security in Special Schools, such as fire extinguishers and drills, are non-negotiable. The PMC indicated that it felt that in this respect the main hurdle was not a lack of funding but a dearth of innovative leadership at the school level. The PMC were disappointed by the condition of Kutlwanong School for the Deaf which was observed when the SAHRC conducted a walkabout of the school prior to opening the public hearing. Nearly all the physical structures in the school playground were dilapidated or broken.

The PMC also noted that the sports fields was not in an acceptable condition for the intended purpose. The PMC emphasised that it is the responsibility of the school management to ensure that school facilities are well taken care of and that they are safe for learners to use. The PMC pointed out that learners in Special Schools were typically under-stimulated in the time they spend at the hostels outside of classes. Again, the PMC was of the view that this was not a question of funding as much as passion and innovation.

The PMC did concede that funding was a factor and that, at the level of the portfolio committee it is an issue which is raised repeatedly. The PMC also submitted that the DBE was a very complicated department with multiple concurrent functions which are very difficult to manage. The PMC expressed some frustration at the lack of implementation at provincial level and emphasised that ultimately the Minister of Education, at national level, is accountable. The PMC expressed some frustration that the programmes DBE does implement successfully are typically effected through the medium of conditional grants.

The PMC also submitted that the following issues presented challenges across the board:

1. Learner transport

Especially at a provincial level where learners were especially vulnerable to violence when travelling to and from their schools. PMC recommended a conditional grant to address this issue.

2. Lack of learner work books

The PMC indicated that this had been an issue since the DBE took over distribution of school text books.

3. Policy gaps

If the relevant guidelines were implemented that would alleviate a lot of the issues the Commission was concerned about.

4. Lack of implementation

There is a lack of will to implement. The PMC representative indicated that they had considered the norms and standards together with the Head of Department of the NW Department of Basic Education and Sports and there had been no mention of Special Schools or learners with disabilities within the Province. This suggests that these schools are not considered a priority. Further, provincial departments of education only tend to take action reactively when NGOs intervene, they are not proactively taking preventative measures to intervene to reduce risks.

5. Lack of accountability

The PMC submitted that when incidents do occur no consequences seem to flow for the individuals who are tasked with implementation and risk management. There is a need to create a culture of accountability.

6. House parents

The lack of training and skills is an issue at schools throughout the country.

7. Infrastructure

Most of the hostels were not built for the intended purpose of housing learners with disabilities.

8. Lack of basic provisions

The PMC submitted that on its monitoring visits it has even observed children eating with their hands because the school kitchen does not even have basic eating utensils.

3.4 KUTLWANONG SCHOOL FOR THE DEAF (KUTLWANONG)

Kutlwanong was established in 1944 and is the only primary school for the deaf which admits learners from the entire NW province. It is surrounded by and located in close proximity to the Impala Platinum Mine. Kutlwanong currently has 278 learners and admits learners from the age of 4 years old. Of the 39 educators 34 have been trained in South African sign language. That training was provided by the NW University and was funded by the North West Department of Education and Sports Development (Provincial DBE) in 2013, 2014 and 2015. The support staff complement (house parents / household aids) includes 23 household aids, of which 7 are deaf and 16 are hearing. Kutlwanong has 22 class assistants, 16 of whom are deaf and 6 of whom are hearing. Approximately 98% of the School's deaf employees are graduates of the school. It also has two professional nurses who are employed by the DBE.

There are 32 Special Schools in the NW province. The Provincial DBE itself has been proactively conducting needs assessments on these Schools from as early as 2010/2012. Kutlwanong indicated that they had regularly engaged with the Provincial DBE at all levels from the circuit office, district office and at a provincial level to appraise the Department of their urgent needs. Further, Kutlwanong is visited by the district office and the circuit manager. It was therefore submitted that all the relevant provincial role-players are fully aware of the existing safety and security gaps at the school and there is no need to conduct further assessments. The existing assessments merely need to be updated. It was also submitted that there has been an undertaking from the Provincial DBE that fire detectors would be installed in the School hostels by the end of March 2018.¹⁴⁵

Kutlwanong was not built with the specific needs of deaf learners in mind. There are consequently serious infrastructure challenges which compromise the safety and security of the learners and staff, particularly with respect to fires and other emergencies. The hostels where the learners and the house parents sleep, pose a particular threat to the learners' well-being in the event of an emergency. The Provincial DBE has conducted assessments and Department representatives inspected the school in 2010 and again in August 2014 (immediately after the fire at Christiana School for the Blind as well as North West Secondary School for the Deaf).

Kutlwanong does not regard itself as compliant with its own safety policy because there is no fence or wall around the perimeter of the school. In addition to the aged school buildings, which do not meet basic safety and security standards, the electricity and the sewerage systems are outdated and require constant maintenance. The school has engaged the NW Department of Public Works which has indicated in the past that it has no budget to assist.

Kutlwanong falls under the Rustenburg Local Municipality which supplies it with electricity. However, over the past 2 to 3 years, the school experienced challenges with paying its account and the Municipality consequently cut off the electricity services to the school due to late payments. On numerous occasions Kutlwanong sought to prevent disconnection or arrange a speedy reconnection on the basis that the School serves learners who are unable to communicate in the dark using sign language. However, these requests were not heeded until the school sought what was described as a "political intervention".

In January 2018 Kutlwanong was informed by the Municipality (represented by MMC Mr. John Molubi) that it would be formally 'adopting' the school as a beneficiary. This relationship would then allow some benefits to accrue to the school, including a reduced electricity bill. However, at the Hearing the Municipality reneged on this representation stating that the formalities for the establishment of such a relationship had not been complied with.

Challenges identified by Kutlwanong:

1. Filling Posts

When DBE advertises support staff posts at the level of schools they do not consult with the schools to assess their needs. The DBE must assess what we need at the level of the school before posts are advertised.

2. Lack of support staff

Kutlwanong is in need of additional support staff, for example general assistants, foremen, hostel supervisors.

3. Safety and security challenges

Many of the school's challenges are related to infrastructure. For example, the first one is the lack of security wall around the school. Kutlwanong has no fire hydrants on the school premises in the event of an emergency. Water at the school is supplied by Impala Mine. In 2017 Impala Mine came to conduct a water pressure assessment to establish whether the water pressure is sufficient for fire hydrants or emergency sprinklers at the School and in the hostels. It is not yet clear whether the water pressure is sufficient. Further, it is extremely dark around the school premises due to insufficient lighting.

¹⁴⁵ Kutlwanong and Provincial DBE to confirm whether this was completed.

4. Old and aging infrastructure

The sewer system and the drainage system is very old and, as a consequence, there are frequent severe blockages. This problem is compounded by the open cast mining conducted around the school which damages the clay pipes. The department of Public Works does assist Kutlwanong when requested to do so but they have repeatedly indicated that they can only provide limited assistance because the entire system needs to be renewed.

5. Lack of Assistive Emergency Devices

Deaf learners who are in a hostel require special emergency devices, for example bed shakers, pillows that vibrate, and strobe lights to alert them to an emergency. Kutlwanong does not currently have any such assistive devices.

6. Inconsistent electricity supply

Kutlwanong receives the fund transfer earmarked for electricity costs on a quarterly basis. This means that they do not always have funds readily available when payment is due. Consequently the school is not always in a position to pay the Municipality on time. The school principal indicated that when Kutlwanong do not pay the Municipality on time they do not hesitate to cut the electricity supply to the school. On the last occasion that this happened Kutlwanong made numerous appeals to the Municipality orally and in writing appealing to them to reconnect the electricity because the learner's primary language (SASL) means that they need light in order to communicate. Lighting is also crucial to the safety and security of the learners.

7. Inconsistent fund transfer dates

Special Schools in the NW province receive four transfers of funds per annum, however, they are not provided with the specific dates upon which they will actually receive the transfer. Often transfers are received by Kutlwanong later than indicated or anticipated, this creates a major problem in meeting their financial obligations and has led to the school's electricity supply being suspended.

8. Lack of screening of employees

There is no process at the school level to vet employees against relevant registers (for example, the Justice Register, the National Sexual Offenders Register, the Department of Social Development's Child Protection Register and the SA Council for Educators' (SACE) list of banned teachers). At the level of the school, only the processes of short listing, interviews and recommendations are conducted during the hiring process.

3.5 **RUSTENBURG LOCAL MUNICIPALITY (MUNICIPALITY) - MS LILLIAN SIFIKE AND MR EPHRAIM BOYKI MAFALWE**

In written correspondence to the Municipality prior to the Hearing the Commission inquired whether the Municipality ensures constant and reliable water, sanitation and electrical supply to Special Schools located in the Municipality. The Municipality indicated that Special Schools are entitled to such services. However, they also admitted that these services are provided only 'upon request' because these services are delivered by the Municipality together with other bodies, for example, in the case of electricity this service is delivered in conjunction with Eskom.¹⁴⁶ So the process of water, sanitation, and electricity is done in the following manner: there is an application to the Municipality and if approved there is a connection fee. There has to be connection fees to enable the Municipality to provide the service.

¹⁴⁶ A similar argument was advanced by the Minister of Education in the *Equal Education and Another v Minister of Basic Education and Others* judgment referred to above (see footnote 96). It is notable that the Court rejected this argument.

In response to the oral submission by Kutlwanong regarding the disconnection of the school's electricity by the Municipality, Ms Sifike apologised profusely on behalf of the Municipality and its Chief Financial Officer (who the school appealed to for reconnection and who refused to provide same) for the Municipality's unacceptable decision to disconnect the school's electricity supply due to late payment. However, Ms Sifike also took the opportunity to clarify that Kutlwanong had *not* been adopted by the Municipality as had been indicated in a meeting between the School principal and the political heads of the Municipality (the MMC).

She submitted that, the MMC is the political head of the Municipality and is therefore compelled to make promises while unaware of the administration that needs to be undertaken before a process can be completed. For the process of adoption there are certain procedures, there must be a council sitting and this decision must be made by way of council resolution. Therefore, this is not a decision that can be made by the MMC or the Municipality. It was submitted that it is possible for Kutlwanong to be adopted, but only if the correct processes are followed. If Kutlwanong is adopted by the Municipality what will happen is that it will be placed on an 'indigent register' and will pay reduced tariffs to be decided by the Municipality.

The Municipality is mandated to provide basic services, including water, sanitation, electricity, refuse removal, cleaning the environment and removing any objects that may cause a health risk around the vicinity of a school located in the municipality. It was submitted that the Municipality is obligated to provide refuse removal services to all schools in the vicinity. However, the approach in practice is to only provide refuse removal services if a school does not have a service provider. In those circumstances the Municipality will only assist in instances where a school informs them that there has been illegal dumping around the premises by removing the illegally dumped objects and seeking to trace the transgressor.

However, the Municipality did indicate that should there be a request from a school that the Municipality assist them to clean inside the school premises then this is possible through the unit that deals with environmental education. The Municipality does have environmental management forums that it invites all schools to be part of. Kutlwanong is part of the eco-schools and the Rustenburg environmental management forum.

