



**Joint Parallel report by Equal Education and Equal Education Law  
Centre to the United Nations Committee on Economic, Social and Cultural  
Rights for its Consideration of South Africa's Initial State Party Report -  
64<sup>th</sup> Session (24 September - 12 October 2018)**

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## **A. Introduction**

1. This is a joint parallel report prepared by Equal Education (EE) and Equal Education Law Centre (EELC) for the UN Committee on Economic, Social and Cultural Rights' (the Committee) 64<sup>th</sup> session, in which it will consider South Africa's initial State Party report<sup>1</sup> (State Report) submitted on 25 April 2017.
2. EE is a membership-based, democratic movement of learners, parents, teachers and community members. Its head office is located in Khayelitsha (Cape Town), South Africa, and it has additional offices in both the Eastern Cape and Gauteng provinces. EE's membership base spans across various provinces in South Africa, including the Western Cape, the Eastern Cape, Gauteng, Limpopo and KwaZulu-Natal. Its core objective is to work towards achieving quality and equality in South Africa's education system.
3. EELC is a public interest law centre specialising in education law and is located in Khayelitsha (Cape Town), South Africa. EELC works closely with EE in pursuit of their mutual goals of an equal education system and quality education for all.
4. This joint submission focuses specifically on those issues related to the provision of basic education in South Africa, and responds particularly to information provided by South Africa in paragraphs 138 - 159 of its State Report. This joint submission also provides information on certain issues raised by the Committee in paragraph 29(a)-(g) of its List of Issues, which relate to the right to education as enshrined in articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>2</sup>

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<sup>1</sup> Committee on Economic, Social and Cultural rights "Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Initial Reports of States parties due in 2017 - South Africa" E/C.12/ZAF/1 (25 April 2017).

<sup>2</sup> Committee on Economic, Social and Cultural Rights "List of Issues in Relation to the Initial Report of South Africa" E/C.12/ZAF/Q/1 (1 November 2017).

## **B. South Africa’s declaration made upon ratification of the ICESCR**

5. Upon its ratification of the ICESCR, South Africa made a declaration specifically aimed at the implementation of Articles 13(2)(a) and 14 of ICESCR, which provide for free and compulsory *primary education* for all. In paragraph 139 of its State Report, South Africa elaborates by stating that the right to education, as provided for in Article 13(2)(a) and Article 14 of the ICESCR, will be given **progressive effect** within the framework of its National Education Policy and **available resources**.
6. Section 29 of the South African Constitution negates this declaration. The Constitution enshrines the right to basic education as being immediately realisable, and therefore not subject to qualifiers such as “progressive realisation”, within “available resources”, subject to “reasonable legislative measures”.<sup>3</sup> Furthermore, in General Comment 13, the Committee states that the obligation to provide primary education for all is an immediate duty of all State Parties, the failure of which constitutes a violation of Article 13 of the ICESCR.<sup>4</sup> Consequently, South Africa’s declaration has the effect of limiting the immediate realisation of the right to basic or primary education, which is inconsistent with its domestic constitutional obligation and fails to prioritise primary education in the manner envisaged by ICESCR.

## **C. Fees as a barrier to schooling**

7. EE and EELC welcome South Africa’s ‘no-fee’ Schools Policy as stated in paragraph 142 of the State Report. The national ‘no-fee’ Schools Policy has been implemented as a means to ensure access to basic education, particularly for poor and working-class households, whereby identified schools may not charge school fees.<sup>5</sup> However, EE and EELC note that certain ‘no fee’ schools have reportedly adopted practices that

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<sup>3</sup> See *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) (11 April 2011) at para 37.

<sup>4</sup> Committee on Economic, Social and Cultural Rights “Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 13 (Twenty-first session, 1999) - The right to education (Article 13 of the Covenant)” (E/C.12/1999/10) para 51. In addition, paragraph 59 of General Comment 13 states that States Parties failure to introduce, as a matter of priority, primary education that is compulsory and available free to all, constitutes a violation of article 13 of the ICESCR.

