Improvement in **quality learning outcomes** & **equity** in public education in South Africa

A SPOTLIGHT ON

"Underperforming" SCHOOLS

This report has been drafted and published by the Equal Education Law Centre (EELC)

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The EELC is a public interest law centre with a team of activist lawyers and researchers working to advance the struggle for quality and equality in education through legal research, advocacy and strategic litigation.

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I. INTRODUCTION

The right to education is based on the premise that a "well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence".[1] It is an enabling and multiplier right, serving as *"the primary vehicle by which socially and economically marginalized adults and children can lift themselves out of poverty."*[2] The process of education is one that requires the engagement of many different actors: the learner, the parents, the teacher, the school and, ultimately, the state.

Building on the promise of the right to basic education enshrined in section 29(1)(a) of our Constitution, a plethora of pro-poor education policies and legislation have been developed over the years. This includes the South African White Paper on Education and Training,[3] the South African National Education Policy Act,[4] the South African Schools Act[5] and the National Norms and Standards for School Funding.[6] But despite the introduction of this extensive legal regulatory framework, patterns of inequality along racial lines are still pervasive in South Africa's education system.[7] The bimodality of education in this country is an indisputable fact.

The reality is that two children, born in different parts of the country or of different races and socio-economic background, will have **entirely different** educational outcomes.

This is an affront to the essence of the Constitution, especially section 9(2) under which "equality includes the full and equal enjoyment of all rights and freedoms".[8] Far from being a right equally enjoyed by all, the provision of basic education varies wildly.

There are schools, particularly in rural and township areas, which are entrenched in a history of dysfunctionality, with little to no resource allocation, and which are ill-supported to provide children from poor communities with opportunities to excel academically or even, at the bare minimum, to achieve a level of education that will provide them with the skills they require to eschew poverty and live a life of dignity.[9]

Evidently the standards of education provided throughout the country are not equal. The promise contained in section 29(1)(a) of our Constitution does not necessarily translate into the provision of equitable, inclusive, quality education without deliberate and strategic intervention in and support of underperforming schools.

The gross structural inequalities that existed in South Africa's education system were amplified and exacerbated by COVID-19.10 In their report on the impact of COVID-19 on education, Amnesty International observed that:

> ***"A child's experience of education in South Africa still very much depends on where they are born, how wealthy they are, and the colour of their skin."***[11]

The Amnesty report highlighted the unequal impact of schools being closed during 'hard lockdown' in South Africa:

> ***"there is no prospect of continued education for children in poorer communities who already had no access to the internet and computers. These children have no prospect of being able to participate in online teaching and whose parents/carers are usually not in a position to home teach due to their own lack of education and capacity."***[12]

On the other hand, learners in private schools as well as in affluent and middle-class public schools migrated relatively easily to emergency remote learning, because these learners had access to devices and connectivity as well as support from teachers and parents.[13] Access to the internet is not evenly distributed across provinces.

1. General Comment No. 13: The right to education (Adopted by the Committee on Economic, Social and Cultural Rights 8 December 1999).
2. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), Art. 13.
3. The White Paper on Education and Training (GN 196 in GG 16312 of 15 March 1995).
4. Act 27 of 1996.
5. Act 84 of 1996.
6. Amended National Norms and Standards for School Funding (GN 1282) (14 December 2006).
7. Edward B. Fiske and Helen F. Ladd (2004) "Equity: Education reform in post-apartheid South Africa".
8. Constitution of the Republic of South Africa 1994.
9. N Spaull (2013) "South Africa's Education Crisis: The Quality of education in South Africa 1994-2011".
10. L Le Grange, "Covid-19 pandemic and the prospects of education in South Africa" 2020.
11. Amnesty International "Failing to Learn The Lessons?: The Impact of COVID-19 on a Broken and Unequal Education System" 2021, p15.
12. Ibid at p17.
13. Ibid at p18.

The report recorded that:

> ***"only 22% of households have a computer nationally and 10% an internet connection. In North West and Limpopo provinces, only 3.6% and 1.6% of the student populace respectively have access to the internet at home."***[14]

In this way, COVID-19 exposed, and exacerbated, the social and economic fractures that exist within communities. Scholars such as Crain Soudien, Vijay Reddy, and Jaqueline Harvey contend that, as a result of COVID-19, the country is in danger of being set-back in its improvement trajectory by five years. Moreover:

> ***"As even this first attempt at making sense of the COVID-19 educational experience reveals, the South African educational system and the most prevalent educational approaches being implemented are not sufficiently robust and innovative to deal with the first order of business of stabilising the system, let alone the challenges of innovating towards greater equality."***[15]

The Universal Declaration of Human Rights,16 the International Convention on Economic, Social and Cultural Rights,[17] the United Nations Convention on the Rights of Child,[18] and the African Charter on Human and Peoples' Rights,[19] place obligations on signatories to secure the right to basic education for all. The South African Constitution echoes this and enshrines this fundamental right in section 29(1)(a), guaranteeing everyone the unqualified right to a basic education. Additionally, the right to basic education must be understood in the context of democratic values of human dignity, equality, and freedom. But these guarantees and protections are a far cry from reality for thousands of learners attending public schools in South Africa.

In an attempt to address this disparity and ensure that quality educational outcomes are achieved across the board, the South African Schools Act 84 of 1996 ("SASA") makes provision for the identification, support and management of "underperforming schools".

The criteria for identifying an underperforming school are set out in section 58B(2) SASA. Essentially, an underperforming school is a school where the standard of performance of learners is below the standards prescribed by the National Curriculum Statement and likely to remain so; a school with a serious breakdown in management or governance; or a school where the safety of the learners and staff is threatened.[20]

The purpose of this report is to analyse the situation of underperforming schools, and the palpable policy and implementation gaps in addressing the problem. In doing this, the report pays special attention to the right to basic education, as enshrined in the Constitution, and expanded upon in SASA and in the National Education Policy Act 27 of 1996 ("NEPA"). The report assesses the existing regulatory framework for underperforming schools to determine whether it is capable of addressing systemic underperformance. Drawing on this analysis, the report makes a number of recommendations to improve the identification, management and support of underperforming schools. The full set of recommendations can be found in Part VI.

14. Ibid, p17.
15. Crain Soudien, Vijay Reddy, and Jaqueline Harvey, "The Impact of COVID-19 on a Fragile Education System: The Case of South Africa" 2021, 321.
16. Universal Declaration of Human Rights (adopted 10 December 1948), Art 26.
17. International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), Art. 13.
18. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), Art. 28.
19. African Charter on Human and Peoples' Rights (adopted June 27 1981, entered into force Oct 21 1986), Art. 17.
20. Section 58B(2) of the South African Schools Act 84 of 1996.

II. EXECUTIVE SUMMARY

The regulatory framework for underperforming schools, contained within sections 16A and 58B SASA, is one of the key mechanisms by which the legislature intends to secure quality education for all learners.

Section 58B requires the HOD to do two things. First, the HOD must identify underperforming schools according to three criteria. Second, the HOD must take all reasonable steps to assist these schools in addressing underperformance.

Section 16A requires the school principal to prepare an annual report for the HOD on the school's academic performance and use of resources. The HOD must use this report, along with any other relevant reports, when identifying underperforming schools. If a school is identified as underperforming, the principal must prepare a plan – commonly known as a School Improvement Plan or "SIP" – setting out how academic performance at the school will be improved. This plan must be presented to the HOD, who may approve it or return it to the principal with recommendations. Once the plan is approved, the principal must report to the HOD and governing body on its implementation.

At least in principle, the EELC endorses the attempt to identify and **offer support** to schools who need it.

The provisions in SASA allow for this to happen on a systematic and ongoing basis. This is crucial. Ad hoc or one-off injections of additional support or resources are simply not enough. However, the existing regulatory framework is seriously flawed.

First and foremost, there is an excessive focus on academic performance.

Failure to meet the standards prescribed by the National Curriculum Statement is one of the three criteria for underperformance contained in section 58B; the other two being breakdown in school management, and threats to safety. Yet the Provincial Education Departments report a whole host of problems – from shortages of teaching materials, to lack of learner transport, to gangsterism caused by the socio-economic difficulties faced by learners and parents – many of which are external rather than internal to the school. So, the closed list of criteria is under-inclusive, and fails take account of the multifaceted nature of so-called 'underperformance'. In some cases, the criteria are also over-inclusive in that not all schools can be expected to achieve the same exam results. This may be the case if, for example, the school's learners have high rates of fetal alcohol spectrum disorder. Lower exam results are not necessarily a sign that a school is struggling or in need of additional support. The problem is compounded by circulars from the DBE, which are supposed to provide guidance on the interpretation of section 58B, but which focus exclusively on academic performance, sidelining the other two criteria as well as any other issues the school may face. On a related note, we consider that language of 'underperformance' is unduly stigmatizing, and we suggest a shift from a paradigm of blame to a paradigm of support.

The excessive focus on *academic* performance also extends to the reporting requirements under section 16A. The annual reports school principals must prepare concern only academic performance and use of school resources. The School Improvement Plan is a plan to improve academic performance; not a plan to address the real problems faced by the school in question or to improve its functioning more generally.