Mr Ephraim Boyki Mafalwe also made submissions on behalf of the Municipality's Emergency Services Unit which sits within the Public Safety Directorate of the Municipality. The submission focused on issues of fire safety in Special Schools. It was submitted that safety officers are expected to ensure the implementation of minimum fire safety and standards in Special Schools. The Municipality expects to have safety officers within schools, however, lack of safety officers in Special Schools is a serious challenge. For example, it was submitted that the front gate outside Kutlwanong School had clearly not been subjected to a fire safety check with fire safety officials because, in view of its height, it would not be possible for a fire truck to pass underneath it to access the area on which the school buildings and hostels are situated.

The Municipality submitted that such infrastructural shortcomings are common in the NW province. The Hearing Panel registered their shock that the newly constructed front gate of Kutlwanong would actually serve to hinder emergency relief in the event of a fire. The Municipality claimed it was not the first time they had visited the school but indicated that they had not been engaged during the construction of the gate. It was undertaken on behalf of the Municipality that it would engage with the relevant role players to implement a rationalisation process to emergency vehicle access (most likely creating an additional separate entrance specifically for that purpose).

Mr Mafalwe indicated that further challenges were identified by the Municipality at Kutlwanong during the walkabout inspection conducted by the Commission, including:

1. lack of emergency evacuation procedures;
2. lack of first aid boxes;
3. incorrect placing of fire extinguishers;
4. lack of emergency lighting and generators;

5. lack of emergency evacuation plans, updated at least annually;
6. lack of relevant emergency training to all staff or key personnel (including, first aid and firefighting, emergency aid, emergency evacuation procedures, emergency management techniques);
7. evacuation drills conducted at least twice a year;
8. lack of engagement with local emergency services;
9. improper use and maintenance of firefighting equipment;
10. lack of suitable signage indicating evacuation routes, fire equipment and exits;
11. placement of assembly points and safety areas; and
12. lack of relationships between Special Schools and departments such as SAPS to address issues of crime prevention particularly, child abuse.

It was submitted that there were probably similar challenges in other Special Schools but the Municipality does not know because it has not visited other Special Schools in its jurisdiction.

In terms of the South African Building Standards and National Building Regulations it is expected that all buildings shall be designed, constructed and equipped for the needs of people with disabilities, for the purposes of alerting occupants or users to an emergency and to prioritise evacuation. Unfortunately, though, some of the buildings were constructed prior to the promulgation of the codes.

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3.6 NORTH WEST SECONDARY SCHOOL FOR THE DEAF (SECONDARY SCHOOL)

The Secondary School used to be based at Rustenburg Hoërskool where the two schools shared a premises from 1997 until 1999. The Secondary School did not have a building of its own. The Secondary School was subsequently moved to Leeudoringstad at the end of 1999. The Secondary School currently has 89 learners, all the learners are residents at the hostel. In terms of the staff complement, there is one principal, two Heads of Department (HODs) and eight teachers. Of the two HODs one is permanent and one is acting. Of the eight educators, three are permanent and five are temporary. The Secondary School has two class assistants. They do not have a school nurse, psychologist, or an audiologist. Most urgently, the Secondary School does not have sufficient hostel staff. There are currently only three supervisors and 13 household aids.

The Secondary School made submissions regarding two unfortunate events that led to loss of life on the school premises. On 2 August 2015 there was an accident that claimed three lives, one class assistant and two learners. Two weeks later three learners died in a fire at the Secondary School. There was a strong suggestion in the departmental report on the fire that it may have been a result of arson. The principal submitted during the Hearing that this had been suggested by the forensic investigators and that the case had been handed over to SAPS. During her last interaction with SAPS she was informed that the case is with the senior State prosecutor.

The reconstruction of the Secondary School premises began in August 2016. In the interim the Secondary School has been moved again to temporary premises, this time to a location in Wolmaranstad. At Wolmaranstad the learners reside at Hoërskool Wolmaranstad. The learners are mainly confined to the hostel so this has not proved to be a pleasant experience for them and they are anxious to return to their reconstructed school premises. The newly reconstructed School was supposed to be completed in March, but at the time of the Hearing it was still under construction and the new date provided to the principal for occupation was in June 2017.

The temporary school premises is at Diamond Market which is owned by Agriforum. The learners have to commute between the hostel and the school which are approximately 6 kilometres apart. Every morning and afternoon the driver has to transport the learners between the hostel and the school. This presents a challenge because the Secondary School essentially has to manage and run the three places – the temporary school premises, the temporary hostel accommodation and the construction site for the rebuilding of the Secondary School.

The Secondary School identified a number of challenges:

1. Small staff complement

With such a small staff complement and different locations it is difficult to conduct the daily activities of the school, especially where staff have to be excused to attend training and need to be transported to the training by the school driver. Recruiting staff is a problem due to the location of the Secondary School which is considered by several potential recruits to be too rural. A further problem with recruiting staff is that there are educators who are interested in teaching at the Secondary School but they do not know sign language. At some point in the past the DBE implemented an initiative in terms of which teachers from the Secondary School who did not know sign language were able to complete a three year sign language certificate at the University of the North West. However, most of the teachers who received the training left the employ of the Secondary School shortly thereafter. It was suggested by the principal that where employees receive bursaries of this nature there should be an expectation that they remain in the employ of the Secondary School for a certain period thereafter.

2. Financial constraints

Agriforum recently locked the Secondary School and its learners out of building because the Secondary School was in arrears with their rental.

3. No school nurse

There is no one to administer medication to the learners. This means that additional resources, including the driver and a staff member need to accompany learners who need medication administered to a health facility. The Secondary School submitted that there are weeks when it has to take learners to the health facilities every single day because a number of learners have chronic conditions. There are learners with chronic illnesses so this is very difficult. Further, as the winter months approach the students tend to be sicklier and more vulnerable and there is no nurse to attend to them.

4. No audiologist

For learners that rely on hearing aids, it is necessary for these assistive devices to be regularly checked by an audiologist and that is a position that the Secondary School states that it needs to fill.

5. Hostel staff

It was submitted that the most urgent vacancies at the Secondary School are the hostel staff. The principal submitted that she had made submissions to human resources and to the district in this regard, and indicated that meetings had been held at the provincial level about this issue. In the interim, the teachers have been assisting with the supervision. The teachers who provide this assistance receive a supervision allowance which is 5% of their annual salary. However, the teachers are increasingly dissatisfied with this interim arrangement, because they are at school during the day teaching and then they have to rush to the hostel to supervise and sleep over with the learners. At some point the majority of the teachers decided they did not want to continue providing supervisory services and there was consequently a stage at which the principal only had about six employees willing to perform supervisory duties.

6. Lack of sign language interpreters

The other challenge is that when deaf members of staff attend workshops, there are no interpreters provided by the workshop facilitators. Consequently, the Secondary School has to send their own interpreters to interpret for them so that they can complete the training. This compromises the education of the learners. Similarly, when deaf staff members and learners need to undertake personal administrative tasks and engage the public sector, for example renewing their South Africa Social Security Agency (SASSA) details, the Secondary School needs to provide and interpreter to interpret for them. This is a daily challenge because the learners are at the Secondary School for the whole term.

On a more positive note, the Secondary School submitted that the local municipality¹⁴⁷ have assisted them with respect to safety and have considered the Secondary School's safety policy. However, safety challenges persist because the interim hostel and Secondary School facilities are separate and because neither premises belong to the Secondary School. The Secondary School also submitted that, before the fire in 2015, the local municipality attended at the Secondary School to conduct fire drills with learners. This also happened in 2016 and 2017. However, every year the Secondary School has new learners that require training. The Secondary School also submitted that there are pre-arranged dates for the local municipality to conduct fire drills at the Secondary School's new premises.

It was also submitted that at the new Secondary School structure there are fire extinguishers, smoke detectors, fire blankets and more inclusive safety features (including flashing light emergency systems and bed shakers that will alert the learners of an emergency. Further, there are solar panels to provide electricity if the electricity connection is interrupted. There are also ramps. The principal submitted that the new Secondary School premises has all the required amenities to safely accommodate the learners, including amenities that were previously recommended by the Commission.¹⁴⁸

3.7 NORTH WEST UNIVERSITY

The NW University, Faculty of Education, School of Psycho-social Education, subject group Educational Psychology and Learner Support, assembled a team (Task Team) to assist the Commission in providing input regarding their investigation into the lack of security and safety measures in Special Schools. The Task Team made a number of written and oral submissions. As a general submission the Task Team indicated that the attitudes of relevant role-players towards Special Schools were disappointingly non-committal and generally disclosed a lack of accountability. Where problems do occur, it was submitted that there is a tendency for stakeholders to evade responsibility for solving them and when tragedy strikes they 'play the blame game'.

Other pervasive issues identified by the Task Team in their submission include the following:

1. lack of adequate funding allocated or otherwise available to Special Schools;
2. too many vacant professional and support posts at both the school and district level to fulfil the needs of Special Schools;
3. lack of support from DBSTs for the SBSTs;
4. lack of technical and legal guidance and support provided by the district to principals of Special Schools. Further, principals are not included in all decisions regarding the school despite being on the front line and experiencing the school's challenges first hand;
5. lack of active input and oversight by DoH, DBE and DoJ;
6. lack of guidance and support offered to parents of learners in Special Schools;

¹⁴⁷ Maquassi Hills Local Municipality is a local municipality in Dr Kenneth Kaunda District Municipality, North West Province, South Africa.

¹⁴⁸ The Principal did express some concerns that the safety features had been prematurely installed. Initially stairs were installed that didn't meet the requirements of the fire department but these have since been fixed to meet those standards.

7. lack of willingness of government departments to take action when gaps are identified;
8. tendency of relevant stakeholders to work in silos. Opportunities to enhance communication, co-operation and mutual networking or support are missed. Even between municipalities and the Learners with Special Educative Needs (LSEN) schools within their municipal boundaries there is very little or no co-operation. This situation also prevails amongst governmental departments. Conversations across departments are necessary to facilitate pro-active planning, intervention and problem solving. Conversation and collaboration are necessary to effect change, rather than top-down directives;
9. lack of resources made available to monitor the implementation and enforcement of relevant legislation and policies by principals and staff members of Special Schools;
10. already inadequate, ageing school infrastructure is deteriorating rapidly due to the absence of routine maintenance. Nor is financial aid provided to Special Schools to undertake this necessary work, consequently, schools are compelled to cover these costs out of their internal daily running budgets;
11. LSEN learners do not receive the emotional or physical support they require and tend to be forgotten altogether;
12. educational psychologists and / or counsellors should be made available to Special Schools alongside nurses; and
13. district members must create more posts for support staff (occupational therapists, physiotherapists, speech therapists, learner support specialists etc.). Comprehensive support is urgently needed at the school level.