<sup>5</sup> South Africa’s Initial State Party Report to the Committee on Economic, Social and Cultural Rights E/C.12/ZAF/1 (7 June 2017) paragraphs 142, 144 and 151. Also see section 39(7) - 39(16) of the South African Schools Act 84 of 1996, which details the State’s process of determining ‘no-fee’ schools.

contradict the aims of the ‘no fee’ policy. In particular, certain ‘no-fee’ schools charge fees variously called ‘voluntary contributions’, ‘development levies’ or ‘compulsory contributions’. EELC has dealt with cases where a parent’s failure to pay such fees has led to a learner being excluded from schooling or denied access to learning materials, and even report cards.<sup>6</sup> In addition, certain Grade R learners attending ‘no-fee’ schools are reportedly requested to pay school fees, and are often the only grade in a school obliged to do so.<sup>7</sup>

8. Furthermore, in its State Report, South Africa states that the Minister has promulgated regulations that exempt parents with children in fee-paying schools from paying school fees in certain circumstances.<sup>8</sup> The State Report fails to state that such exemptions have been awarded based on proof of income from both parents. EE and EELC note that the practice of demanding proof of income from both parents can, in some cases, have a discriminatory effect. This has been particularly noted in cases concerning divorced or separated mothers who are often the primary caregivers, and struggle to obtain a father’s proof of income. This has occurred either because a father has bluntly refused to provide his financial information or because he is untraceable. EELC has litigated on this issue and, despite a progressive judgment obliging schools to grant such parents exemptions,<sup>9</sup> there has not been a consistent national policy or practice to implement the terms of this judgement in order to prevent such discrimination. There are also concerns about the extent to which parents are made aware of the fact that they may apply for fee exemptions in fee charging schools.<sup>10</sup>

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<sup>6</sup> See for example: IOL ‘*No fee school forcing parents to pay*’ <https://www.iol.co.za/news/no-fee-school-forcing-parents-to-pay-1552430> (25 July 2013).

<sup>7</sup> The EELC has become aware of these practices through its work as a pro-bono law clinic, in which clients and members of the community have reported such practices.

<sup>8</sup> South Africa’s Initial State Party Report to the Committee on Economic, Social and Cultural Rights E/C.12/ZAF/1 (7 June 2017) paragraph 143.

<sup>9</sup> *Head of Department Western Cape Education Department and Others v S* 2018 (2) SA 418 (SCA) (13 December 2017).

<sup>10</sup> Section 3(1)(a) of the Regulations for the Exemption of Parents from the Payment of School Fees, 2005 (Government Notice R1052 in Government Gazette 29311 of 18 October 2006, as amended by Government Notice 1149 in Government Gazette 29 392 of 17 November 2006) requires a school principal to inform parents of the amount of the annual school fees to be paid and procedures for applying for an exemption. Through its legal clinic, EELC has become aware that parents of learners are not always informed of their right to apply for school fee exemptions.

## **D. Menstrual hygiene in South African schools**

9. The State has recognised the importance of access to sanitary products, and its effect on the mental, physical, and emotional well-being of girls, as well as their participation in the classroom. In particular, the Provincial Department of Education in KwaZulu-Natal has noted that many girls may miss, at a minimum, up to 36 school days a year due to inadequate access to menstrual hygiene products.<sup>11</sup>
10. Surprisingly however, there is currently no national policy or legislation regulating access to menstrual hygiene products in South African schools. There is also a lack of uniformity and national co-ordination as provinces currently differ in terms of the roles and responsibilities of state departments, the programmes implemented to ensure menstrual hygiene, and the budget allocations made in terms thereof. The Department of Women has circulated various drafts of a national policy framework titled ‘Sanitary Dignity’ in an effort to provide norms and standards on the provision of sanitary products to indigent persons.<sup>12</sup> While the policy framework recognises the challenges facing female learners in schools, its status, and timelines for public comment and finalisation, are not known. In addition, very few attempts have been made at a national level to formalise norms and standards for menstrual hygiene in schools.