We therefore recommend that sections 58B and 16A should be reformed so that the focus of the regulatory framework is less on exam results and more on the bigger picture, looking at each school in context to identify its specific problems and appropriate solutions. The DBE circulars should be retracted. Instead, broadened and clarified legislation should be supplemented with new norms and standards, giving detailed, comprehensive guidance on the identification and management schools in need of support.

Second, the role of the HOD is too limited.

Currently, the onus is on the principal to develop the School Improvement Plan. The HOD's role is limited to review of the plan, with a discretion to make recommendations. The Provincial Education Departments have noted that, in practice, support from the HOD in developing the School Improvement Plan is very limited. Further, it is for the principal to implement the plan, albeit with the support of the HOD, and report back at the end of the year. While there is value in the school being able to develop and own the School Improvement Plan, the existing regulatory framework fails to recognize that the school principal and leadership team are often part of the problem and may lack the will or capacity to turn the situation around. The HOD should be more closely involved from the outset to guarantee meaningful change.

Third, there is no clear guidance on remedial interventions.

The HOD has an extensive obligation to take "all reasonable steps" to assist an underperforming school. SASA explicitly states that the HOD must consider taking some specific measures: managing poor work performance, taking functions away from the SGB or changing the personnel, and counselling the principal. DBE circulars provide some additional guidance on steps that could be taken to improve underperforming schools. However, our research has shown that a wide variety of different approaches are taken in different provinces. A few provinces have

pioneered innovative interventions, seemingly to good effect. But such innovations are found in isolated pockets; they are not rolled out across the board. The existing regulatory framework leaves too much scope for narrow, punitive approaches rather than a holistic approach taking account of contextual factors.

The EELC recommends that new norms and standards should provide detailed guidance on implementing appropriate remedial interventions, and should promote a holistic, multi-disciplinary and tailored approach. They should set requirements for a long-term plan to be put in place with remedial interventions to be reviewed and adjusted as necessary, until the school has improved.

Fourth, accountability mechanisms exist in theory, but they are not working well in practice.

To promote accountability, one of the DBE's key performance indicators should be the actions taken in respect of school 'underperformance', pursuant to duties under section 8 NEPA. The DBE's annual report must set out what steps it has taken to support schools identified in terms of section 58B. Further, the DBE should ensure that the MEC reports are of sufficient quality and contain sufficient information to allow for a comprehensive understanding of the situation of schools across provinces.

Finally, parents and school governing bodies should be empowered to hold underperforming schools to account. School governing bodies should be trained and capacitated to provide effective oversight. Parents should be supplied with expanded school reports, detailing how the school is performing according to set criteria, such as enrolment numbers and teacher turnover, both in absolute terms and in comparison with other schools in the district.

As it stands, the regulatory framework for school underperformance is failing to secure quality education for all learners. It must be reformed to facilitate a holistic approach to school performance. Otherwise, black and coloured learners in poor and rural communities will continue to be left behind.

III. METHODOLOGY

To produce this report, the EELC conducted desktop research to review the existing regulatory framework for underperforming schools, including laws, policies and guidelines.

We also looked at the available evidence to better understand how the different provinces were complying with their statutory duties in relation to underperforming schools, whether implementation was uniform, and whether the current regulatory framework is effective for addressing underperformance. In particular, we looked at:

- Circulars provided to us by the Department for Basic Education ("DBE"); and
- Reports of underperforming schools submitted by the Provincial Education Departments ("PEDs").

Some points to note:

- The EELC corresponded with the DBE on 11 September 2019 and requested copies of reports submitted by the PEDS to the Members of the Executive Committee ("MECs") pursuant to section 58B SASA ("PED reports"). We requested PED reports for the years 2015 to 2019.
- The DBE responded on 4 October 2019, stating that "the management of the under-performance in schools, as stipulated in section 16A and 58B of the South African Schools Act 84 of 1996 is at the core of the sector's efforts of ensuring that all learners receive quality education, regardless of their geographical location". They further noted that they had "developed Circular D1 of 2014 to set out the processes that the provinces had to follow to comply with the provisions of section 58B of the South African Schools Act; and Circular D2 of 2017 to strengthen Circular D1 and provide criteria to guide the process of identifying, managing and supporting underperforming schools." The EELC was furnished with copies of both circulars.
- Our request for the PED reports was only partially fulfilled. We received reports for the years 2018 and 2019 for some but not all of the nine provinces.
- The value of the PED reports we did receive was limited for three reasons. First, the proposed structure in the report template provided to the provinces by the DBE was not always followed. Second, the quality of the PED reports was variable. Some reports were less comprehensive, detailed and considered than others. Third, and perhaps most significantly, the PEDs failed to reflect on the effectiveness of the remedial interventions. This glaring omission makes it difficult to assess the adequacy of remedial interventions in addressing underperformance.

IV. CONTEXT: SOCIAL AND CONSTITUTIONAL

This section sets school underperformance in its social and Constitutional context. The present state of South Africa's education system cannot be understood without reference to the legacy of apartheid. In framing the current reality of underperforming schools, it is necessary to begin with an introduction to apartheid and its impact on education.

IV.A. THE LEGACY OF APARTHEID AND UNDERPERFORMING SCHOOLS

"It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education."

Constitutional Court, Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another[21]

One of the cornerstones of the apartheid regime, the 1953 Bantu Education Act[22] orchestrated the segregation not only of schools but of the training of teachers and allocation of resources. Highly trained and skilled personnel were concentrated in historically white schools, leaving black learners on the periphery of educational productivity and mobility. Schools were instrumental in the suppression of the black population. This deliberately inequitable policy was implemented to stifle the potential of the black population, ensuring a steady supply of cheap labour. [23]

William Faulkner expressed that "the past is never dead. It is not even past." The South African education system embodies this assertion. Over 27 years since the advent of our Constitutional democracy, patterns of inequality along racial lines are still pervasive across the country – particularly within our schooling system. Schools in disadvantaged communities continue to serve black students almost exclusively, with schools in more advantaged communities serving mostly white students.[24] Whilst the social position of some individuals has changed, with the racial composition of South Africa's middle class including an increasing number of black and coloured individuals, there is still a long way to go, with poverty stifling urban and rural black communities all over the country.[25] To this day, a vast majority of black working-class learners' aspirations are trampled by the systemically unequal education they receive.

> ***Apartheid's legacy of deliberate division and inequality manifests itself in South Africa's current divided education system.[26]***
>
> ***Existing data has shown that there is a correlation between the apartheid racial categorisation of schools and their relative performance. For instance, a black child in democratic South Africa is seven times more likely than a white child to obtain a D grade in Maths.[27] By the fifth grade, the education backlog experienced in historically black schools is equivalent to over two years.[28]***

In contemporary South Africa, approximately 80% of high schools are "dysfunctional". This widely cited statistic has its origins in the Institute for Justice and Reconciliation's (IJR) Transformation Audit of 2006. Using Senior Certificate mathematics pass rates as a proxy for performance, the IJR identified two different categories of South African school. The first category accounts for 79% of high schools. These schools are "poorly performing" and "essentially dysfunctional". According to the IJR, "the overwhelming majority of children attending these schools are poor and African." The second category is top or moderately performing schools, which make up 20% of the total number of high schools. Of these, half are Dinaledi-type schools. Importantly, these schools also serve poor, African learners, yet they have managed to "transcend their circumstances and provide good educational opportunities to poor children." The other half are historically white schools. These schools "inherited excellent infrastructure from the apartheid days" and, given that they serve mostly middle-class learners, are generally able to charge high fees.[29]

This crisis of dysfunctionality persists and is now well-documented.[30] In 2010, the Minister for Basic Education acknowledged that "Many of our schools are dysfunctional... South African learners exit the foundation phase without basic literacy and numeracy skills required to succeed later on... The

21. Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another [2009] ZACC 32; 2010 (2) SA 415 (CC).
22. Act 47 of 1953.
23. Edward B. Fiske and Helen F. Ladd (2004) "Balancing public and private resources for basic education: school fees in post-apartheid South Africa" in Chisholm, L. 'Changing Class: Educationand Social Change in Post-Apartheid South Africa'. Human Sciences Research Council Press.
24. However, the latter has seen an increase in the enrollment of children from different racial groups.
25. Bhorat, H (2004) "The development challenge in post-apartheid South African Education" in Chisholm, L. 'Changing Class: Education and Social Change in Post-Apartheid South Africa'. Human Sciences Research Council Press.
26. N Taylor, 'School Reform and Skills Development' in The Institute for Justice and Reconciliation (2006) 'Money and Morality: Transformation Audit', pp65-66.
27. Kholeka Moloi 'Learners and educators as agents of social transformation in dysfunctional South African schools' (2019) available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-01002019000400007 (accessed 1 April 2021).
28. IOL, 'Schools dysfunctional – Motshekga', 11 March 2020, available at https://www.iol.co.za/news/south-africa/schools-dysfunctional-motshekga-476054 (accessed 6 May 2022).
29.
30. DBE (2011) Action Plan to 2014: Towards the Realization of Schooling 2025. Pretoria: Department of Basic Education.

majority of teachers lack the required subject knowledge, are not teaching what they are trained to teach and too often lack the commitment to teach for six-and-a-half hours every day."[31] In January 2019, Dr Nic Spaull summarised the continuing 'education problem' noting that "the majority of teachers (80%) lack the content knowledge and pedagogical skill to teach the subjects they are currently teaching. For example 79% of Grade 6 mathematics teachers cannot get 60% on a Grade 6/7 level maths test." He said that almost half of South African primary schools (45%) are "cognitive wastelands", in that "not a single learner can read and make inferences."[32]

"It is not an overstatement to say that **South African education** is in crisis."[33]

It would be wrong, however, to view dysfunctionality solely in terms of teacher competence and exam results. In reality, school dysfunction has many faces. Bergman, Bergman and Gravitt devised an explanatory model comprising four types of dysfunctions: (1) rules; (2) competences; (3) resources; and (4) extrinsics.[34] The first group encompasses the bending and breaking of rules; rules which are themselves dysfunctional; and abuses of power. Examples include fabrication of learners' marks; chronic unpunctuality and absenteeism of learners or staff; favoritism in hiring and promotion practices; lack of discipline or respect; parents verbally abusing or threatening principals; sexual abuse of learners by teachers; drug dealing on school premises; district officials protecting teachers or learners from censure because of personal relationships; and school government bodies withholding funds because of personal feuds with members of the school management team.