It was further submitted that the underlying causes of the systematic failure to adhere to the minimum safety and fire standards in Special Schools in the NW province include the following:

14. aged buildings and infrastructure where the electrical supply and water pressure is inadequate;
15. lack of specific maintenance routines (or budgets) for routine upgrades or repairs to electrical, water, and sanitation systems;
16. DPW are not available for maintenance;
17. automatic fire protection systems are needed, even if fire extinguishers are available at the schools or in the hostels the children themselves cannot operate this equipment while the adults who can must prioritise getting the children to safety;
18. water supply and pressure should be suitable to support automatic fire protection devices;
19. absence of clearly stated and displayed posters and signage indicating the evacuation procedure and lack of regular practice drills;
20. floor plans of relevant buildings are not clearly displayed and staff are not trained to respond to emergencies;
21. exhaustion of staff members is evident, particularly where staff are required to undertake both daily teaching and supervision of learners at the hostels in the evenings and on weekends;
22. all staff need to be capable of basic first aid and be fully trained in health and safety policies (as well as the implementation and maintenance of these policies); and
23. all emergency policies and plans implemented in Special Schools must be sustained and monitored.

The Task Team's submissions, in terms of reasonably accommodating learners with disabilities during emergencies, indicate that most Special Schools in the NW province lack even the most basic adaptations for special needs learners, including:

- toilets with handles and grips;
- railings;
- ramps;
- lifts, steps, grips and non-slip mats for baths and showers;
- removal of sand and loose gravel;
- installation of automatic, learner disability adapted alarm and fire detection systems;

- emergency contingency plans practiced through emergency drills; and
- safe learner transport, taxis often charge extra to transport a wheelchair and are not specifically adapted for securing a wheelchair safely.

It was submitted by the Task Team that the NW Department of Education and the relevant local municipalities have played an extremely limited role in addressing these challenges. There was also a suggestion that these stakeholders have been grossly negligent in their conduct towards Special Schools.

3.8 DR RUTH SEGOMOTSI MOMPATI DISTRICT MUNICIPALITY (DISTRICT MUNICIPALITY) - EXECUTIVE MAYOR MS BL MAHLANGU

The District Municipality has five local municipalities namely Lekwa-Teemane Local Municipality, Greater Taung Local Municipality, Kagisano Molopo Local Municipality and Mamusa Local Municipality. As far as Special Schools are concerned, Christiana School for the Deaf for the Blind which is based at Lekwa-Teemane Local Municipality, MM Sebitloane Special School based at Taung Local Municipality, and Temuso Special School based in Kagisano Molopi Local Municipality are located within the District Municipality's jurisdiction.

Oral and written submissions were made on behalf of the District Municipality by Executive Mayor Ms BL Mahlangu and the Municipal Manager, amongst others, on the following topics:

- 1. Underlying causes of the systemic failure to adhere to the minimum safety and fire standards in Special Schools in the NW province include the following:**
 - a. Special Schools lack the necessary infrastructure to mitigate hazards during emergencies;
 - b. non-compliance with national legislation and policy pertaining to planning law and zoning schemes applicable by parties establishing Special Schools;
 - c. non-adherence to the by-laws and / or regulations of the municipalities managing land use management when Special Schools are established;
 - d. those that establish Special Schools do not make the correct decisions during construction, building and renovation or in the purchase of properties; and
 - e. non-compliance with National Building Standards, Regulations and Infrastructure Norms and Standards , Regulations for Safety Measures at Public Schools and Uniform Norms and Standards and the DPW Disability Policy Guidelines.
- 2. It was submitted that the existing conception and implementation of law and policy does serve the safety and security interests of learners with disabilities and provide adequate protection. However there are still challenges, namely:**
 - a. implementation of Part S of the National Building Regulations and Building Standards Act is lacking and those responsible fail children with disabilities who are the intended beneficiaries;
 - b. the regulatory environment can be improved by strengthening accountability mechanisms and ensuring that consequences follow from any failures to implement the laws and regulations accordingly. Stiff fines and imprisonment measures should be used to deter acts and omissions. This will deter government officials and stakeholders from abusing their powers or ignoring applicable laws and regulations; and
 - c. stakeholders establishing the Special Schools should enforce zero-tolerance measures and strict adherence to the implementation of applicable laws.

The District Municipality submitted that there is a collaboration between itself and all relevant departments, including DoH, DSD, DBE and SAPS. The District Municipality also claimed to be monitoring compliance with relevant legislation. It was submitted that the District Municipality had never cut the electricity supply to a Special School in its district. The District Municipality is also the water service and sanitation authority, it claims to send environmental health practitioners to check whether the ablution facilities at Special Schools are in place and comply with the applicable rules and regulations on a quarterly basis.

It was submitted further by the District Municipality that, on request, the fire department visits Special Schools to check environmental health, conduct fire drills and ensure all the necessary equipment is in place in the event of a fire. These checks are discussed in quarterly intergovernmental meetings with the District Municipality. The District Municipality also indicated that in January 2018 it requested all the relevant government departments to present on the status of buildings and renovations at Special Schools.

It was also submitted that the District Municipality had requested an infrastructure 'wish list' from Special Schools in the district (as well as public schools) and that these have been provided. The District Municipality undertook this exercise in response to a request by Impala Platinum Mine who have indicated that they wish to invest in district because it is home to most of the mine's employees. This process is still underway, the mine is yet to provide any assistance.

3.9 NORTH WEST DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT (PROVINCIAL DBE) – MS STEFINAH MAMOTHO SEMASWE, HEAD OF DEPARTMENT

The Provincial Department administers a total of 1529 schools including public ordinary, private and Special Schools. Over and above the National Legislative Framework guiding safety and security at schools, SGBs are expected, in terms of SASA, to develop policies informing priority areas to achieve norms and standards for safe environment.

In the Provincial Department's view the underlying causes of the systemic failure of Special Schools in the NW province to adhere to the minimum safety and fire standards and reasonably accommodate learners with disabilities during emergencies are as follows:

1. the Provincial Department has inadequate financial resources to implement the required safety and security measures;
2. the majority of Special Schools in the province are located in previously disadvantaged communities;
3. the existing conception and implementation of law and policy does not serve the safety and security and safety interests of learners with disabilities;
4. the design of existing infrastructure; and
5. a lack of specialised human resources.

The Provincial Department indicated that its role in addressing these challenges, together with the relevant municipalities, is limited to the provision of basic services as well as emergency evacuation drills at special schools. The Provincial Department also stated that the implementation of safety and security measures in all Special Schools are yet to be implemented and the existing measures are lacking. The Provincial Department indicated that it is working with local municipalities (for example, on the provision of sporting facilities in Special Schools) because the budget for these facilities sits within local municipalities in the form of the Municipal Infrastructure Grant. It was submitted that the Provincial Department's budget cannot accommodate these demands.

The Provincial Department did indicate that it is allocated a budget to procure scholar transport for LSEN that is designed to reasonably accommodate specific disabilities. For example, at Tlamelang School there are Combi's which are adjusted accordingly to accommodate a wheelchair, however, there is not enough transport provided.

The Provincial Department expressed the view in its written submission that the existing regulatory framework can be improved by directing that all newly built or renovated infrastructure for learners with disability must comply with safety and security measures and access for learners with special needs. Further, in the long term, funding should be secured to ensure that all Special Schools in the province operate in a safe and secure environment for learners with disabilities.

The Provincial Department submitted that the renovation and construction of the new school building for the NW Secondary School for the Deaf which was damaged in a fire was “99% near completion”. It was further submitted that the new Secondary School building was designed to accommodate all basic safety and security measures, there are fire detectors in all the school buildings (except in the classrooms), fire extinguishers, fire hydrants, ramps, illumination around the building and bed shakers. The Provincial Department advised that the relevant contractor undertook that the building would be handed over in May 2018. The Department conceded that this was a later date than initially indicated to the Secondary School principal but blamed the delays on unforeseen circumstances, specifically heavy rains which delayed construction.¹⁴⁹ The Provincial Department submitted further that the Secondary School will be used as a benchmark for all other Special Schools in the NW. The Provincial Department also submitted that it has recently completed and handed over MM Sebitloane Special School and Bophelong Special School.

In their oral submissions the Provincial Department indicated that it takes full responsibility for the events that take place in schools in the NW province and it is committed to taking steps to resolve those issues that affect Special Schools. However a number of challenges were also highlighted:

6. the Provincial Department inherited old and non-compliant infrastructure which typically lack sporting facilities;¹⁵⁰
7. there is a lack of sufficient funding to adequately address challenges, one of the reasons for this is historic overspending by the Provincial Department (particularly in respect of the compensation budget). Consequently, existing posts and even new posts cannot be filled so that the Provincial Department can address the over-expenditure that it has already incurred. This over-expenditure was incurred over a number of years, therefore no provision for new posts could be made. Special Schools were affected by this;
8. further, due to the historic over-expenditure of the Provincial Department the NW Provincial Government has placed the Provincial Department under “co-management” in terms of section 18 of the Public Finance Management Act.¹⁵¹ This means certain additional administrative steps need to be taken before a vacant post can be filled. Specifically, the filling of any vacant posts must be done together with the Department of Finance or Treasury with the approval of the Provincial Administration;
9. another systemic failure here is the Provincial Department’s own employees, roles are not always clearly understood and the poor implementation of school safety is often due to a lack of capacity, commitment and assertiveness; and
10. attracting and retaining employees with specialised knowledge, skills and competencies for Special Schools is also a challenge, particularly psychologists, sign language interpreters, therapists, nurses and social workers. The Provincial Department competes with the private sector in filling these posts and often does not have the resources to retain these employees. The Provincial Department has however, engaged with DSD to share social worker resources.

¹⁴⁹ At the time of the report this refurbishment had already taken nearly 3 years to complete.

¹⁵⁰ The Provincial Department representative undertook to make a written submission regarding infrastructure to the Commission but no such submission was received by the Commission.

¹⁵¹ 1 of 1999.

The Provincial Department has however, taken some positive steps to alleviate the plight of Special Schools in the NW namely:

11. Dedicated directorate for learners social support services

One of the processes the Provincial Department has embarked upon in is the realignment of the organisational structure to include a dedicated directorate for learners social support services. This is the directorate that will address issues arising in Special Schools, issues of school safety, issues of learner transport, and issues of nutrition in our schools.

12. Audit

The Provincial Department undertook to conduct a safety and security audit in all Special Schools in the NW. The Provincial Department's legal directorate, together with the internal audit directorate, have been tasked with the role of procuring a professional audit firm to assist the Provincial Department to carry out this task. The Provincial Department has instructed the legal directorate and the internal audit directorate to ensure that the audit reflects the cost implications of rectifying the challenges identified. The Provincial Department intends on tabling the audit report with the executive committee of the NW Provincial Legislature so that at the level of the province, relevant functionaries are aware of the challenges and will produce a plan to alleviate those challenges at that level. The Provincial Department also submitted that it would consider the requirements that apply to CYCCs during the course of the audit.

13. Security

It was submitted that the Provincial Department has employed security personnel to monitor all 32 Special Schools in the NW. Further, the Provincial Department has also installed CCTV cameras in 23 Special Schools, it was undertaken that the remaining 9 Special Schools will be provided with cameras in due course. The Provincial Department also averred that they are performing quarterly monitoring of compliance of security personnel and have provided first aid boxes to all Special Schools. Unfortunately there are still those Special Schools that have not collected their first aid boxes, which are still with head office but the directorate for learners' social support services will ensure that they deliver these. The Provincial Department is also pairing a police officer to each Special School to assist in alleviating safety challenges. The Provincial Department indicated that in the event of allegations of sexual abuse of learners the Provincial Department would immediately relieve the accused of their duties pending the outcome of an investigation.