## **E. The provision of scholar transport**

11. While EE and EELC note that a National Learner Transport Policy has been promulgated,<sup>13</sup> we urge the Government of South Africa to ensure that provincial learner transport policies are developed in order for the appropriate implementation, management, and co-ordination of the provision of learner transport to take place. The status of the current learner transport policy in KwaZulu-Natal, for example, is

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<sup>11</sup> The Citizen, ‘30% of SA learners miss school when menstruating’ <https://citizen.co.za/news/south-africa/1960753/30-of-sa-learners-miss-school-when-menstruating/> 22 June 2018.

<sup>12</sup> A third version of this draft was circulated by the Department of Women on 12 June 2018 at a Parliamentary Portfolio Committee meeting held by Women in the Presidency. See <https://pmg.org.za/committee-meeting/26630/>.

<sup>13</sup> National Learner Transport Policy (Government Gazette No.39314 published on 23 October 2015). See also South Africa’s Initial State Party Report to the Committee on Economic, Social and Cultural Rights E/C.12/ZAF/1 (7 June 2017) paragraph 151.

currently unclear, while the learner transport policies of provinces such as Limpopo are not easily, nor publicly accessible.

12. Currently, each province in South Africa addresses the provision of government-subsidised learner transport differently. In many cases, for example, the provision of this critical service falls within the ambit of either the provincial Department of Education or provincial Department of Transport. This has resulted in an uncoordinated response to the need for safe learner transport across provinces. In addition, the provisioning of scholar transport to learners with disabilities is not adequately addressed in all provincial policies, if at all.<sup>14</sup>
13. A severe lack of funding has also curtailed the adequate provision of government-subsidised learner transport in deeply rural provinces such as KwaZulu-Natal.<sup>15</sup> It should be noted that the use of funds allocated by national government is subject to the discretion of the relevant provincial government. As such, if a province chooses not to prioritise the provision of safe learner transport, these funds are at risk of being diverted elsewhere. For this reason, EE and EELC propose the development of a conditional grant, specifically earmarked for scholar transport. Despite having knowledge of this problem, the government of South Africa has delayed in revising its current funding model, leaving thousands of learners in need of scholar transport.

## **F. School Infrastructure and regressive funding**

14. EE and EELC note the South African Government's commitment to eradicate mud schools and provide water, sanitation and electricity through the Accelerated School Infrastructure Delivery Initiative (ASIDI) and through the education infrastructure

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<sup>14</sup> A 2015 report of the Department of Basic Education estimates that there are approximately 597 953 children of school-going age with disabilities across the country who, for various reasons, were not receiving schooling. See Department of Basic Education "Report on the Implementation of White Paper 6 on Inclusive Education - An Overview for the Period 2013-2015 (May 2015) page 20-21.

<sup>15</sup> In recent litigation, the KwaZulu-Natal Department of Education (KZN DoE) indicated that approximately 370 682 learners required transport in the Province, as opposed to the previous estimate of 90 000 learners. The KZN DoE stated further that the budget allocated for learner transport for the 2018/2019 financial year is R206 million, while the projected expenditure is R297 300 000, leaving a shortfall of around R91 million. In addition to this, an amount of R53 million was overspent in the last financial year, resulting in an estimated shortfall of R144 300 000. See *Equal Education v MEC for Education, KwaZulu-Natal* case no 3662/17P - First Respondent's Report Pursuant to Order of Court dated 7<sup>th</sup> November 2017 at para 8.2 - 8.5.

grant programme.<sup>16</sup> Despite this commitment, the state of infrastructure in a large number of South African schools threaten the safety, health and dignity of children.

15. The South African Government has failed in its commitment to ensure that all schools have access to water and sanitation by 29 November 2016, as obliged by the National Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (“Regulations on Minimum Norms and Standards”).<sup>17</sup> According to the Department of Basic Education’s National Education Infrastructure Management System (NEIMS) report published in January 2018, 269 schools across the country still have no electricity supply, and 37 schools do not have sanitation facilities. While the NEIMS report states that all schools have access to water, it includes boreholes and mobile tankers as constituting access to a water supply, and does not indicate the reliability of this water supply, and the regularity of access to clean water.<sup>18</sup> From 2018 provincial department reports, the extent of insufficient water supply is striking. For example, 3010 schools in KwaZulu-Natal have insufficient water.<sup>19</sup>

16. The Regulations on Minimum Norms and Standards also explicitly state that the use of plain pit latrines is banned in schools.<sup>20</sup> Despite the Regulations on Minimum Norms and Standards having been promulgated in 2013, five years down the line, there are still thousands of schools across the country - particularly in rural provinces - that continue to use plain pit latrines on site.<sup>21</sup> In January 2018, the Department of Basic Education’s NEIMS report indicated that up to 8702 schools across the country still use pit latrines as a form of sanitation.