In the second group, incompetence may be on the part of the principal or teachers or other agents within the education system. For example, there may be mismanagement of finances and staff; inability to make decisions because of vested interests; inability to communicate effectively with parents, staff and community leaders; inability to teach a subject; or inability to maintain discipline in class.

The third group covers a range of resource dysfunctions: a lack of qualified staff, including cleaning and maintenance staff as well as educators and management; deficient facilities and infrastructure, including electricity, water, toilets, offices, classrooms, books, security fencing of school premises; and inadequate or absent support and welfare schemes, including security on school premises, safe and efficient transportation of learners to school, student services, psychological services, and feeding schemes.

The fourth group – extrinsics – are dysfunctions that primarily manifest outside the school domain but influence the school's functioning. They include personal and psychological problems of learners, parents and staff; issues in learners' home environments; and other health and welfare problems. For example, learners may have to contend with malnutrition; trauma; child labour; unstable or unsafe living arrangements; repeated changes in household structure or foster care arrangements; or exposure to violence in the neighborhood or on the way to school.

This typology of dysfunctions forms one component of the model. There are three others: the antecedents or causes of dysfunction; motivations for dysfunctional behaviour; and consequences. What emerges is a complex and interconnected web. Bergman et al conclude that

> ***"dysfunctions vary in kind and degree; they are rarely singular but are intricately interwoven and often give rise to further dysfunctions; while principals and their representatives are directly or indirectly connected to the dysfunctions, the dysfunctional episodes usually involve many other actors, power structures, and domains".[35]***

The multi-faceted nature of dysfunctionality, and the limitations of focusing on exam results, has been acknowledged by other researchers, too. For example, the Basic Education Handbook - a collaboration between Section 27, Equal Education, The Equal Education Law Centre, The Centre for Child Law, The Legal Resources Centre, The Southern African Litigation Centre, and the Studies in Poverty and Inequality, notes that there is reason to "question the use of the matric exam as an appropriate gauge of the functionality of a schooling system, or of a learner's academic achievement."[36]

No matter how dysfunctionality is measured, there is no doubt that South Africa has a dual education system, comprising two different sub-systems. The first system is made up of "well-resourced schools, which are the wealthy independent and former Model C schools, and to a lesser extent the former Indian schools". Arguably, it also includes the Dinaledi-type schools. The second system caters for "poor, predominantly African learners" and accounts for "the majority of public schools existing along a continuum of under-resourcing and dysfunctionality."[37] In this way, the ravages of apartheid remain evident in the modern education system.

32. N Spaull (2019) 'Priorities for Education Reform in South Africa', p3.
33. Shepherd, D (2013) "A question of efficiency: decomposing South African reading test scores using PIRLS 2006". Stellenbosch Economic Working Papers: 20/3.
34. Manfred Max Bergman, Zinette Bergman and Sarah Gravett (2011), 'The development and application of the Explanatory Model of School Dysfunctions', South African Journal of Education Vol 31, 461-474.
35. Ibid, p471.
36. Faranaaz Veriava 'Basic Education Provisioning' in Section 27 and others 'The Basic Education Rights Handbook', Chapter 12, p224.
37. Faranaaz Veriava 'Basic Education Provisioning' in Section 27 and others 'The Basic Education Rights Handbook', Chapter 12, p223.

"Today, the **lasting effects** of the educational segregation of **apartheid** are discernible in the systematic problems of **inadequate facilities** and the discrepancy in the level of basic education for the majority of learners."[38]

While there have been some overall improvements in education outcomes in recent years, deep inequalities endure. According to data from a General Household Survey, the percentage of youths who completed Grade 12 was approximately 44.9% in 2009 and 53.8% in 2018.[39] This shows an overall increase, but a deeper look into these statistics shows that there is still much to do in terms of empowering and advancing black and coloured youths. The completion rates of African and coloured youths were at 51.6% and 52.5% respectively, whereas for Indian and white youths the rates were 81.9% and 81.1% respectively. It is hard to applaud a general increase in stats when on a deeper level, the exclusionary effects of apartheid still exist on a bigger scale than one would expect in a post-apartheid South Africa.

TABLE 1: PERCENTAGE OF 22 TO 25-YEAR-OLDS WHO HAVE COMPLETED AT LEAST GRADE 12 OR EQUIVALENT BY POPULATION GROUP, 2009-2018

Population Group	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
African	40.1	41.1	43.2	43.6	44.4	48.4	47.0	46.7	48.8	51.6
Coloured	45.2	48.8	43.9	46.1	45.5	47.6	49.7	51.5	45.8	52.5
Indian	83.2	80.3	84.6	74.1	81.1	81.2	78.5	86.5	81.3	81.9
White	85.9	85.6	89.1	89.1	86.9	87.9	85.6	83.4	79.2	81.1
Total	**44.9**	**45.6**	**47.1**	**47.4**	**47.9**	**51.4**	**50.1**	**50.0**	**50.7**	**53.8**

Source: Statistics South Africa, General Household Survey (GHS), DBE own calculations

Pro-poor education policies have been implemented over the past 27 years, but their ambition of equality has been undercut by their actual impact.[40] In an effort to redress past inequalities, the government sought to disburse more funds and resources to schools located within poorer communities. Under the Quintile system, schools are placed on a poverty-ranking index determined by the Treasury, and apportioned non-personnel funds on a progressive, pro-poor basis.[41] Quintile 1-3 schools comprise approximately 60% of all learners and are no-fee schools so there is no obligation for learners to pay school fees to attend. As a result of this, they have the highest amount allocated to them per learner. For 2020/2021, Quintile 1, 2 and 3 schools have a per leaner school allocation of R1466. Quintile 4 and Quintile 5 schools are allocated R735 and R254 respectively. The logic behind the allocation of more money per learner to poorer schools is that channeling greater resources will translate into a better quality of education. The allocation of resources to poorer schools is certainly very important in improving not only access to basic education but quality learning outcomes. However, as the General Household Survey data shows, it has proved to be insufficient in addressing inequality. The quintile system itself has also been shown to be problematic. As we will we explain in this report, if quality education is to become a reality for every learner, resource allocation must be complemented with various other strategies which collectively improve the capacity and accountability of all different stakeholders.

38. National Education Policy Act 1996.
39. Staff writer '4 tables and graphs you should see ahead of South Africa's matric results' available at https://businesstech.co.za/news/government/363480/4-tables-and-graphs-you-should-see-ahead-of-south-africas-matric-results/ (accessed 19 July 2021).
40. Chisholm,L (2009) "The Challenge of South African schooling: dimensions, targets and initiatives" in 2011 Transformation Audit: From Inequality to Inclusive Growth.
41. Department of Education, Report to the Minister on Review on Cost, Resourcing and Financing of Public Schools ("Report to the Minister on Financing"), February 2003.

As it stands, the education system is failing to serve the country's most vulnerable communities. In turn, these communities are being deprived of the opportunities to enable them to lead a life of dignity and equality.[42] Learners in these communities are likely to have reduced job prospects and reduced opportunities to prosper and live a life of dignity in a democratic society. It is unacceptable that the majority of the population are not benefiting from the fruits of a good quality education.

> ***"Schools entrenched in a history of disadvantage and low resource allocation, serving children from poor communities are not offering them opportunities to excel academically. Moreover, poor quality of education is condemning the vulnerable and mainly black children in the country to an underclass, where poverty, unemployment and disillusion prevail."[43]***

Education is integral to the establishment of a more equitable society. It plays a powerful role in challenging the political and socio-economic inequalities and injustices that prevail. It is instrumental in promoting and realising change and mobility. Education is not only a means of bridging gaps of inequality created by the distribution of social goods parceled out unevenly at birth, but as an emancipatory tool in the personal development of an individual. There have been improvements in the education system since the end of apartheid and there has been a concerted effort by all stakeholders to ensure that equality of educational outcomes, treatment and opportunity are at the forefront of policy and action.[44] Yet a range of social, economic and political inequalities continue play themselves out in the education system.