14. Accountability

The Provincial Department also indicated that it would be implementing 'consequence management' in respect of those found guilty of non-compliance and/or non-implementation.

3.10 DEPARTMENT OF BASIC EDUCATION (DR MOSES THOMAS SIMELANE, DIRECTOR INCLUSIVE EDUCATION)

DBE submitted that addressing the issues that affect special needs education requires an integrated approach and requires the Department to work in close collaboration with sister departments such as the DSD, DoH, and even the Department of Transport. It is also necessary for the DBE to consider the inputs and expertise from other non-governmental institutions such as civil society organisations active within this area.

DBE submitted that safety and security measures in Special Schools may not be appropriate or compliant with the principle of universal design which regulates the accessibility infrastructure, including the accessibility of transport. Therefore, although there is a legislative and policy framework this framework is too generic for Special Schools and demonstrates a bias towards "ordinary" schools. So DBE has to ensure there is alignment of the framework to the needs.

Having said this, DBE also submitted that there is significant law and policy, but the main problem is a lack of implementation and lack of alignment of mainstream programmes and developments to Special Schools. There is a need for capacity-building around this issue. DBE submitted that a possible gap exists because the Department have not actually conducted adequate capacity building of all end users, including teachers and hostel staff.

DBE submitted that the implementation of the Draft Guidelines for Resourcing Inclusive Education (Draft Guidelines) was imminent and indicated that the Draft Guidelines were approved by the heads of education committee as well as the Council of Education Ministers in September 2017. In January 2018 the Council of Education Ministers approved the publication of the Draft Guidelines for public comment.¹⁵² The Draft Guidelines contain provisions for resourcing Special Schools in terms of non-personnel and non-capital provisioning which will include assistive devices.

The main challenge that DBE is seeking to address through the Draft Guidelines are the glaring disparities in terms of how inclusive education is resourced across different provinces. Rural provinces are struggling to implement the inclusive education policy. The Draft Guidelines will assist all the provinces to resource effectively. DBE's representative submitted that he was confident that the Draft Guidelines would go a long way to address most of the challenges. DBE costed the implementation of the Draft Guidelines last year in preparation of presenting a bid to National Treasury to fund their implementation. A bid was submitted to National Treasury in August but was not favourably considered by Treasury which indicated that DBE has further work to do to strengthen them. However, a bid will be resubmitted in 2018.

The Draft Guidelines have three dimensions:

- they seek to address issues of funding across the sector to plug the gaps and the glaring disparities;
- they seek a balanced provision of human resources, including how hostels need to be resourced; and
- looking at issues of infrastructure, issues of accessibility and how the education sector can ensure that all buildings comply with the universal design principle and the scholar transport policy is responsive to issues of transporting learners with disabilities.

DBE also submitted that it is in the process of amending SASA because certain legislative provisions are not compliant with applicable international instruments. Another issue is the myriad of different laws and policies regulating this area. Consequently issues of duplication arise that must be addressed so that limited resources can be used effectively.

During the course of their submissions DBE requested that the Commission note the developments which have taken place since the release of its investigative report into the fire which occurred at the North West School for the Deaf. Namely, a number of safety and security features have been installed, including, an emergency evacuation assembly point, firefighting equipment, automatic backup power, vibrating beds, a special frequency emergency alert in place of an alarm, green and red lights floor mounted to inform of emergency and direction of movement, smoke detection, non-toxic finishes, reception for visitors, separation between boys and girls hostels with access control as well as hostels placed at a clear distance from kitchen areas.

Further, at Hoërskool Klerksdorp it was submitted that the measures implemented by the DBE since the Commission's report include non-combustible beds, fencing and residence layout which comply with fire regulations, ramps for level differences, hydrants at staircases, fire escapes as well as access control. In terms of issues of general safety, full 24-hour security has been provided and safety glass doors, burglar proofing, and door locks have been installed.

¹⁵² The Guidelines were published for comment on 20 April 2018. Available at: https://www.gov.za/sites/default/files/41581_gon434.pdf.

DBE also asked that it be put on record that it has made the *implementation of the inclusive education policy, including the improvement of quality education for LSEN, a national priority for the sector*. However, it was also conceded that those developments were inherently reactive and conceded that DBE is required to take preventative measures to proactively anticipate safety and security risks to learners and teachers in Special Schools.

3.11 EQUAL EDUCATION AND CENTRE FOR CHILD LAW

In its written submission the Centre for Child Law (CCL) and the Equal Education Law Centre (EELC) submitted that, through their respective work in attempting to ensure that children with disabilities can access their constitutional right to a basic education, they have become aware of the dire conditions that many children face when residing in Special School hostels (including in the North West province). The CCL and EELC's experience with respect to the situation in Special School hostels is not specific to the NW province, the submissions reflect broader, systemic issues occurring in various provinces:

1. Shortages of skilled hostel staff

As a general proposition hostels in special schools are direly understaffed, resulting in the neglect of learners, and exposing them to risks which could otherwise be avoided. Two schools in the NW province reported that they house approximately 100 learners with multiple disabilities but have only eight staff members assigned to look after those learners per shift. As a result, only two staff members are assigned to a dormitory of approximately twenty-five children who are responsible for bathing the children, assisting them with toileting and brushing their teeth, getting them ready for school in the morning, serving (and assisting them to eat) breakfast, lunch and dinner, preparing and distributing snacks, washing and ironing their laundry, tidying and mopping the hostels in the evenings, getting them ready for bed and assisting them during the night.

Consequently, hostel staff are not able to provide adequate supervision or individualised attention to each learner, the already vulnerable children are susceptible to physical injury (particularly when washing)¹⁵³ and the creation of feelings of neglect, loneliness, unworthiness and homesickness. The EELC was also made aware of understaffing at a school hostel accommodating special needs learners in Kwa-Zulu Natal in 2016 and 2017, hostel staff reported incidents of theft, severe bullying, and sexual abuse amongst learners residing in the hostel, which could be attributed to inadequate supervision due to understaffing. It is apparent that the carers are overburdened and therefore unable to adequately and appropriately care for the learners.

2. No child care qualifications required for non-professional, non-educator staff who care for children

Hostel staff are tasked with the direct care of the learners, this requires a degree of skill or training to ensure learners are properly cared for. However, hostel staff are not required to have any specific qualifications. Further, in some instances hostel staff do not receive regular, up-to-date training concerning the treatment of special needs learners and the administering of medication. As such, hostel staff are not necessarily capacitated to adequately administer medication, nor are they properly trained to attend to medical emergencies that may occur amongst learners. Often, there is no first aid kit in a hostel, and hostel staff are left with very little support to attend to even minor injuries or ailments. Where a nurse is not on staff learners with serious conditions such as epilepsy are vulnerable to medical emergencies without adequate medical support. There is also a danger that medication will not be correctly dispensed.

¹⁵³ It was submitted that one North West school had disclosed to the CCL that the risk outlined above had in fact resulted in a fatality. In 2006, a learner entered the bathroom, climbed into the bath and turned on the hot water tap, allowing the hot water to spill onto her legs. Having no sensation in her legs, she did not know how hot the water was and was not able to alert the general assistants, who were in the bathroom with another learner, to her presence or the danger she was in. The assistants found her minutes later, after she had already sustained second-degree burns. Although she was hospitalised and operated on several times, she passed away, apparently as a result of infection.

3. Infrastructure and maintenance

Many hostel facilities are completely inadequate for the housing of learners with disabilities. Often, the school hostel is designed for learners without disabilities in mind. As a result, there are no railings or ramps to assist learners with physical disabilities, while bathroom facilities, eating facilities, and other rooms in the hostel are not designed to support special needs learners. Many hostels are also extremely dilapidated and require maintenance. For example, the CCL and EELC had observed the following conditions in Special Schools across the country during the course of their work:

- a. missing or broken hostel doors;
- b. broken bedroom locks;
- c. severely dilapidated baths and showers;
- d. lack of hot water available for hostel learners;
- e. no running water in the showers;
- f. unhygienic toilets that did not have seats or rails to assist the learners in using them;
- g. lack of perimeter fencing resulting in multiple break-ins;
- h. no electricity; and
- i. lack of suitable emergency equipment.

1. Corporal punishment and abuse

The CCL is aware that corporal punishment continues to be used in the Special School hostel environment. While much is needed to combat the abuse of learners in Special School hostels, as a minimum, the vetting of staff would go some way to resolving the issue. Such vetting should include checks to ensure that the potential staff member does not have a criminal record.

2. Overcrowding in hostel rooms

In some instances the EELC found that learners are residing in overcrowded conditions in hostel rooms. This situation may exacerbate bullying and conflict among learners, particularly where learners differ in ages and in physical and mental disability.

3. Lack of scholar transport to and from the hostel

Some learners with severe physical disabilities are compelled to walk from the school hostel to school and back on numerous occasions, as the school bus is either not operational, has no bus driver to operate the bus, or the bus collects learners living in the surrounding areas and cannot also manage the collection of hostel learners. Attorneys from the EELC have personally witnessed a learner carrying a younger learner with a severe disability over their shoulder to school as the latter was not able to walk the distance without assistance.

4. Lack of safe, educational activities and facilities in hostels

As hostel learners are often far from home and spend a large portion of their free time at the hostel, it is crucial that hostel facilities provide some form of safe, stimulating recreation to assist learners in socialising with each other, and engaging in extra mural activities that they would have been able to do if at home. Often, there are no facilities to provide safe, educational entertainment for learners over the weekends.

Further, because learners cannot be properly supervised they are kept inside the hostel as often as possible. If they are permitted to spend time outside, they only have the use of the hostel grounds at their disposal. These grounds comprise mostly of gravel / tarred areas, are not properly enclosed, and have building material on site. It was submitted that learners

with disabilities complained of boredom and a lack of stimulation after school and on weekends. Despite this, there were no programmes in place to guarantee adequate stimulation and there were no games for the children to play. Carers were exhausted over weekends, leaving little motivation to assist the children with recreational activities.

5. Lack of emergency procedures

Many Special Schools do not have emergency procedures in place. CCL submitted that one of the Special Schools it engaged with admitted that they did not have a formal emergency procedure in place because there was no legal obligation on them to do so and they did not have the requisite expertise to draft such a procedure (indicating the need for government to provide some form of guidance).

6. Failed attempts to engage with State officials

EELC has repeatedly made attempts to raise awareness of about the conditions at Special School hostels at the provincial level and the national level with little success.¹⁵⁴ Officials at both provincial and national level are often unresponsive and little progress is made, even over long periods of time.



¹⁵⁴ In particular, the EELC has written to various KwaZulu Natal officials working at different levels of the KwaZulu Natal Department of Education, and has even escalated the matter to the Minister of Basic Education, with little success. The challenges the EELC has faced include severely delayed or no response to letters written to officials, limited access to task team reports and recommendations, which have been scant and vague, with no evidence of follow-ups, and severe difficulties in accessing the provincial departments plans to address the problems facing the hostel. In addition, five investigations have been undertaken by the KZN DBE since 2011, the most recent being October 2015. However, to date, the conditions at the hostel remain substantially unchanged. The EELC has been informed that, in response to a recent letter, a new task- team is currently in the process of interviewing school and hostel staff.