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<sup>16</sup> South Africa’s Initial State Party Report to the Committee on Economic, Social and Cultural Rights E/C.12/ZAF/1 (7 June 2017) paragraph 154.

<sup>17</sup> South African Schools Act 84 of 1996: Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (Government Gazette Notice No. 37081 published on 29 November 2013) Regulation 4(1)(b)(i).

<sup>18</sup> Department of Basic Education “NEIMS Standards Report January 2018”. The KwaZulu-Natal and Free State departments of education have released progress reports indicating the progress made in their implementation of the Regulations Relating to the Minimum Uniform Norms and Standards for Public School Infrastructure. From these reports, it is apparent that 3010 schools in KwaZulu-Natal have insufficient water, while 138 schools in the Free State Province have insufficient water.

<sup>19</sup> See footnote above.

<sup>20</sup> South African Schools Act 84 of 1996: Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (Government Gazette Notice No. 37081 published on 29 November 2013) Regulation 12(4).

<sup>21</sup> Department of Basic Education, *National Education Infrastructure Management System (NEIMS)*. January 2018 at <https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20Report%20%2020172018.pdf?ver=2018-01-30-120305-787>.



17. This deplorable state of school infrastructure is also confirmed in a case currently being litigated before the Limpopo High Court, located in Polokwane (Limpopo Province), in which the Limpopo Education Department (LED) indicated that, as at July 2018, the Limpopo Province has identified 1 658 schools with sanitation needs, with 1 489 of these schools having pit toilets<sup>22</sup> on site, consisting of 17 144 seats.<sup>23</sup> The LED states further that, with its current budget, the estimated period within which it will replace all pit latrines in public schools in the Province is fourteen years, therefore from 2018 to 2031.<sup>24</sup> These figures illustrate the extreme backlog that exists, at least in the Limpopo Province, in addressing infrastructure needs in terms of the timeframes set out in the Regulations on Minimum Norms and Standards.
18. As a result of these failures, South Africa has seen the tragedy of two learners, Michael Komape and Lumka Mketwa, falling into dilapidated pit latrines while at school and drowning in human waste.<sup>25</sup>
19. Alarminglly, South Africa’s latest budget, for the 2018/2019 financial year, revealed that the State allocated fewer resources to basic education infrastructure than it did for the previous year.<sup>26</sup> This is in line with the decade-long trend of regressive budgeting in basic education generally. Based on this trend, research notes that between 2010 and 2019, funding per learner declined by 10% in South Africa.<sup>27</sup>
20. In addition to inadequate funding, there has also been severe mismanagement and inadequate efforts to ensure effective implementation of the Regulations on Minimum Norms and Standards.<sup>28</sup> In the case of provinces such as the Eastern Cape, poor work

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<sup>22</sup> EE and EELC interpret “pit latrine” in this context as referring to a plain pit latrine, and not including the use of a ventilated, improved pit (VIP).

<sup>23</sup> *Rosina Mankone Komape and Others v Minister of Basic Education and Others* Case no 1416/2015 Affidavit on Behalf of First and Second Defendant para 7.5.

<sup>24</sup> Para 9.2.

<sup>25</sup> Mail & Guardian ‘*Another child dies in pit latrine*’ (16 March 2018) at <https://mg.co.za/article/2018-03-16-00-another-child-dies-in-a-pit-latrine>; and see IOL ‘*Six year old dies in school pit toilet*’ (21 January 2014); <https://www.iol.co.za/news/six-year-old-dies-in-school-pit-toilet-1634700>.