Suffice to say, it is a grave injustice that the majority of the learners attending schools in South Africa are not reaping the benefits of a good quality education. Our Constitution, in terms of section 9, advocates for a system in which all people are not only treated equally, but where legislative measures are put in place to advance disadvantaged categories of persons, with the ultimate vision that citizens are not only treated the same but are also on a level playing field. We have to ask ourselves whether the legislative measures put in place to give effect to the transformative vision of the Constitution are working on a practical level.

Clearly, then, a discussion on quality learning and equity in public schools cannot be completed without reference to the equality clause contained in the Constitution and its meaning within the context of the right to a basic education. We now turn to consider these Constitutional provisions and their particular importance when one seeks to assess the current regulatory framework intended to address and assist underperforming schools.

IV.B. THE CONSTITUTIONAL RIGHT TO A BASIC EDUCATION

The preamble of the Constitution provides that one of the progressive intentions of the Constitutional project is to "[i]mprove the quality of life of all citizens and free the potential of each person."[45] There is no doubt that the right to basic education is crucial to achieving this intention. In fact, it has been recognized as an empowerment right, playing a pivotal role in "promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential...[it] provides a foundation for a child's lifetime learning and working opportunities."[46] The right to basic education is a fundamental and unqualified right, recognized in multiple international, regional and national human rights conventions.[47]

Unlike other socio-economic rights, the right to basic education is immediately realizable and is not subject to internal limitations of progressive realization and availability of resources. This was emphasised by the court in the case of *Juma Musjid*.[48] The right may only be limited in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[49]

Woolman and Fleisch define basic education as "the minimum levels of literacy, numeracy and essential life skills, necessary to do more than menial work in a complex society."[50] But, as the World Declaration on Education for All[51] makes clear, there can be no one-size-fits-all approach:

> ***"Basic Education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, work seekers or self-employed. Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of particular learning audiences or groups, and should provide access to a nationally recognised qualification or qualifications."[52]***

This definition has been widely endorsed and was used by the Ministry of Education as far back as 1995 in their White Paper on Education and Training.[53] To use an analogy, the right to basic education can be compared to a made-to-order cake. The cake, no matter the type, has core ingredients. But the flavour of the cake, its appearance and its toppings depend on the needs of the specific purchaser. Similarly, the right to basic education has some core ingredients, but many aspects of the right depend on the needs of the specific learners or schools. The type of education provided must be "flexible", "developmental" and "targeted" and may vary according to context.

42. Sen, A (1999) "Development as Freedom" Oxford University Press.
43. Spaull, N (2014) "Accountability in South African Education", Ch4 in "Transformation Audit 2013: Confronting Exclusion" p. 51-65 Institute for Justice and Reconciliation.
44. Equality of opportunity has been a central part of the post-apartheid government's policy, and this has translated into some positive results, with an improved curriculum and improved rates of numeracy and literacy among the population as a whole. See Department of Education (2004) "The Development of Education" Country Report of South Africa. See also UNESCO (2013) "Teaching and Learning: Achieving Quality Form All".
45. Constitution of the Republic of South Africa, 1996.
46. Judgment of Nkabinde J in Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae) 2011 (8) BCLR 761 (CC), para 43.
47. Universal Declaration of Human Rights (adopted 10 December 1948); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976); African Charter on Human and Peoples' Rights (adopted June 27 1981, entered into force Oct 21 1986); Constitution of the Republic of South Africa 1994; South African Schools Act 1996; National Education Policy Act 1996.
48. Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae) 2011 (8) BCLR 761 (CC).
49. Section 36(1) of the Constitution.
50. Stu Woolman and Brahm Fleisch (2009) "The Constitution in the classroom: Law and education in South Africa 1994-2008" 113.
50. United Nations Educational, Scientific and Cultural Organization World Declaration on Education for All, 1990 (World Declaration).
51. The White Paper on Education and Training (GN 196 in GG 16312 of 15 March 1995).
52. The White Paper on Education and Training (GN 196 in GG 16312 of 15 March 1995).
53. Madzodzo obo Parents of Learners at Mpimbo Junior Secondary School and others v Minister of Basic Education and others [2014] JOL 31500 (ECM).

Over the years, the content of the right to basic education has been fleshed out in the courts, when individuals claim that their right has been violated. In *Madzodzo and others v Minister of Basic education and others*,[54] the court was asked to consider furniture shortages in schools in the Eastern Cape. The court held that the right to basic education means more than simply making available places at schools. It also requires the provision of "educational resources" such as schools, classrooms, teachers, teaching materials and appropriate facilities. Hence, the government had breached the right to basic education "by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space."[55]

The so-called "textbooks case"[56] was brought in response to the failure of the DBE to provide all learners in Limpopo public schools with textbooks for each subject prior to the start of the academic year.[57] The SCA made clear that "the delivery of textbooks to certain learners but not others cannot constitute fulfilment of the right... If there is one learner who is not timeously provided with her textbooks, her right has been infringed."[58]

In the case of *Tripartite Steering Committee*,[59] the court had to determine whether the right to basic education includes a right to be provided with transport to and from school at the state's expense for those learners who live a distance from their respective schools and who otherwise cannot afford transport costs. The court answered in the affirmative, providing that, *inter alia*, "the right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and transport to and from school at State expense in appropriate cases."[60]

In the context of underperforming schools, the jurisprudence on the right to basic education offers a guideline for holding the state to account. These cases indicate what the state must do to create school environments conducive to learning. Underperformance is a multi-faceted issue. But, oftentimes, poor infrastructure or a lack of resources is a contributing factor; schools underperform partly because one or more of the core requirements of the right to basic education, as identified by our courts, is missing. Of course, the provision of infrastructure and resources in schools across the country is far from uniform. As explained above, it is still black and coloured schools that tend to suffer, many years after apartheid has ended. Hence, the right to basic education interacts with the right to equality in ways which are particularly relevant to the issue of underperforming schools. It is to this interaction that the discussion now turns.

IV.C. THE EQUALITY CLAUSE AND THE RIGHT TO BASIC EDUCATION

The drafters of the Constitution were mindful of the poverty, discrimination, and socio-economic inequalities that engulf our society. Thus, equality is a right and a foundational value that underpins the social fabric of the new Constitutional dispensation. The equality clause in the Constitution is a tool to be utilized in pursuit of its transformative vision. Our Constitution is often classified as a 'never-again' constitution. Thus, section 9 provides that everyone is equal before the law and has the right to equal protection and benefit of the law and the state may not unfairly discriminate, directly or indirectly, against anyone on the listed grounds, as espoused in section 9(3) of the Constitution, or analogous grounds. This provision guards against the imposition of unfair treatment or discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA") defines discrimination in broad terms that include conduct which imposes a burden, obligations or disadvantage on, or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds listed in PEPUDA.[61]

In addition, section 9 of the Constitution is not just preventative in nature but advocates for a unified dual approach with regards to the pursuance of equality. It acts as a restraint clause and also has promotional aspects that undergird the right. For example, Justice Goldstone highlighted in *Hugo v President of RSA*[62] that the equality project cannot be achieved through insistence upon identical treatment in every circumstance.[63] Substantive equality transcends equal treatment, recognizing that treating people alike despite pre-existing disadvantage or discrimination can perpetuate inequality.[64] Further, Justice Ngcobo in *Bato Star*[65] asserted that:

> ***"the achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one "in which there is equality between men and women and people of all races". In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it".[66]***

Therefore, our courts have explicitly recognized that, without a positive duty to promote equality, patterns of discrimination and social exclusion will remain unchanged.[67]

54. Madzodzo obo Parents of Learners at Mpimbo Junior Secondary School and others v Minister of Basic Education and others [2014] JOL 31500 (ECM).
55. Ibid, para 41.
56. Minister of Basic Education and others v Basic Education for All and others [2016] 1 All SA 369 (SCA).
57. This was supposed to happen in accordance with a policy that the Department of Education ("DBE") adopted, which mandated the above and therefore the SCA ensured that the DBE complied with its own adopted policy.
58. Minister of Basic Education and others v Basic Education for All and others [2016] 1 All SA 369 (SCA).
59. Tripartite Steering Committee and another v Minister of Basic Education and others [2015] 3 All SA 718 (ECG).
60. Ibid, para 18.
61. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, section 1.
62. President of the Republic of South Africa and Another v Hugo 1997 (6) BCLR 708 (CC).
63. Ibid, para 41.
64. Sandra Fredman (2008) "Human Rights Transformed: Positive Rights and Positive Duties", Oxford University Press, p311.
65. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC 15.
66. Bato Star para 74.
67. The same sentiments were echoed by the Constitutional Court in National Coalition for Gays and Lesbians, where the court held that "it is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely." National Coalition for Gay and Lesbian Equality v Minister of Justice & Others 1999 (1) SA 6 (CC), para 60.

Nevertheless, in over 20 years of democracy, equality in education remains a distant dream for learners in mostly rural provinces. For almost fifteen years, Equal Education ("EE") has been striving for quality and equality in South African education and the struggle continues. Alongside EE, others in civil society have called attention, time and again, to ongoing inequalities. For example, in their book, 'Ready to Learn? A Legal Resource for Realising the Right to Education', Legal Resources Centre observed that pupils in certain schools in the Eastern Cape are not deriving the same teaching and learning benefits as their peers in adequately resourced schools.[68] In short, learners at predominantly black schools are frequently subjected to inadequate infrastructure, materials, teachers and school management as well as inadequate support for learners who require accommodation for their particular needs. The same educational disadvantage that learners in these schools experienced under apartheid is still rife and it manifests in the poor educational outcomes for learners. For as long as these disparities exist, the right to equality cannot be said to be realised within South Africa's education system.