4. FINDINGS.

This investigation concerns basic safety in Special Schools in the NW province and whether, as a general proposition, there are factors present which may cause harm to learners and educators particularly in residential hostels. The Hearing panel finds as follows:

4.1 FACTUAL FINDINGS:

- a. The current state of much Special School infrastructure, particularly hostels, in the NW province poses a direct and imminent threat to the health and safety of learners with disabilities. Many children with disabilities are not safe in Special School hostels;
- b. The inspection of Kutlwanong Primary School conducted by the Commission prior to the formal opening of the Hearing revealed distressing, dangerous and poor conditions and the submissions suggest that similar conditions obtain at other Special Schools in the NW province;
- c. Many Special Schools in the NW province are characterised by significant infrastructural inadequacies, including: unreliable electricity provision; unreliable water supply; inaccessible ablution facilities; lack of perimeter fencing; and a general and pronounced lack of access to assistive devices;
- d. Previous incidents resulting in the deaths of children with disabilities in Special Schools hostels in the NW province evidence a general awareness of the unsafe conditions and the need to upgrade infrastructure and install appropriate assistive emergency devices and equipment;
- e. The current applicable legal framework is characterised by an over-reliance on non-binding guidelines or policies, many of which include a budgetary qualification and / or require only 'progressive' compliance which is inappropriate in the context of imminent harm and an immediately realisable right to education;
- f. Special School hostels should be regarded as 'School infrastructure' for the purposes of the Infrastructure Norms and Standards. Nevertheless, these Infrastructure Norms and Standards are not nuanced enough to ensure the safety and security of learners with disabilities in residential Special Schools in the North West Province;
- g. The lack of explicit legally binding norms and standards that are intended to ensure minimum safety standards in Special School hostels constitutes a concerning legal / regulatory gap;
- h. No safety norms and standards are in place to establish the minimum qualifications and experience of Special School hostel and support staff, nor is there adequate staff development in place;
- i. Special School safety policies and procedures are either non-existent or not well-known by staff and seldom by learners, nor are they adequately drilled or practiced.
- j. Provincial and district department officials and SGBs are not held accountable for failing to ensure safety compliance in Special Schools;
- k. There are no action or performance plans containing adequate indicators which relate to Special School safety and security;
- l. There is inadequate monitoring of Special Schools in the North West province;

- m. Infrastructure compliance is not monitored by DBE;
- n. Schools lack the funds to implement necessary infrastructure adaptations and they are often overwhelmed and under-resourced and safety measures are therefore neglected.
- o. The failure to implement basic emergency (including fire) safety measures in Special Schools is unjustifiable in all circumstances;
- p. Special School hostels are excluded from the care and protection arrangements contemplated by the Children's Act. If these hostels were brought under either that Act or similar provisions, then there would be a legal framework that would ensure regular monitoring and vetting of employees took place;
- q. There is inadequate provision in our policy framework relating to post-provisioning for Special Schools and residential Special Schools in particular. In these circumstances there is a need for round the clock supervision of learners with a higher level of support need. This would require staff to have a higher level of training and specialisation. There are no norms and standards which relate to post-provisioning of Special Schools hostel staff;
- r. The practice of teachers also serving as hostel parents should be discouraged. This creates a continuum of school and care that is inappropriate and impairs learners' dignity. In addition, learners in special schools have higher levels of support need which a teacher will not necessarily have the skills to address;
- s. White Paper 6 has proved ineffectual and has failed to result in substantive improvements, most likely due to the lack of budgeting and costing as well as political will. In the absence of proper resourcing the State cannot be perceived as meeting its Constitutional obligations to vulnerable learners in Special Schools;
- t. The Guidelines for Resourcing Inclusive Education have only been adopted as guidelines and not as norms and standards. Therefore, they are not binding, and the National Treasury would not be compelled to provide a budget for their implementation. Nor do they make sufficient or detailed provision for special school hostel staff, and they don't take into account any differences that may be needed depending on the different levels of care that learners might have;
- u. The submissions demonstrate that the Provincial Department is capable of establishing Special Schools with compliant infrastructure and equipment to alert children with disabilities to emergencies. It is however disturbing that this only followed an incident in which learners died. It should not be only in reaction to a fatal accident that funds allocated in annual budgets are utilised for the purpose budgeted for. This suggests that, due to a lack of political will, insufficient effort is being made to better the conditions at Special Schools which relevant stakeholders are well aware of;
- v. The failure to implement safety and security measures necessary to ensure the safety of learners in schools and hostels has also rendered learners vulnerable to physical and sexual abuse. The protective measures contemplated in the Children's Act do not apply to special schools hostel facilities as they are not categorised as "child and youth centres" for the purposes of that Act. The DBE has not developed specific legislation, guidelines, or post provisioning norms to address this obvious regulatory gap. This is a shocking oversight.

4.2 LEGAL IMPLICATIONS OF THE FACTUAL FINDINGS:

- a. As noted by the Court in *Equal Education v Minister of Basic Education*, "[t]here is an incongruence manifested by the acceptance on the one hand of the reality of the substandard public school infrastructure and the inherent dangers created thereby on the other hand, not offering anything. This open-ended approach is unreasonable and thus unacceptable";¹⁵⁵
- b. The right to equality in terms of section 9 of the Constitution implies a corresponding duty on the State to ensure substantive equality is achieved. In the context of the right to education, this includes accessibility, quality of education, and quality of the learning environment, infrastructure, and materials. At a minimum, the safety and security guarantees and measures implemented at public schools should be put in place in Special Schools, but

¹⁵⁵ Para 198.

- should be designed to meet the specific needs of the learners. This duty cannot be interpreted as imposing a disproportionate or undue burden on the State. They also cannot be as understood as suggesting that a regression in the standard of provision of access to safety and security is acceptable;
- c. Section 9(2) and (3) of the Constitution guarantees the right to equal enjoyment of all rights and freedoms and place a positive duty on the state not to unfairly discriminate against anyone. The Constitution also prohibits discrimination on the listed ground of disability. This prohibition requires differentiation between different disabilities and the reasonable accommodation of specific impairments;
 - d. Sufficient provision for adequate infrastructure and safety and security measures in Special Schools in the NW province has not been made. Nor is reasonable accommodation provided or budgeted for. The failure to reasonably accommodate learners with disabilities in the context of an emergency amounts to unfair discrimination in terms of PEPUDA;
 - e. Potential harm to children with disabilities in Special Schools in the NW province is reasonably foreseeable given the conditions of the hostel buildings and lack of appropriate safety and security mechanisms. This constitutes a wrongful and negligent breach of a variety of duties of care toward learners with disabilities, inclusive of constitutional duties to protect children with disabilities;
 - f. The systemic practice or policy of failing to take steps to equip Special Schools in NW province with safe and adequate infrastructure, and allowing the lack of adequate safety to persist should be understood as a breach of the right to dignity in terms of section 10 of the Constitution to the extent that it compromises the dignified existence of those children;
 - g. The right to basic education is correctly understood to include the provision of adequate and safe infrastructure at public schools for learners. It follows that the principle of equality requires that in the context of Special Schools, the provision of adequate and safe infrastructure includes infrastructure designed and / or adapted to the specific needs of the learners. A failure to do so compromises right to basic education and does not serve the best interests of the children in question as required by section 28(2) of the Constitution;
 - h. The right to a basic education provided for in terms of section 29(1)(a) of the Constitution is an unqualified right, it is *not* subject to progressive realisation within available resources and is immediately realisable. The safety and security of learners is an essential precondition to vindicating the right to a basic education. However, the inadequate safety and security measures falls far short of this requirement, with the result that children who attend these schools do not receive a basic education of reasonable quality.
 - i. The provision of safe, accessible, and inclusive hostel facilities at residential Special Schools is necessary to vindicate the right to an environment that is not harmful to one's health or well-being in terms of section 24(a) of the Constitution;
 - j. The Hearing panel find that children not being safe is a breach of Constitutional obligations, we also find the fact that there are no laws in place is a breach of the various role-players' legal obligations.

The conceded and observed failure of DBE and the Provincial Department of Education and Sports Development to ensure Special Schools comply with the minimum building, safety and fire standards required by policy, law, rule, and practice infringes the learners' right to a safe environment and impairs their dignity. The acts and omissions of the DBE and the Provincial DBE constitute a failure to reasonably accommodate the learners' disability for the purposes of securing their safety and security, which in terms of Section 9(c) of PEPUDA constitutes a rebuttable presumption of unfair discrimination.¹⁵⁶ The mere provision of a school for learners with disabilities is not a measure of reasonable accommodation if loss of life is a reasonably foreseeable possibility at such a school.

¹⁵⁶ *MEC for Education: KwaZulu-Natal and Others v Pillay* CCT 51/06 (2007) ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at paragraph 72 and 77.

The DBE and other government institutions have developed, and continue to develop, legislative and policy imperatives for the State to take measures to develop and implement programmes, policies and guidelines in order to promote equality and reasonably accommodate people with disabilities. These legislative and policy imperatives for reasonable accommodation for learners with disabilities are not being fully implemented. Systemic non-compliance with the minimum building, safety and fire standards for the residential facilities at NW Special Schools is indicative of this failure. Reasonable accommodation for learners at Special Schools in the North West is not adequately implemented.

The DBE is not compliant with the provisions of the CRPD with respect to Special Schools. DBE does not appear to have prioritised equitable access to education for children with disabilities. Accountability is lacking at the national level, provincial, district and individual school level.

The Panel therefore finds that, based on their observations and the submissions received during the Hearing, that the rights contained in section 9, 10, 11, 24, 28 and 29 of the Constitution of children with disabilities attending residential Special Schools in NW province are being infringed.

4.3 DUTY TO VINDICATE INFRINGED RIGHTS

The duty to protect human rights rests significantly with the State through its policies, officials and institutions. In terms of Schedule 4 of the Constitution, “education at all levels... is a concurrent provincial and national legislative competence. This concurrent competence operates as described by the Constitutional Court:

“Education is a functional area of concurrent national and provincial legislative competence. Parliament may legislate on education and a province too. In turn, the Premier and MECs in a province exercise authority by implementing provincial legislation.”¹⁵⁷

In respect of the governance of public schools in terms of SASA the Constitutional Court held as follows:

“[P]ublic schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school’.”¹⁵⁸

Further, the Constitutional Court observed in *Head of Department, Department of Education, Free State Province v Welkom High School & others*¹⁵⁹ that SASA:

“makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HoD and MEC, and the Minister.”

It follows that Special Schools in the NW province are jointly administered by the DBE and the Provincial DBE in the NW province. Section 34(1) of SASA obliges the State to fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision. Section 60 of SASA, which holds the State liable for any damage or loss caused as a result of any act or omission in connection with any educational activity at a public school, forms the basis of the State’s liability for negligence.

¹⁵⁷ *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; 2016 (4) SA 546 (CC) at para 26

¹⁵⁸ *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC) paras 55-56.