<sup>26</sup> Equal Education ‘*Basic Education budget vote speech compromises a public education system under duress*’ (10 May 2018) at <https://equaleducation.org.za/2018/05/10/media-statement-2018-19-basic-education-budget-vote-speech-compromises-a-public-education-system-already-under-duress/>.

<sup>27</sup> See: N. Spaul ‘*Basic Education being thrown under the bus – and it shows in test results*’ (16 April 2018) <https://www.businesslive.co.za/bd/opinion/2018-04-16-basic-education-thrown-under-the-bus--and-it-shows-up-in-test-results/>.

<sup>28</sup> Equal Education ‘*EE is disappointed at the underspending of the ASIDI grant and condemns the acceptance of failure by the DBE*’ (14 September 2016) at <https://equaleducation.org.za/2016/09/14/equal-education-ee-is->

by implementing agents - entities responsible for building schools on behalf of the Eastern Cape Department of Education (ECDoE) - and the ECDoE's failure to hold them to account, has contributed significantly to poor service delivery. These implementing agents have failed to perform efficiently, with project delays and contract cancellations, being common cause.<sup>29</sup>

## **G. Undocumented Learners**

21. EE and EELC note that children of foreign or undocumented parents often face considerable challenges in accessing basic education. EE and EELC have noted in particular that certain schools, often relying on the instruction of state officials, deny school admission to, or even threaten to detain, children who cannot produce the relevant immigration documents.<sup>30</sup> This is despite national policy, which requires schools to admit foreign learners upon evidence that they, or their parents, have applied to the Department of Home Affairs to legalise their stay, and not necessarily provide proof of having yet obtained the necessary documentation confirming such stay.<sup>31</sup>

## **H. Private actors in education**

22. South Africa's education system allows for the involvement of private actors in education in various capacities – primarily in the establishment and running of private (independent) schools. However, the regulatory framework for such involvement is not, in our view, sufficiently robust. EELC, through its walk-in clinic, has encountered several parents who have raised, what amounts to be, abuse by private schools

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disappointed-at-the-underspending-of-the-accelerated-schools-infrastructure-delivery-initiative-asidi-grant-and-condemns-the-acceptance-of-failure-by-the-department-of-basic/.

<sup>29</sup> Mail & Guardian *'Equalisers fight for schools not built'* (3 November 2017) at <https://mg.co.za/article/2017-11-03-00-equalisers-fight-for-schools-not-built>.

<sup>30</sup> See: News24 *'Schools cannot threaten to detain children over missing documents -rights group'*

(1 March 2017) at <https://www.news24.com/SouthAfrica/News/schools-cannot-threaten-detain-children-over-missing-documents-rights-group-20170301>; Business Day *'Human rights lawyers issue directive to schools about undocumented children'* (2 March 2017); <https://www.businesslive.co.za/bd/national/education/2017-03-02-human-rights-lawyers-issue-directive-to-schools-about-undocumented-children/>.

<sup>31</sup> Section 21 of the Admission Policy for Ordinary Public School in terms of the National Education Policy Act 27 of 1996 (Government Gazette No. 19377 published on 19 October 1998).

especially in the enforcement of school-fee payment<sup>32</sup> and disciplinary issues.<sup>33</sup> Such abuses can be curbed by strengthening the regulatory framework to prioritise the rights of learners to education and the paramountcy of the child's best interests principle.

23. In recent times, the involvement of private actors in education has also extended to the governance and management of public schools. EE and EELC note that the Western Cape Province is undertaking a project, called "collaboration" schools, which introduces private actors into schools as donors and operating partners. The private actors would be entitled to direct parts of the curriculum; the hiring and firing of certain teachers; and the management of the financial and other affairs of the school. The model runs contrary to the national laws in South Africa, which place the governance of a public school in the hands of a majority of parents and the school community itself. Furthermore, national legislation only allows for external parties to be co-opted without voting rights. Our view is that this constitutes an unconstitutional conflict with national law, and is unconstitutional.
24. While framed for the time being as a "pilot project", we also note that the Western Cape government is attempting to amend provincial legislation<sup>34</sup> to allow for the provincial education Minister to declare schools "collaboration" schools at her discretion. The attempted, permanent legislation of this type of school not only undermines national legislation, but is also not based on adequate evidence to establish the efficacy of this model of public private partnerships in schools.
25. The proposed legislation also seeks to introduce an additional type of school into the Western Cape Province, called "donor-funded" schools, in which a private donor provides funding to a public school and may have majority voting representation on the school's governing body. The proposed empowering legislation provides no criteria that these donors must meet and does not preclude for-profit donors from participating.