The state has the power and obligation, in terms of section 9(2) read with section 7(2) of the Constitution, to take measures to uproot the chains of disadvantage that continue to entrap schools in rural provinces. When one looks at the context of underperforming schools, one is struck by the extent to which the state has failed to promote substantive equality within the provision of education in South Africa.

Admittedly, the education system has undergone a dramatic change that saw an introduction through progressive legislation and policy of a single unified system based on the principles of equity and redressing the formerly fragmented and racially divided education system.[69] As explained above, the government has introduced various mechanisms to redress the problem of unequal education, such as the introduction of no-fee schools and subsidies for schools in poorer localities. This report is by no means an attempt to minimize the strides made by the government over the years. However, while the introduction of no-fee schools ensures access to education, it does not guarantee quality and does not automatically translate into equal educational outcomes. Moreover, the removal of racial taxonomies does not remove the entrenched system of disadvantage that marks township and rural schools.

Our current legal regulatory framework attempts advance population groups labeled as "previously disadvantaged." However, such provisions are either deficient or under-utilized. NEPA, for example, provides that national education policy should be directed towards the "advancement and protection of the rights of every person... in particular the right... of every person to basic education."[70] This should be read in tandem with section 9(2) of the Constitution which provides that "equality include[s] the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect, or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." Holistically, South African law does not only mandate formal equality, but requires that government policy should be directed at ensuring that all individuals, irrespective of race, class, gender, disability, social status, etc., are provided with a good quality education that serves the purposes recognized in the jurisprudence detailed above.

The vision set out in section 29 of the Constitution, read with sections 9 and 28, has not yet been realized. It is evident that the "pattern of disadvantage engraved onto our education system by apartheid has not been erased." [71] Although there may not always be a direct correlation between resources on the one hand and academic performance on the other, learners will tend to thrive in an environment conducive to learning, with proper infrastructure, textbooks, qualified teachers, access to proper water and sanitation facilities, transport to school etc. Yet there is currently a resource deficit, starkly illustrated in the August 2017 Southern and Eastern Africa Consortium for Monitoring Education Quality ("SACMEQ") Report. This report showed that less than 60% of Grade 6 learners in the Eastern Cape and Limpopo, and only 45.5% of Grade 6 learners in KwaZulu-Natal, have access to their own reading textbooks. In addition to this, only 57.2% of learners in the Eastern Cape, and 50.1% of learners in KwaZulu-Natal have access to their own mathematics textbooks.[72] This deficit is borne mostly by black learners, who often form the entire learner population in poor rural and township schools. As observed in *MEC for Education, KZN and others v Pillay*:

> ***"...although the law no longer compels racially separate institutions, social realities by and large still do. Most Black learners are educated in township schools where there are generally no White learners at all." [73]***

For as long as these social realities exist, the right to equality will remain intangible. An examination of the actual social and economic conditions of groups and individuals reveals that Constitution's commitment to substantive equality is not being met. Clearly, large scale social change cannot, and has not, occurred simply through the enactment of legislation. Legislation is not self-enforcing. Without accompanying action, it is impotent; mere words on a page. In South Africa, we have statutes that are arguably good in theory, but fall short when it comes to implementation.

It is clear that the objective in respect of section 9 is substantive equality and, unfortunately, education in South Africa is still marked by racial disparities. As a result, it can be argued that "the state may well be failing to meet its commitments in terms of section 29(1) [when] read with the obligations imposed by section 9 of the Constitution."[74] Part of the transformative vision is to correct the injustices of our past. But the Constitution is also "forward-looking" and its "commitment to work towards a society based on social justice implies not only the redressing of the outcomes of past injustice, but a deep restructuring of the underlying institutional arrangements which generate various forms of political, economic, social and cultural injustice."[75] There is still much to be done to "restructure" the economic and social landscape of South Africa. Without structural change, we run the risk of moving from the proverbial "never-again" society to a "yet again" society, in which the realities of the education system continue to fall far short of the Constitution's transformative vision.

68. Legal Resource Centre, "Ready to Learn? A Legal Resource for Realising the Right to Education" 1st Edition (2013).
69. Jordan Pillay, "Educational Decentralization and School Governance in South Africa: from Policy to Practice", 2005, p25.
70. National Education Policy Act 1996.
71. MEC for Education, KZN & others v Pillay (Governing Body Foundation (1st amicus curiae), Natal Tamil Vedic Society Trust (2nd amicus curiae), Freedom of Expression Institute (3rd amicus curiae)) [2008] JOL 20810 (CC), para 31.
72,. "The SACMEQ IV Project in South Africa: A Study of the Conditions of Schooling and the Quality of Education" Short report, August 2017, p19.
73. MEC for Education, KZN & others v Pillay (Governing Body Foundation (1st amicus curiae), Natal Tamil Vedic Society Trust (2nd amicus curiae), Freedom of Expression Institute (3rd amicus curiae)) [2008] JOL 20810 (CC).
74. De Vos,P. (2011) "Time for Litigation on Education" Constitutionally Speaking.
75. S Liebenberg "Socio-Economic Rights: adjudication under a transformative constitution" 2 ed (2016) 27.

V. ANALYSIS OF THE EXISTING REGULATORY FRAMEWORK

As explained in Part IV, section 9(2) read with section 7(2) of the Constitution gives the state a power and an obligation to address the disadvantage plaguing schools in rural provinces. Pursuant to this obligation, legislative measures were adopted in 2007 when section 58B, entitled 'Identification of underperforming public schools', was inserted into SASA. Section 58B appears to be the legislature's way of ensuring that key players including school principals, Head of Departments ("HODs"), MECs and the Minister of Basic Education pay special attention and provide specific support to underperforming schools in every province in the country, to ensure that learners everywhere achieve quality learning outcomes.

Section 58B(1) read with 58B(2) of SASA mandates all HODs to identify schools that are underperforming according to any one of three criteria. The criteria are set out at section 58B(2)(a)-(c). They are as follows:

a. the standard of performance of learners is below the standards prescribed by the National Curriculum Statement and is likely to remain so unless the Head of Department exercises his or her power in terms of this Act;

b. there has been a serious breakdown in the way the school is managed or governed which is prejudicing, or likely to prejudice, the standards of performance; or

c. the safety of learners or staff is threatened.

Identification of underperforming schools according to these three criteria is just the beginning. Section 58B makes provision for a three-stage process to address underperformance:

- **STAGE 1:** the identification of schools as underperforming based on one or more of the three listed criteria.
- **STAGE 2:** management and support of identified schools, and implementation of appropriate remedial interventions.
- **STAGE 3:** monitoring, oversight and accountability by provincial and national government departments.

In this section of the report, we address each of these three stages in turn. We assess the practical effect of section 58B and we make a number of recommendations for improvement. The full set of recommendations can be found in Part VI.

V.A. STAGE 1: IDENTIFICATION OF UNDERPERFORMING SCHOOLS

Stage 1 of the process for addressing underperformance is the identification of underperforming schools.

(i) Reports to be considered when identifying underperforming schools

HODs are responsible for identifying underperforming schools in their province based on any or all of the three criteria listed in section 58B of SASA. The HOD must issue a written notice to the underperforming school, informing the school that it should respond within 14 days.[76]

To identify underperforming schools, the HOD must make use of reports prepared and submitted by school principals pursuant to section 16A(1)(b) of SASA. Reports prepared and submitted under section 16A are only required to cover the academic performance of the school and the use of school resources. However, section 58B(1) provides the HOD must also take account of "other relevant reports" to identify underperformance. There is a strong argument that this allows – and, indeed, obligates – the HOD to take account of other information, beyond academic performance and use of resources. This could include, for example, information on learner drop-out rates, teacher quality and teacher retention, and problems around management and leadership at the school.

Focusing in on learner drop-outs: this has been an issue for over a decade, and as such, should at this point be viewed as a national crisis. The issue has been exacerbated by the Covid-19 pandemic and the resultant school closures. It has been estimated that approximately 750, 000 children may have dropped out of school as a result of the pandemic, this being a massive jump from "pre-pandemic" figures of 230, 000. Pandemic aside, the issue of drop-outs has been and is still a serious problem as, according to Statistics South Africa, only around 50% of youths complete Grade 12. Several factors contribute to learners leaving school, including socio-economic circumstances, curriculum coverage and support and curriculum delivery. The list goes on. What is clear, however, is that there are many measures that can be put in place to reduce dropout rates, one of which involves making drop-out reductions a key performance indicator. According to the Zero Dropout Campaign, "dropout prevention should be an explicit goal of the schooling system, requiring schools to regularly report on their levels of learner disengagement." Taking account of reports on pervasive issues like learner drop-out when identifying underperformance would be a useful step in the right direction.

The EELC considers that a wide interpretation of section 58B(1) is correct as a matter of law and appropriate as a matter of policy. HODs must take account of all relevant information when assessing underperformance, not just information about academic performance and use of school resources. This should, however, be made clearer.