¹⁵⁹ [2013] ZACC 25; 2014 (2) SA 228(CC) paras 36-37

4.3.1 DBE ACTING THROUGH THE MINISTER OF BASIC EDUCATION (MINISTER)

The Constitution places positive obligations on the State “to protect, promote and fulfil” fundamental rights. The National Government bears the overall responsibility of ensuring the state’s compliance with the obligation in section 29(1)(a). The Minister of bear’s constitutional and statutory responsibility for the provision of basic education, as well as the governing, administration and funding of public schools. These duties arise from the Constitution, SASA and the National Education Policy Act¹⁶⁰ (‘NEPA’).¹⁶¹

The Minister, whose primary role is to set uniform norms and standards for public schools, bears the responsibility for determining school education policies and for administering a budget sanctioned by Parliament.¹⁶² She also holds ultimate responsibility for ensuring Constitutional and statutory compliance. In terms of section 61(a) of SASA the Minister “may make regulations...to provide for safety measures at public and independent schools”. The Minister of Education also determines national policy in respect of educator post provisioning, in terms of the National Education Policy Act.¹⁶³ The Director-General of Basic Education is responsible for the implementation of measures directed at ensuring Constitutional and statutory compliance.

These duties are summarised by the Centre for Child Law below:

“National government, acting through the Minister of Basic Education and the Department of Basic Education (DBE), is responsible for:

- a. providing leadership to the education sector, which includes developing strategies to address the backlogs in school infrastructure;
- b. developing national norms and standards, frameworks and national policies related to the nature, planning, funding, provision, maintenance and use of school infrastructure;
- c. building the capacity of Provincial Education Departments (PEDs) to fulfil their responsibilities with regard to the planning, provision and the like, of school infrastructure;
- d. managing and exercising oversight of the use of any conditional grants for funding school infrastructure in accordance with the requirements of the annual Division of Revenue Act;
- e. monitoring PEDs’ compliance with the abovementioned school infrastructure norms and standards, frameworks and national policies; and
- f. if necessary, intervening in provinces when they fail to fulfil an executive obligation, such as failure to implement a national policy or national norms and standards related to school infrastructure.”¹⁶⁴

4.3.2 MEMBER OF THE EXECUTIVE COUNCIL IN THE NORTH WEST DEPARTMENT OF EDUCATION (THE MEC) AND THE HEAD OF THE PROVINCIAL DEPARTMENT OF EDUCATION (HOD)

The provincial government acts through the MEC for Education who has the obligation to establish and provide public schools and, together with the HoD, exercises executive control over public schools through principals.¹⁶⁵ The HoD in each

¹⁶⁰ 27 of 1996.

¹⁶¹ In his budget speech on 25 February 2015, then Finance Minister Mr Nhlanhla Nene indicated that the school infrastructure backlogs programme was allocated R7.4 billion for the replacement of over 500 unsafe or poorly constructed schools, as well as to address water, sanitation and electricity needs. This education infrastructure grant of R29.6 billion over the medium term was intended to enable all schools to meet the minimum norms and standards for school infrastructure by 2016. Yet in 2018 Special Schools in the NW province (and likely across South Africa) still lack basic infrastructure.

¹⁶² See *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC) paras 55-56.

¹⁶³ No. 27 of 1996.

¹⁶⁴ Carmen Abdoll, ‘Budgets and Bricks’, Centre for Child Law, University of Pretoria (2016). Available at: https://data.vulekamali.gov.za/dataset/79eda387-9d15-4e67-bfc6-f77666f4051d/resource/021663b5-9241-43ab-8a0f-4dc320f73c35/download/budgets_bricks_final.pdf

¹⁶⁵ See *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC) paras 55-56.

province is responsible for carrying out school governance on a provincial level.¹⁶⁶ The HoD is tasked with the implementation of measures for the realisation of the right to basic education in the Province. The MEC is responsible for delivery in the Province and has a constitutional obligation to ensure access to education.

In terms of section 12(1) of SASA the MEC “must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature”. Section 12(2) asserts that the “provision of public schools referred to subsection (1) may include the provision of hostels for the residential accommodation of learners.” Further, in terms of Section 27(1) of the North West Schools Act¹⁶⁷ the MEC in consultation with the Head of Department may make regulations which are not inconsistent with any law, as to –

- a. “any matter which shall or may be prescribed by regulation under this Act;
- b. any matter which the Member of the Executive Council may deem necessary or expedient to prescribe in order to achieve the objectives of this Act.”

It follows from section 27(1) of the North West Schools Act that the MEC and the HoD have the power to enact regulations in respect of safety and security in Special School hostels. This was confirmed by the SCA in *MEC: Department of Education North West Province and Another v FEDSAS*.¹⁶⁸ The SCA held that:

“The MEC is vested with regulation-making powers. This is clear from ss 12(1) and 12(2) of SASA. The MEC is empowered in terms of s 27(1)(b) of the North West Schools Act to make regulations deemed necessary or expedient in order to achieve the objects of the North West Schools Act. The right to education must include the provision of necessary facilities which includes hostels.”¹⁶⁹

The SCA went on to locate this power within the broader Constitutional context:

“The authority to promulgate the regulations is a necessary and ancillary power to the constitutional and legislative duty to provide basic education. This must be understood within the broader constitutional scheme of cooperative governance (ss 40 and 41 of the Constitution) that enjoins all spheres of government to adhere to the principles of unity, indivisibility and coherence in inter-spherical government relations as well as the fostering of friendly relations assistance and support. This must also be seen in the context of concurrent legislative competence where the MEC is enjoined to make basic education accessible to everyone. Thus the MEC’s power to make regulations is also derived from his statutory power to arrange for the provision of education, and in many instances, this cannot be done without providing a hostel. Once the hostel is provided, the MEC must make regulations pertaining to that hostel.”¹⁷⁰ (Emphasis added).

Further, the educator post establishment in each province is determined by the MEC, subject to national norms prescribed for the provisioning of posts.¹⁷¹

¹⁶⁶ Ibid.

¹⁶⁷ NO. 3 OF 1998.

¹⁶⁸ 021/2016) [2016] ZASCA 192.

¹⁶⁹ Para 22.

¹⁷⁰ Para 23.

¹⁷¹ Employment of Educators Act, No. 76 of 1998, section 5(1). Available at: <https://www.elrc.org.za/sites/default/files/documents/sa%20schools%20act.pdf> at page 44.

As summarised by the Centre for Child Law:

“Provincial governments, acting through their respective MECs for Education and PEDs, are responsible for:

- c. analysing the demand for and planning the provision of school infrastructure;**
- d. representing the education sector in the provincial budget processes and making credible bids for budgets;**
- e. funding the provision of school infrastructure;**
- f. managing the building, refurbishment and maintenance of school infrastructure, which includes maintaining a comprehensive asset register of school infrastructure;**
- g. managing the spending of conditional grants from national government for funding the provision of school infrastructure in accordance with the requirements of the annual Division of Revenue Act; and**
- h. monitoring the use of school infrastructure by schools; and g. reporting to the DBE on specified matters related to school infrastructure.”¹⁷²**

4.3.3 SCHOOL GOVERNING BODY (SGB)

The SGB in each school is responsible for the everyday management of the school through, inter alia, the development and implementation of school policies. This includes policies that are designed to ensure the safety and security of learners.¹⁷³ Section 20(1)(g) of SASA identifies one of the function of governing bodies, subject to the Act, as the power to administer and control the school’s property and buildings and grounds occupied by the school, including school hostels.¹⁷⁴ As explained further by Prinsloo:

“[t]his entails, inter alia, keeping school buildings in good repair, keeping school grounds free of dangerous objects and maintaining equipment in good working order (e.g. playground equipment and fire hydrants). Section 21(1)(a) further provides that school governing bodies may be allocated the function of maintaining and improving the school’s property, as well as the buildings and grounds occupied by the school. Failure to control and maintain these facilities so as to keep them safe for use by learners and educators could lead to liability.”¹⁷⁵

Section 16 of SASA stipulates that the SGB of a public school stands in a position of trust towards the school to the extent that it is vested with its governance. SGB’s have a crucial role to play in creating a safe school environment and “a major responsibility to ensure that the learners’ right to a safe school environment is realised.”¹⁷⁶

4.3.4 SCHOOLS AND EDUCATORS

Section 15 of SASA stipulates that every public school is a juristic person with legal capacity to perform its functions. Section 16 of SASA stipulates that the professional management of a public school must be undertaken by its principal. A school is given temporary custody of a child by the child’s parents for the purposes of receiving an education (in the case of many of the Special Schools in the NW province, this education is provided within a residential school environment). In the

¹⁷² Carmen Abdoll, ‘Budgets and Bricks’, Centre for Child Law, University of Pretoria (2016). Available at: https://data.vulekamali.gov.za/dataset/79eda387-9d15-4e67-bfc6-f77666f4051d/resource/021663b5-9241-43ab-8a0f-4dc320f73c35/download/budgets__bricks_final.pdf

¹⁷³ I.J. Prinsloo ‘How safe are South African schools?’ South African Journal of Education (2005) Vol 25(1) 5–10, at page 9. Available at: <https://www.ajol.info/index.php/saje/article/view/24963/20679>.

¹⁷⁴ As long as the exercise of this power does not in any manner interfere with or otherwise hamper the implementation of a decision made by the MEC in terms of any law or policy.

¹⁷⁵ I.J. Prinsloo ‘How safe are South African schools?’ South African Journal of Education (2005) Vol 25(1) 5–10, at page 9. Available at: <https://www.ajol.info/index.php/saje/article/view/24963/20679>.

¹⁷⁶ Ibid.

course of providing that education, schools also have the duty to protect pupils from harm, maltreatment, neglect, abuse or degradation whilst they are under the supervision of the school. The level of protection for which a school is responsible includes basic protections, to comply with regulatory standards, and to put in controls occasioned by special needs and or particular risks that school children within its environment and control may be subjected to.

Public schools have an obligation to protect learners in their care. The type and level of protection is determined by the context of the education environment provided by the school. As emphasised by Prinsloo:

“South African educators have an important duty towards the safety and the protection of learners, not only in terms of the Constitution and other legislation, but also in terms of their in loco parentis status (i.e. the educator “acting as parent”). All these duties include responsibilities for the physical and psychological well-being of the learner. The in loco parentis status of educators furthermore forces schools to foresee the potential dangers to which learners may be exposed at schools and to act pro-actively by taking steps in the form of safety measures or policy to protect learners from harm.”¹⁷⁷



¹⁷⁷ I.J. Prinsloo 'How safe are South African schools?' South African Journal of Education (2005) Vol 25(1) 5–10, at page 6. Available at: <https://www.ajol.info/index.php/saje/article/view/24963/20679>.

5. RECOMMENDATIONS.

The Commission's recommendations attempt to address the Findings set out in the previous section. Given the nature of the current legal framework and the duties and obligations of the relevant stakeholders, some of the recommendations will have a national impact that exceed the boundaries of the NW province. Given that many of the issues identified during the provincial hearing are systemic and based on submissions that indicate that similar issues are prevalent in Special Schools across the country the Commission regards this as an appropriate response in light of the mandate of the Commission.