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<sup>32</sup> See for example: Sunday Tribune 'Pupil placed in solitary over unpaid fees' (17 October 2017) <https://www.iol.co.za/sunday-tribune/news/pupil-placed-in-solitary-over-unpaid-fees-11245762>.

<sup>33</sup> See for example: GroundUp 'Girls expelled from school for kissing' (14 August 2018) <https://www.groundup.org.za/article/girls-expelled-school-kissing/>

<sup>34</sup> The Western Cape Provincial School Education Amendment Bill is available at [http://www.wcpp.gov.za/sites/default/files/Western%20Cape%20Provincial%20School%20Education%20Ame nd.%20Bills%20B1-2018\\_final.pdf](http://www.wcpp.gov.za/sites/default/files/Western%20Cape%20Provincial%20School%20Education%20Ame nd.%20Bills%20B1-2018_final.pdf) (last retrieved 29 August 2018).

26. The proposed legislation provides little guidance on the roles and responsibilities of the private actors involved in collaboration and donor-funded schools. It is also silent on admission criteria and does not require schools to maintain their no-fee status.<sup>35</sup>

## **I. Recommendations**

27. EE and EELC therefore recommend that the Committee on Economic, Social and Cultural Rights urge the South African Government to do the following:

- a. To withdraw the declaration entered into upon ratification of ICESCR on 20 January 2015;
- b. To ensure a more robust enforcement of the prohibition of all illegal policies or practices at ‘no fee’ schools that require parents to pay amounts of money equivalent to school fees, including at Grade R level;
- c. To remove all barriers to parents’ access to fee exemptions, in accordance with court judgments;
- d. To promulgate, within a reasonable period, a national policy that regulates menstrual hygiene in South African schools, to ensure the implementation of this policy, as well as allocate adequate funding towards this;
- e. In terms of government-subsidised scholar transport:
  - i. To ensure that all provinces have clear and publicly accessible scholar transport policies, which specifically ensure that learners with disabilities have access to learner transport,
  - ii. To ensure the collation of reliable data, which would indicate those schools and learners in need of this service,
  - iii. To ensure ring-fenced funding to implement these policies, such as a conditional grant;
- f. In terms of school infrastructure:
  - i. To ensure the implementation of the Regulations on Minimum Norms and Standards within the relevant deadlines;

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<sup>35</sup> EE and the EELC’s comprehensive submission on the relevant provisions of the proposed legislation is available here: <https://equaleducation.org.za/wp-content/uploads/2018/06/EEs-Submissions-on-the-WC-Provincial-School-Education-Amendment-Bill-20180411.pdf> at paras 67 to 167.

- ii. To ensure that the ASIDI is adequately budgeted, that budget allocations are fully spent, on time, and that deliverables are met;
- iii. To ensure that implementing agents are held to account for non-delivery of services.
- g. To issue a national circular with clear guidelines on how schools should receive non-national or undocumented learners.
- h. To indicate those steps that the State will take to ensure that an adequate legal framework is in place to guard against the unjustified handing over of the governance of public schools to private entities, and to hold private actors in education accountable to human rights standards.<sup>36</sup>

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<sup>36</sup> The Human Rights Council has recently confirmed such an approach in a resolution in which it “Urges States to put in place a regulatory framework to ensure the regulation of all education providers, including those operating independently or in partnership with States, guided by international human rights law and principles, that establishes, at the appropriate level, inter alia, minimum norms and standards for the creation and operation of educational services, addresses any negative impact of the commercialisation of education and strengthens access to appropriate remedies and reparation for victims of violations of the right to education.”

See Human Rights Council “The right to education: Follow-up to Human Rights Council resolution 8/4” A/HRC/38/L.13 (3 July 2018) para 5.