Further, section 58B(1) should be reformed to explicitly state which other reports may be relevant. There should be a non-exhaustive list, which should include reports on teacher quality and teacher retention, learner drop-out rates, and problems around management and leadership at the school.

76. Section 58B(3)(a) of the South African Schools Act.

(ii) Criteria for underperformance under section 58B(2)

Even if the HOD takes account of all relevant information in making their assessment, the regulatory framework has other limitations. These relate to the criteria for underperformance which, to recap, are a) poor academic performance; b) breakdown in school management; and c) threats to safety. The problems with these criteria are as follows: first, they are vague and unclear; second, and more fundamentally, the criteria are both under- and over-inclusive, when considered in light of the history and context of school performance in South Africa. These problems are significant because the information provided to the HOD is only relevant insofar as it relates to the criteria for underperformance. No matter the content of the reports, a school will not be eligible for section 58B support unless it can show that it meets one of the three criteria.

Turning to the first of the two problems, the criteria in section 58B(2)(a)-(c) make use of vague terms which make their application unclear. The concern about vagueness is especially acute in relation to sections 58B(2)(b) and (c), which lack the touchstone of the National Curriculum to help define their meaning and scope. On a plain reading of subsection (b), it is unclear when it will be triggered. First, the form of breakdown in school management or governance required is unclear. Second, there is also a lack of clarity as to who the legislator envisaged as ultimately being affected by the serious breakdown in order for requirements of subsection (b) to be met. Third, it is not clear whether the "standards of performance" to which subsection (b) refers are the standards of performance of the educators, learners, or the school generally.

Subsection (c) is similarly unclear. It provides that threats to safety is a criterion for underperformance. But it offers no detail on the circumstances that would trigger the criterion or the forms of "safety" that are relevant. For example, it is not clear whether the threat to learners or staff must be ongoing or immediate for the subsection to be triggered. On a strict reading of this provision, almost every school is likely to fall short given that safety-related issues posing some threat to educators or learners are so commonplace. But it is unlikely to have been the intention of the legislature that virtually all schools should be classed as unsafe for the purposes of section 58B. Therefore, the scope and applicability of the provision are very unclear.

> ***The lack of clarity as to the meaning and scope of subsections (b) and (c) means that the many public schools facing challenges with management and governance, or located in regions where violence is rife, may not be caught by the criteria for underperformance and may not, therefore, be able to unlock the support provided for by section 58B. This should be addressed by reform of section 58B(2), to ensure that there are clear criteria for accessing additional support.***

As well as being unclear, the criteria suffer from a more fundamental problem: they are both under- and over-inclusive.

Oftentimes, the criteria will be too narrow. They miss the bigger picture and fail to acknowledge the serious and deep-rooted problems facing the South African education system. As illustrated by Bergman et al's model, set out in Part IV, dysfunction can take many different forms. But the existing section 58B criteria only take account of a select few of these. Consider, for example, a school with a very high learner drop-out rate; where learners receive no support for the issues they face outside of the classroom; where unreliable transport means that learners are consistently missing lessons; where classrooms are cramped and there is no access to technology. Provided that this school maintains the required exam results, it will not be caught by the academic performance criterion. Nor is it likely to be caught by the breakdown in management or threats to safety criteria. Thus, a seriously dysfunctional school may be excluded from obtaining the much-needed support that section 58B seeks to unlock.

The EELC does not consider that all of the 80% of schools which are dysfunctional should be caught by section 58B. The fact that 80% of schools are dysfunctional points to systemic failures which need to be addressed through a transformation of the system and not necessarily through a mechanism such as s58B. The use of section 58B should be reserved for the most serious cases of dysfunction. However, in the EELC's view, the criteria should reflect and take account of all the various dimensions of dysfunction, rather than focussing more narrowly on academic performance, safety and management and governance.

In other cases, the criteria may be over-inclusive. Consider, for example, a school serving learners with high rates of fetal alcohol spectrum disorder. It may be unrealistic and inappropriate to expect this school to attain the same pass rate as a school serving a different cohort of learners. In spite of a law pass rate, the school should not necessarily be classed as 'underperforming' and may not need any additional support. And yet it could be caught by the section 58B criteria.

This discussion gives rise to a further point, about the language of 'underperformance'. In light of the structural inequalities of the South African education system, and the extrinsic challenges that many dysfunctional schools must contend with, the language of 'underperformance' can be unduly stigmatizing. It risks placing too much onus on individual schools to remedy their 'failings', instead of focusing on measures state actors can take to help engender systemic change. Rather than a paradigm of blame, it may be more appropriate to shift to a paradigm of support and to change the language of the regulatory framework accordingly.

For example, Sara Black in her doctoral thesis 'The Tyranny of Timespace: Examining the timetable of schooling activities as the interface between policy and everyday rhythms' has recognised the way that language can erase the work and effort put in by schools that struggle, unfairly placing blame or shame on staff at these schools.[77] Rather than 'performing/underperforming' or even 'functional/dysfunctional', Black borrows the nomenclature of 'fortified/exposed' used by Teese and Polesel in a study of secondary schools in the state of Victoria, Australia.[78] Black writes:

> **"The sense of unassailability, of 'shored-up-ness' expressed in the term fortified captures well the position of those few privileged schools in South Africa that 'function'. These institutions are sufficiently insured against certain types of knocks, are able to weather changes in curriculum and policy, and are able to protect themselves against the vicissitudes of broader society. Exposed schools, on the other hand, are far more vulnerable to shifts in the economy, in public transport systems, to violence and crime, to staff turnover and shifts in student intake, even to the weather." [79]**

78. Teese, R., & Polesel, J. (2003). Undemocratic schooling: Equity and quality in mass secondary education in Australia: Melbourne Univ. Publishing.
79. S Black, 'The Tyranny of Timespace: Examining the timetable of schooling activities as the interface between policy and everyday rhythms' (28 August 2019), doctoral thesis, School of Education, Faculty of Humanities, University of Cape Town, p 5.

The EELC recommends that the section 58B criteria should be fundamentally reconsidered to ensure that schools who need it are able to access support. Further, the legislature should consider dropping the language of 'underperformance' to reflect a shift from a paradigm of blame towards a **paradigm of support**.

(iii) Criteria for underperformance set out in the DBE circulars

Circulars issued by the DBE apparently aim to offer some guidance on the interpretation of section 58B. Unfortunately, however, rather than offering clarity, the circulars compound the problems outlined above by setting a second, contradictory standard which focusses exclusively on academic performance.

Circular D1 of 2014 developed by the DBE appears to set out the processes that the PEDs must follow to comply with the provisions of section 58B. This was further strengthened by Circular D2 of 2017 which now sets the specific criteria that PEDs must apply when identifying underperforming schools. These Circulars have been issued to PEDs together with a reporting template, which contains criteria that exclusively focus on the academic performance of the school. This is despite Section 58B prescribing three different criteria, only one of which concerns academic performance.

The criteria as prescribed by the DBE are as follows:

- **Primary schools:** deemed underperforming if, using numeracy and literacy as proxy, less than 60 % of the learners perform at level 4 and above in grade 6.
- **Secondary schools:** deemed underperforming if its pass percentage in the NSC examinations falls below 65% and it has produced less than 30% bachelor and diploma passes, combined.
- **Chronically underperforming schools:** deemed chronically underperforming if it is identified as such by the province for a period of 3 consecutive years.

Upon studying the PED reports for 2018 and 2019 we learned the following regarding the use of the DBE'S criteria for the identification of underperforming schools:

- Most PEDs were using the criteria for the identification of underperforming schools as prescribed by the DBE in these Circulars.
- In relation to secondary schools, the information contained in the reports indicates that of the nine provinces, six were using the DBE criteria, while three provinces, KwaZulu-Natal, Mpumalanga and Northern Cape, had deviated. In the case of KwaZulu-Natal, a secondary school was considered underperforming if its pass rate was less than 60%, while Mpumalanga made use of individual schools, circuit, and district assessment results to identify primary and secondary schools that were underperforming. Northern Cape also deviated from DBE criteria and used a pass rate less than 75% to identify underperforming secondary schools in the province.

Based on the above, there is clearly variance in the standards applied by the provinces, as well as deviation from the criteria set by the DBE. This is likely due to the vagueness of the standards in SASA itself, combined with a lack of clarity on the relationship between SASA and the DBE guidance.

As mentioned above, while Section 58B lists three criteria for the identification of underperforming schools, the DBE's own criteria only focus on the school's academic performance, to the exclusion of other grounds listed in section 58B(2). This creates even more confusion and lack of clarity regarding the criteria that must be used for the identification of underperforming schools. The lack of clarity could result in the exclusion of schools in dire need of the support unlocked by Section 58B. This is particularly concerning given that most of these schools are located in rural areas and are previously disadvantaged schools, serving the majority of our black and coloured learners.