In terms of Section 13(1)(a)(i) of the SAHRC Act, the Commission is "entitled to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution." All parties to whom recommendations have been addressed are required to provide a detailed written report to the Commission in six months, and again in 12 months, from the date of release of the final report. Those detailed written reports must address all measures taken to implement the recommendations contained herein.

In addition, as required by section 18(4) of the SAHRC Act, the executive authority of all relevant national and provincial departments concerned must, within 60 days of the release of the final report, provide a written response to the Commission indicating the intention to take any steps to give effect to the recommendations.

5.1 DEPARTMENT OF BASIC EDUCATION

1. DBE, together with the Provincial DBE, must make provision for temporary emergency mechanisms at Special Schools in the North West province pending the provision of a permanent solution so that the immediate threat to learners in Special Schools is eliminated. These temporary measures should include:

- ensuring accessible entrance and exit routes for emergency personnel and vehicles to access all Special Schools;
- the provision of basic fire extinguishing equipment, including water tanks, to Special Schools ;
- necessary training being imparted to the staff and other officials at Special Schools in fire prevention, to use the fire extinguishing equipment, initiate emergency evacuations and protect their students in the event of fire and other emergencies by the local Fire and Emergency Services Department;
- the implementation of quarterly mock emergency drills, the dates and details of such drills must be recorded by the school principal;
- immediately undertake certain basic renovations in existing school hostel buildings, including: installing ramps and handles; increasing lighting in and around hostels; provide additional exit doors and broaden existing entrance and exit doors;
- the provision of emergency lighting and generators;
- ensure that all 32 Special Schools in the NW province have fully stocked first aid boxes;
- prioritise the filling of outstanding empty posts to avoid overworking current staff at Special Schools in the NW

province;

- sensitise districts to the unique needs of Special Schools and insist on rigorous and routine monitoring and oversight;
- establish whether the SGBs of all Special Schools in the NW province are compliant with section 24 of SASA and are properly constituted of members that meet the requirements of that Act;
- ensure that any persons who have frequent contact with learners with disabilities residing in residential hostels in Special Schools (including medical staff, security guards, and drivers) are checked against the registers in the Children's Act and the Sexual Offences Act, as required by law. This includes all current staff members and not merely incoming staff members.
- Evidence of compliance should be provided to the Commission.

(TIMELINE: 3 MONTHS)

2. DBE must produce a document addressing the Commission on:

- what past steps it has taken that demonstrate its commitment to an inclusive education system and reasonable accommodation specifically;
- what structural changes will be made in future to vindicate section 24 of the CRPD by ensuring that people with disabilities are not excluded from the general education system on the basis of disability;
- why existing residential Special Schools in the North West do not constitute the 'segregation' and 'institutionalisation' of children with disabilities contemplated in General Comment 4;
- its progress in meeting its 2015 – 2019 targets in respect of the policy directives set out in the Implementation Matrix in the WPRPD in terms of which it is named as a lead agency; and
- what steps it has taken to protect children with disabilities in Special Schools from violence and abuse (specifically sexual violence and abuse) at a national level.

(TIMELINE: 3 MONTHS)

3. DBE must ensure that comprehensive, co-ordinated, equitable and transparent budgets for inclusive education and Special Schools at national and provincial level are publically available each financial year. Thin budgets, with little differentiated information about the wide range and combinations of disabilities catered for in Special Schools in South Africa means that these budgets are difficult to analyse and contributes to a lack of transparency.

(TIMELINE: 12 MONTHS)

4. There must be explicit recorded departmental consideration of ring-fenced budgeting for Special Schools. Special Schools are a scarce resource and are not evenly distributed across the country and this constitutes a compelling rationale for treating it differently at the level of National Treasury as well as the introduction of norms and standards to regulate post provisioning in Special School hostels.

(TIMELINE: 12 MONTHS)

5. DBE must ensure the implementation of the Infrastructure Norms and Standards in Special Schools in the NW province and deliver on its obligations in respect thereof, which should be properly understood as applying to residential hostel buildings in Special Schools. If necessary, DBE should take the lead in establishing a task team including relevant state stakeholders for this purpose.

(TIMELINE: 12 MONTHS)

6. DBE must perform an annual formal review of the Infrastructure Norms and Standards to ensure that they remain current and serve the needs of the teaching and learning process. A document describing the review process undertaken by DBE should be both: made publicly available on an annual basis and submitted to the Commission.

(TIMELINE FOR SUBMISSION TO COMMISSION: 12 MONTHS)

7. DBE must promulgate legally binding regulations in terms of section 61 of SASA regulating all aspects of safety and security in residential hostels at Special Schools. These regulations should consider the regulations applicable to Child and Youth Care Centres promulgated pursuant to the Children's Act, together with the norms and standards contained in Part V of the Annexure B of the Children's Act. These binding Regulations must, at a minimum:

- require appropriate emergency procedures (including routine drills) that delineate staff responsibilities to be implemented which take into account hostel layout and the children's disabilities, staff and learners must be aware of and trained to carry out any emergency procedures;
- explicitly articulate minimum fire safety procedures including fire suppression equipment, emergency exits, and appropriate infrastructure;
- contemplate the constitution of an emergency task force in every Special School comprising of the principal, two teachers / staff members, and a member of the local South African Police Services and a member of the local Fire and Emergency Services Department service. The external members of the task force should conduct inspections once every three months;
- prescribe routine scheduled and unscheduled safety audits in all Special Schools to assess compliance with stipulated safety procedures and include clear sanctions for non-compliance directed at SGBs and school principals to ensure accountability and compliance;
- prescribe basic routine maintenance, including the replacement of old electrical wiring and equipment;
- contemplate insuring Special School buildings (including residential hostels) against fire and natural calamities;
- require mandatory routine fire safety inspections by local Fire and Emergency Services followed by the issuance of a 'safety certificate' to the Special School as a mandatory requirement for granting permission for both the establishment of or continuation of a Special School;
- provide that only non-combustible fireproof heat resistance materials should be used in the construction of hostel facilities;
- contemplate a preference for single story hostel buildings and restricting the maximum number of floors in Special School hostel buildings;
- require that Special School hostel buildings shall be free from inflammable and toxic materials, which if necessary, should be stored away from the school building;
- require that all Special Schools comply with all applicable fire regulations and any legislation intended to regulate the use of tobacco products and / or electronic nicotine delivery systems;
- require that all aspects of Special School hostel buildings comply with SANS 10400 and ensure that regular inspections are conducted by provincial departments of education to ensure ongoing compliance;
- require that staircases, which act as exits or escape routes, shall adhere to provisions specified in the SANS 10400 to ensure the rapid evacuation of children in an emergency;
- contemplate the constitution of a provincial inspection team consisting of the MEC, the Provincial DBE HoD, the Director of Inclusive Education, educational authorities experts including a Civil Engineer, a Health Officer, a Revenue Officer, a Psychologist, a Fire Officer, a local body officer and a development officer besides the educational authorities shall carry inspection and assessment of infrastructural facilities before the commencement of each academic year. The Team shall submit its Inspection Report to the MEC;
- describe to whom and how to report a case of abuse or serious injury at a residential hostel and who is responsible for investigating such reports within prescribed timeframes;
- describe to whom and how to report the injury or death of a child in a residential hostel and who is responsible for investigating such incidents within prescribed timeframes;
- comprehensively delineate children's rights in residential hostels and ensure that learners are aware and informed of their rights which must be prominently displayed in all residential hostels;

- set out a comprehensive and accessible complaints handling procedures for children and staff to follow;
- set minimum requirements for residential and recreational programmes;
- make provision for application procedures for the registration of residential hostels;
- ensure that independent quality assurance processes are conducted;
- ensure that individual development plans are drawn up for all children resident in the hostel of a Special School;
- require robust and routine internal inspection mechanisms to be developed and implemented to ensure DBE oversight of the Provincial DBE;
- ensure that there is regular and independent oversight of Special School hostels by a body or organisation which is able to conduct site visits, interview staff and learners, and make binding directives to those who have duties in respect of special school hostels (any such mandate should be appropriately funded);
- ensure that minimum qualifications for hostel staff are established, as well as additional special qualifications depending on the type of disability the staff member will be working with and contemplate the provision of additional training for hostel staff where appropriate;
- require that appropriate checks on hostel staff are undertaken to ensure their suitability to work with children by checking all staff against the registers in the Children's Act and the Sexual Offences Act, as required by law; and
- Prescribe explicitly that persons who have frequent contact with learners with disabilities residing in residential hostels in Special Schools (including medical staff, security guards, and drivers) are checked against the registers in the Children's Act and the Sexual Offences Act, as required by law.

(TIMELINE: 24 MONTHS)

8. DBE must collaborate with DoH and DSD to secure necessary support staff, for example, occupational therapists, physiotherapists, and social workers.
9. DBE must ensure that Special Schools receive transfers of funding timeously on regular, specific, predetermined dates without delay.
10. DBE must develop an internal monitoring mechanism to ensure that Special Schools are routinely monitored (at least every quarter) in a transparent and accountable manner by the Department and the district. Reports produced by those monitoring activities should be published on the website of the Department.

(TIMELINE: 2 MONTHS)

(TIMELINE: 3 MONTHS)

5.2 NORTH WEST DEPARTMENT OF EDUCATION AND SPORT DEVELOPMENT (PROVINCIAL DBE)

1. The Provincial DBE, together with the DBE, must make provision for temporary emergency mechanisms at Special Schools in the North West province pending the provision of a permanent solution so that the immediate threat to learners in Special Schools is eliminated. These temporary measures should include:

- ensuring accessible entrance and exit routes for emergency personnel and vehicles to access all Special Schools in the NW province;
- the provision of basic fire extinguishing equipment, including water tanks, to Special Schools;
- necessary training being imparted to the staff and other officials at Special Schools in fire prevention, to use the fire extinguishing equipment, initiate emergency evacuations and protect their students in the event of fire and other emergencies by the local Fire and Emergency Services Department;
- the implementation of monthly mock emergency drills, the dates and details of such drills must be recorded by the school principal;

- immediately undertaking certain basic renovations in existing school hostel buildings, including: installing ramps and handles; increasing lighting in and around hostels; provide additional exit doors and broaden existing entrance and exit doors;
- the provision of emergency lighting and generators;
- ensuring that all 32 Special Schools in the NW province have fully stocked first aid boxes;
- prioritising the filling of outstanding empty posts to avoid overworking current staff at Special Schools in the NW province;
- sensitising Districts to the unique needs of Special Schools and insist on rigorous and routine monitoring and oversight; and
- ensuring that any persons who have frequent contact with learners with disabilities residing in residential hostels in Special Schools (including medical staff, security guards, and drivers) are checked against the registers in the Children's Act and the Sexual Offences Act, as required by law. This includes all current staff members and not merely incoming staff members.