> ***The EELC recommends that the DBE circulars should be retracted. Instead, the Minister for Basic Education should prescribe new norms and standards for the identification of underperforming schools pursuant to her powers under, for example, section 5A SASA. These new norms and standards should make reference to all criteria set out in section 58B, including any new or reformed criteria enacted in line with our recommendations. The norms and standards should not be limited to academic performance or exam results but should instead take a holistic view of school underperformance.***

(iv) Contextual factors affecting academic underperformance

In addition to the problems set out above, the EELC also has a serious concern about the failure of the existing framework to take account of contextual factors which result in academic underperformance, and which will need to be addressed if performance is to be improved. Nowhere in the regulatory framework is clear and explicit provision made for the identification and consideration of all the relevant contextual factors that may impact the overall functionality of a school.
Our analysis of the PED reports revealed a number of cross-cutting challenges that schools face. These include curriculum delivery; learner transport; teacher quality and retention; Learning Teaching and Support Material ("LTSM") shortages; improper management of learner progression; school management and leadership; and school safety.

While these challenges may well impact a school's academic performance, and could be addressed incidentally, the regulatory framework does not clearly and explicitly require this. Nor does it provide scope for these challenges to be addressed head-on and in their own right. Further, and as explained above, if a school maintains its pass rates it is unlikely to be identified as requiring support under the existing regulatory framework, and its dysfunctions may not be addressed at all.

Curriculum delivery

Each of the PEDs identified numerous issues in relation to the curriculum and curriculum delivery, which seem to be a key contributing factor to school underperformance. Some of the most notable issues include the poor content knowledge and methodology of teachers in particular subjects and superficial curriculum coverage due to the shortage of quality teachers. The large number of new educators, especially in the Further Education and Training ("FET") band, pose a challenge since the new educators are often ill-prepared by their university training with regards to curriculum content knowledge, methodology and classroom management. Additionally, there is minimal and inconsistent internal subject monitoring by the School Management Teams ("SMTs"). Some SMTs do not have mathematical knowledge but are expected to support math teachers. Workbooks in some schools are not maximally utilized by teachers and SMTs, a significant number of teachers do not follow formal lesson plans, and contact time between learners and teachers are not fully monitored and utilized in some schools. Furthermore, there is a shortage of subject advisors at the district level due to the moratorium on the appointment of office-based officials. There is also ineffective monitoring of content coverage by HODs, and poor moderation of School-Based Assessment Test.

Unreliable learner transport

One school in North West noted the need for learner transport to be provided. In EELC's own experience, unreliable learner transport is widespread and results in many learners losing out on learning and teaching time. In our pamphlet, 'The Long Walk to School', we noted that the 2016 General Household Survey found that 483 633 learners in KwaZulu-Natal and 183 202 learners in Eastern Cape walk more than half an hour in one direction to school each day. In 2014, learners from the village of Nquthu in KwaZulu-Natal told EE about their experiences. Learners faced difficulties including "walking very far distances in extreme heat and in thunderstorms, and crossing rivers and mountains, at great risk of violent crime including sexual assault." We further noted that "[m]any learners are tired and hungry after the long walk, and cannot concentrate properly in class or perform well at school."[80] In June 2021, EE and EELC succeeded in a long legal struggle for a learner transport policy in KwaZulu-Natal. But in many places, learner transport remains a barrier to quality education.

Teacher quality and retention

Of the nine provinces, four noted in their reports the shortage of qualified teachers and poor teacher quality and retention as some of the most important school-related factors that influence underperformance. The Western Cape in its 2018 report notes that poor communities struggle to access highly skilled teachers when there are vacancies, particularly in subjects such as Mathematics, Physical Science or Life Science and Accounting, Mathematics Literacy, History, Geography, Foundation Phase and Languages. PEDs further noted the insufficient support to Mathematics, Science and Technology Academy ("MSTA") schools, as well as challenges with the redeployment of teachers at said schools. Some PEDs have to rely mostly on foreign educators to teach crucial subjects and the recruitment process is cumbersome. Alternatively, un/under qualified educators are appointed in these critical posts. Generic workshops are provided to teachers by subject advisors that do not speak to the specific topic deficiencies identified. The North West PED particularly mentioned that schools were allocated inexperienced teachers, including at Grade 12, and noted that some critical subjects were without teachers. A similar observation was made in the Eastern Cape.

LTSM shortages

Some provinces reported that they have LTSM shortages. This is partly due to the fact that there is a poor retrieval of textbooks at the school level. Further, some provinces, such as the Northern Cape, pointed out challenges related to the increase in enrolment due to in-migration of people to urban and semi-urban areas. Mpumalanga PED, in its 2019 report, noted that many schools had a shortage of textbooks as the last deliveries were done in 2012.

Improper management of Learner Progression

A further challenge highlighted by provinces is the improper management of the learner progression policy. In the North West, this resulted in a large number of learners being progressed from Grade 11 to Grade 12 prematurely. Mpumalanga PED reported that in instances where learners have progressed, said learners are mostly unsupported and that, in some schools, learner performance improvement strategies were not shared with parents.

School leadership and management

Most provinces identified poor and weak leadership and school management as two of the 'root causes' of academic underperformance at schools. It was reported that slow and/or delayed appointments in management vacancies leads to prolonged periods of uncertainty. In addition, large numbers of newly appointed Principals and SMTs, and their lack of experience with regards to Curriculum management, presents a serious challenge. The majority of provinces stated that unstable SMTs are a contribute to school underperformance. The North West PED specifically noted instability at SMT level at identified schools. Mpumalanga PED reported poor leadership and management skills in some SMTs. Free State PED, in both its 2018 and 2019 reports, noted a lack of effective development, monitoring and support by the SMTs; internal conflict amongst the staff and SMT members; and underproductive leadership that is unable to overcome impediments to improved performance. Limpopo PED interestingly noted that there was no or poor usage of departmental intervention documents like Diagnostic and internal moderator reports, exam guidelines, Mind the Gap (MTG) documents, and past exam papers, as well as the poor implementation and monitoring of SIPs.

School safety

Some provinces cited poor discipline and commitment of learners and parents due to their impoverished socio-economic circumstances as a reason for underperformance in some of their schools. This lack of discipline can constitute a safety issue. In Manenberg and Lavender Hill in the Western Cape, it was stated

80. Equal Education and Equal Education Law Centre, "The Long Walk to School", https://eelawcentre.org.za/damages-claim-instances-corporal-punishment-2/ (accessed 8 May 2022).

that socio-economic issues impact the schools in the form of gangsterism. Gauteng noted a severe lack of discipline amongst learners that affected performance.

And yet, despite the multifaceted challenges that schools in townships and rural areas experience, the legislature adopted an 'accountability systems' approach that places examination results at the heart of measuring school performance and ignores contextual factors. Underperformance remains a thorny issue in 'historically' disadvantaged schools that serve learners from working class and predominantly poor communities. Many scholars have lamented that the provisions in SASA are deficient and do not properly engage with the underlying problems affecting school and learner performance. For example, ethnographic research conducted in the Ilembe region in KwaZulu-Natal confirms the disjuncture between educational policy, schooling and contextual factors affecting particularly rural schools.[81]

As explained above, one key problem is that the underperformance criteria specified in section 58B(2) relate only to issues of academic outcomes, governance and management and safety. This is a closed list and neglects vital considerations, such as lack of resources and infrastructure, that may be huge indicators of dysfunctionality in schools. The criteria seem to rest on the erroneous assumption that internal features, such as breakdown in management, are the prime movers behind school dysfunction, and that corrective measures should be directed towards these internal features in order to turn the situation around. The closed list ignores many of the sources and manifestations of dysfunction. Often – and as is clearly demonstrated by the provincial reports we have analysed – the real problems may be far removed from the criteria prescribed under section 58B and, as such, will receive limited traction or intervention.

Likewise, the DBE's circulars overlook these contextual factors and leave little room for provinces to engage with and address them. In improving the standard of academic and overall performance of a school, it is crucial to acknowledge and take into account all the contextual factors that impact the quality of the education at the school. Both section 58B and the DBE circulars fail to do this. This means that schools in need of support are either excluded from the scope of the regulatory scheme or – if identified as underperforming – offered remedial interventions ill-suited to their needs.

> ***The recommended new norms and standards should ensure that all relevant contextual factors are taken into account when identifying schools.***

V.B. STAGE 2: SUPPORT AND MANAGEMENT

Stage 2 of the process for addressing underperformance involves the support and management of identified schools.

(i) School Improvement Plans

Section 16A(c)(i) of SASA requires that principals of schools identified as underperforming must, at the beginning of the academic year, prepare a plan setting out how academic performance at the school will be improved. It must be presented to the HOD on a date determined by him or her and tabled at a School Governing Body ("SGB") meeting.[82] This type of plan is formally known as an Academic Performance Improvement Plan,[83] but is often referred to as a School Improvement Plan ("SIP")or School Performance Improvement Plan ("SPIP"). "SIP" is a term commonly used by the PEDs, and we adopt this term for the remainder of this report.

Section 16A empowers the HOD to ensure that SIPs are of a good standard by enabling the HOD to improve the SIP by making recommendations to the school. One of the merits of this mechanism is that it allows for the creation of homebrewed solutions starting at school level, but with the necessary guidance and support from the HOD and/or the relevant designated departmental officials.

Section 16A further places an obligation on underperforming schools to report to HODs and their SGB regarding the progress made in the implementation of the SIP by 30 June each year – though the HOD may extend the deadline if good cause is shown.[84] In this way, section 16A allows for HODs to be involved not only in drawing up the SIP, but also in providing ongoing oversight and monitoring to ensure that performance improves.