(TIMELINE: 3 MONTHS)

2. Produce a document indicating the Provincial Departments level of compliance with the recommendations set out in the Commission's investigative report into the NW School for the Deaf (published 31 January 2018). Supporting documents to confirm compliance must be provided and any failures to comply must be explained with full reasons and supporting documentation.
3. (Timeline: 2 months)
4. As recommended in the Commission's investigative report into the NW School for the Deaf (published on 31 January 2018) the Provincial DBE must:

- produce a full audit report of safety and security that entails the audit of each and every Special Schools in the NW province and publically publish same and provide the Commission with a copy thereof. The audit report should also address:
 - an update on progress in the renovation of the North West School for the Deaf;
 - the number of Special Schools in the NW province, which district each Special School is located in and the corresponding district and local municipality, the number of children attending those Schools as well as their individual needs;
 - a profile of the most immediate and pressing needs in each Special School;
 - the number of children with disabilities attending public schools that are not Special Schools in the NW province;
 - all existing safety mechanisms;
 - safety and security training needs;
 - identifying, profiling and prioritising potential risks to learners;
 - an assessment of the qualifications and competencies of Special School staff members;
 - establish whether the SGBs of all Special Schools in the NW province are compliant with section 24 of SASA and are properly constituted of members that meet the requirements of that Act;
 - evaluate the SGBs of all Special Schools in the NW province knowledge of and compliance with section 20(1)(g) of SASA and assess the level of training or capacitation required (if any);
 - an assessment of whether the emergency equipment in Special Schools is appropriate for the specific needs of the learners of each school;
 - an estimate of how many children with disabilities are not enrolled in a school at all in the NW province;
 - average waiting list length for each of the Special Schools in the NW province;

- whether there is an appropriate scholar transport plan for children with disabilities in the NW province; and
- what steps need to be taken to address the results of the audit and the estimated budget required to do so and the relevant estimated timelines.
- Establish a centralised system through which compliance with safety standards is monitored and which enable timely interventions for corrective action where non-compliance is noted.

(TIMELINE: 3 MONTHS)

5. Produce a costed time-bound plan of action to address the results of the audit and ensure that schools in the NW province are in full compliance with the National Building Standards, Regulations for Safety Measures at Public Schools and Uniform Norms and Standard and compliance with Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure; and best practice for the protection of persons at schools in the event of fire or such other emergency which potentially impact on the rights of learners and publically publish same and submit a copy thereof to the Commission. The time-bound plan must also include:

- details of what ongoing and routine monitoring by the district will be implemented to ensure compliance;
- The framework and timelines for the centralised compliance monitoring system referred to above; and
- a budget for the implementation of this plan.

6. Provide the Commission with copies of all annual reports produced by the MEC in compliance with section 58C of SASSA demonstrating the extent to which there has been provincial compliance with the Infrastructure Norms and Standards or, if they have not been complied with, to indicate the measures that will be taken to comply.
7. (Timeline: 2 months)
8. The MEC also has planning and reporting obligations under the Regulations.¹⁷⁸ In terms of sub-regulation (6)(a) of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure

“A Member of the Executive Council must, within a period of 12 months after the publication of the regulations and thereafter annually on a date and in the manner determined by the Minister, provide the Minister with detailed plans on the manner in which the norms and standards are to be implemented as far as schools referred to in sub-regulation (1) are concerned.”¹⁷⁹

The Department must provide the Commission with a copy of this report.

(TIMELINE: 2 MONTHS)

9. The Provincial DBE must ensure there is adequate fire, safety and security equipment in place in every special needs school in the NW province. This must be monitored on an ongoing basis and at least quarterly by districts. Evidence of such monitoring should be provided to the Commission.

(TIMELINE: 3 MONTHS)

10. The Provincial DBE must arrange for annual seminars between the local SAPS, the Fire and Emergency Services to be held at every Special School in the NW province. This must be monitored by districts. Evidence of such monitoring should be provided to the Commission.

(Timeline: 3 months)

¹⁷⁸ Regulations 6.

¹⁷⁹ Further, “(b) the plans referred to in paragraph (a) are to make provision for, but not be limited to, the following: (i) the backlogs at district level that each province experiences in terms of the norms and standards (ii) costed short, medium and long-term plans with targets (iii) how new schools should be planned and maintained and how existing schools are to be upgraded and maintained and (iv) proposals in respect to procurement, implementation and monitoring. (7) In addition to the requirements contained in section 58C of the Act, a Member of the Executive Council must, in the manner determined by the Minister, report annually to the Minister on the implementation of the plans required in terms of subregulation (6). (8) Measures which are taken to comply with the norms and standards contained in these regulations must be funded through the relevant budgetary sources and processes for new facilities and the upgrading of existing facilities at schools.”

11. The Provincial DBE must indicate when the installation of CCTV cameras in all Special Schools will be complete and send the Commission a memorandum indicating the extent of coverage of these cameras in each school.
(TIMELINE: 2 MONTHS)
12. The Provincial DBE indicated that it conducted quarterly monitoring of compliance in Special Schools. The Provincial DBE must provide the Commission with evidence demonstrating this monitoring activities and provide the Commission with copies of any reports produced in pursuit thereof over the 2018 – 2019 period.
(TIMELINE: 2 MONTHS)
13. The Provincial DBE must submit evidence demonstrating the establishment and activity of the school safety forums it has established and indicate how it oversees the activities of such forums.
(TIMELINE: 2 MONTHS)
14. The Provincial DBE must provide the Commission with a copy of:

- the Safety and Security Measures in Special Schools Academic Year Implementation Report;
- Schools Risk Assessment Check List;
- School Safety SAPS Monitoring Tool; and
- Copies of service level agreements concluded between the Department and the various private security companies retained to guard the Special Schools.

(TIMELINE: 2 MONTHS)

15. The Provincial DBE must ensure that all staff in Special Schools receive basic first aid training.
(TIMELINE: 6 MONTHS)
16. Minimise the risks attached to children travelling long distances to Special Schools on their own by aligning provincial learner transport policies with the NLTP (which states that when identifying beneficiaries of subsidised learner transport services, priority must be given to learners with disabilities, taking into consideration the nature of the disability) by either amending current policies, publish guidelines for the full operation of the NLTP, or promulgating new policies specifically designed to address this issue.

(TIMELINE: 6 MONTHS)

5.3 NORTH WEST MUNICIPALITIES (DR RUTH SEGOMOTSI MOMPATI DISTRICT MUNICIPALITY (DISTRICT MUNICIPALITY) AND RUSTENBURG LOCAL MUNICIPALITY)

1. The Municipalities must attend to the cleaning up the immediate environment around Special Schools within their jurisdiction and the removal of any equipment, vegetation, or objects that may pose a health risk from the vicinity of the school premises. Written confirmation signed by Special School principals should be provided to the Commission.
(TIMELINE: 2 MONTHS)
2. The Municipalities must provide the Commission with a copy of the IDP it is required by law to develop.
(TIMELINE: 2 MONTHS)
3. The Municipalities must, in their IDPs, take into account education infrastructure considerations in terms of planning layouts and the provisioning and maintenance of infrastructure services such as water, sanitation and power supply (electricity). Amended IDPs must be submitted to the Commission.
(TIMELINE: 12 MONTHS)
4. The Municipalities should circulate a directive indicating that, under no circumstances, should the electricity supply to Special Schools within their jurisdictions be disconnected. The directive should make reference to Regulation 10

of the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure which states that all Special Schools must have a consistent and reliable electricity and water supply. A copy of that directive must be provided to the Commission.

(TIMELINE: 2 MONTHS)

5. The Municipalities must correspond with all Special Schools in their jurisdiction in writing setting out in clear steps the process to be followed to arrange for the 'adoption' of a school by the Municipality, copy the Commission on this correspondence and must thereafter assist all Special Schools which express an interest in being adopted to comply with this process where assistance is requested.

(TIMELINE: 3 MONTHS)

6. The Municipalities must correspond with all Special Schools in their jurisdiction in writing setting out in clear steps the process to be followed in order for a Special School to be entered into the indigent register and must thereafter assist all Special Schools which express an interest in being adopted to comply with this process where assistance is requested.

(TIMELINE: 3 MONTHS)

7. The Municipalities must engage with Special Schools in their jurisdiction and implement a written plan to undertake:

- regular monitoring in line with their responsibilities in respect of community safety (such monitoring may be undertaken by Community Policing Forums); and
- monitor compliance with building and safety standards as required by the by-laws.

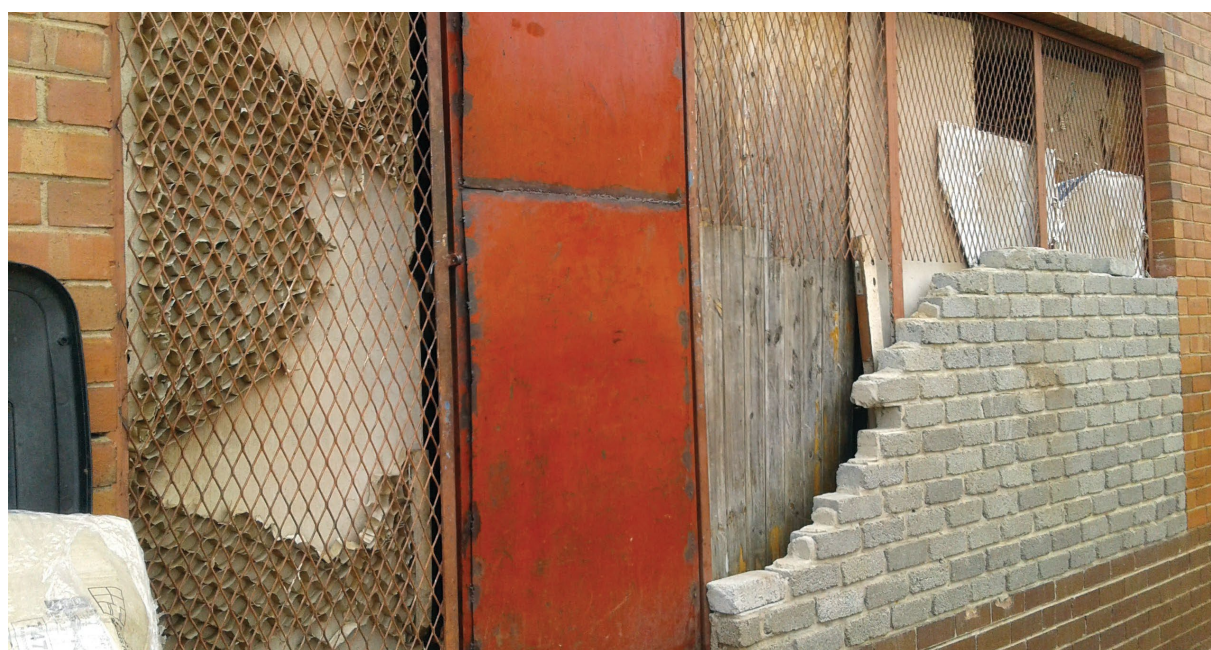
(TIMELINE: 3 MONTHS)

8. The Directorate for Health and Public Safety must routinely inspect Special School residential hostels on a regular basis to assess compliance in terms of health & safety standards. The Municipalities must confirm in writing to the Commission how often this monitoring will take place, who will be responsible for such monitoring and which Special Schools will be monitored.

(TIMELINE: 3 MONTHS)

9. Compel local Fire and Emergency Services to conduct regular fire inspections and provide the Commission with evidence of the arrangement).

(TIMELINE: 3 MONTHS)





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