In the ideal world, section 16A, read with section 58B, facilitates an ongoing dialogue between HODs, SGBs, and the principals of underperforming schools in an attempt to identify and remediate the causes of underperformance. This process offers an opportunity for schools to take ownership of measures for addressing the problems at their schools, while at the same time being given the necessary support and oversight by the HOD and relevant departmental officials.

However, section 16A presents two problems. The first problem is the excessive focus on academic performance. The obligation under section 16A is to prepare a plan to improve academic performance and to report on steps taken in relation to this plan. There is no obligation to address other challenges the school may face. As we explain above, two of the criteria for underperformance listed in section 58B(2) are breakdown in school management and threats to the safety of learners and staff. However, while both grounds are listed as indicators of school underperformance, this is not reflected in the obligations under section 16A. This could have perverse results. For example, a school could be identified as underperforming solely because of threats to the safety of learners. And yet the principal would be obliged to prepare a plan setting out how *academic performance* will be improved; *not* how threats to safety will be neutralised. Even if the school is identified as underperforming in academic terms, there will very likely be contextual factors which will need to be addressed if academic performance is to be improved. Rarely, if ever, can poor academic performance be remedied in isolation from other factors.

> ***The requirements under section 16A should not be limited to academic performance. Rather, section 16A should require that schools come up with a plan to address underperformance more generally, taking account of contextual factors affecting performance, and report on steps taken in relation to this holistic plan.***

81. P P N Langa (2013) 'Exploring school underperformance in the context of rurality: an ethnographic study'.
82. Section 16A(1)(c)(ii) of the South African Schools Act.
83. Section 16A(1)(c)(ii) of the South African Schools Act.
84. Section 16A(1)(c)(ii)(bb)(iv).

The second problem is that, in practice, the assistance offered to schools in drawing up SIPs appears to be limited. Upon studying the PED reports, we learned the following regarding the provision of support to schools when drawing up SIPs:

- Some PEDs reported that the HOD sent letters to all underperforming schools in the province identifying them as underperforming schools and requested that they submit SIPs. The schools are responsible for drawing up these plans and the Circuit Managers ("CMs") moderate and provide support and assistance with the finalization thereof before the SIP is signed off and submitted to the HOD.
- In the Northern Cape and Limpopo, there is some indication that districts scrutinize plans and assist with the development or improvement, where necessary.
- CMs are responsible for the monitoring of the implementation of the reports. CMs report on the status of the implementation of reports to the HOD.
- The Western Cape has an online improvement monitoring tool. This tool is used for continuous monitoring of school improvement, which is communicated to schools on a quarterly basis.

Aside from Northern Cape, Limpopo and Western Cape, it appears that minimal support is provided to school principals when it comes to drawing up the SIP. Further, where there are mechanisms in place to monitor the drawing up of the plans, this does not seem to address the need to capacitate principals on how to draw up these plans. Assistance and support from the relevant education district and HOD seems to come mostly at a later stage. This is particularly concerning given the integral role SIPs play in the provision of specific support and remedial interventions for schools who need it.

The lack of support for principals in drawing up SIPs may flow from flaws within section 16A itself: section 16A places a reporting obligation on principals without providing for their capacitation and, save that the HOD must input and make recommendations, section 16A does not provide for an obligation on the part of the HOD to collaborate with the school in drawing up the SIP. That being said, there is an argument that the duty placed on HODs by section 58B(4) to take "all reasonable steps" to assist underperforming schools also includes putting in place the necessary support and assistance for drawing up SIPs. In EELC's view, the obligation under section 58B(4) means that HODs must take steps to rectify the gaps in section 16A and take a more active role in working with schools to draw up SIPs.

When a school is underperforming, the HOD should develop the SIP in **collaboration** with the school management team from the outset, in order to guarantee its effectiveness. Further, the HOD should take steps to capacitate the principal to successfully perform this vital function.

(ii) The HOD's obligation to offer support and remedial intervention

Section 58B unlocks support and remedial intervention for schools identified as underperforming. Section 58B(4) places an extensive obligation on the HOD as it requires that they "must take all reasonable steps to assist" an underperforming school. Sections 58B(5) and 58B(6) set out a non-exhaustive list of interventions aimed at assisting underperforming schools, which the HOD must consider in the exercise of the obligation under section 58B(4).[85] These interventions are:

- Implementing the incapacity code and procedures for poor work performance;
- Withdrawing the functions of the SGB in terms of section 22;
- Appointing persons in terms of section 25 to perform the functions or specified functions of the SGB; and
- Counselling the principal, which may include the appointment of an academic mentor to take over the functions and responsibilities of the principal for the period determined by the HOD.

Given the expansive language of section 58B(4), the steps the HOD must take include but are not limited to the specific remedial interventions listed in sections 58B(5) and (6).

Unfortunately, however, the remedial interventions prescribed by SASA have only limited application. This is because the HOD's obligation to take such steps is triggered only in circumstances

85. In terms of section 16 of the Employment of Educators Act – Section 58B(5)(a).

where a school is identified as underperforming. This is a problem because, as explained above, the criteria for identification of underperforming schools are flawed and may result in the exclusion of many schools in need of the support an HOD could offer through this mechanism. The problem is compounded by the DBE circulars which, in focusing exclusively on academic performance, are likely to exclude even more schools from accessing support. This significantly limits the broad ranging powers provided to the HOD by sections 58B(4)-(6).

Further, the guidance offered by sections 58B(4)-(6) as to what interventions to implement and how is not sufficient. The phrase "all reasonable steps" is vague. While sections 58B(5) and (6) make some more concrete suggestions, these suggestions are very limited. The range of possible interventions a school may require goes far beyond managing poor work performance, changing the functions and composition of the SBG, or counselling the principle.

(iii) DBE guidance on management of underperforming schools

In its circulars, the DBE offers some additional guidance, to supplement sections 58B(4)-(6). It outlines steps for the management of underperforming schools. For instance, the circulars highlight some of the measures PEDs could take. These measures include use of:

(i) Accountability mechanisms provided for in section 16A of SASA, which outlines the precise roles and responsibilities of school principals;

(ii) Section 16 and schedule 1 of the Employment of Education Act 76 of 1998, which provides for procedures to address unfit educators; and

(iii) Schedule 8 of the Labour Relations Act 66 of 1995, which can be used to deal with matters relating to fair dismissals for reasons related to conduct or capacity.

Interestingly, the circulars also urge creative utilization of local top-performing schools as a means of recognizing their value as national assets, and as a mechanism to improve learning outcomes in across the provinces.

The DBE circulars go some way to addressing the limitations of sections 58B(4)-(6). But they do not go far enough. As we will explain below, in subsection (iv), some provinces implement creative interventions to good effect. But, because of the lack of comprehensive guidance, there is no consistency across provinces, and some schools do not get the benefit of best practice pioneered elsewhere.

(iv) Management of underperforming schools in practice

In studying the PED reports, we identified the steps taken in practice by different provinces to manage school underperformance. These include: use of top performing schools; disciplinary measures taken against principals and educators; training and capacitation of teachers and SMTs; and some innovative interventions such as tailored learner support in Mpumalanga and use of YouTube lessons in the Western Cape. These are explained in more detail below.

Use of top performing schools

Most provinces indicated that they are making use of top performing schools to improve school performance, but not all provinces indicated how this is done. Two of the provinces, namely the Eastern Cape and Northern Cape, provided insufficient detail as to how these top performing schools were used, merely stating that top performing schools were identified.

It appears from the reports of the other seven PEDs that top performing schools are used in some of the following ways:

- To share good practices with underperforming secondary and primary schools;
- To motivate underperforming secondary schools during the "district schools SMT summit";
- To improve underperforming schools during the "schools that work" workshops;
- To assist and support underperforming schools in their respective education districts;
- Educators from top performing schools to support underperforming schools;
- Educators from top performing schools teach at underperforming schools during Autumn classes;
- To establish a partnership between identified circuits and schools in order to improve learning outcomes. The twinning of schools is also happening within individual districts and circuits;
- Workshops are also organized for all CMs to be trained on their roles and responsibilities in managing and supporting underperforming schools. The workshop is also a platform for CMs, District Directors, and Curriculum Coordinators to network and to learn best practice from each other.

In EELC's assessment, the use of top performing schools appears to be a valuable mechanism through which underperforming schools can be capacitated, learn good practices and build supportive networks to improve their performance.

Disciplinary measures taken against principals and educators of underperforming schools

In some of the provinces, such as the Free State and Mpumalanga, principals were expected to state reasons as to why disciplinary proceedings should not be instituted against them for continuous academic underperformance of the school. Some principals were removed from their roles and charged with underperformance or suspended pending investigations in line with the Educators Employment Act 76 of 1998.

Training and capacitation of teachers and SMTs

Most provinces invest in training and capacitation of SMTs and teachers. In almost all the provinces the training and support of SMTs was prioritized. Some of the interventions included training workshops on the roles and responsibilities of SMTs by the Chief Directors to increase accountability for curriculum delivery and the implementation of the SIP. Provinces also identified the need to capacitate and support educators through various strategies including content assessment workshops for teachers and conducting pre and post tests to measure the impact of said intervention. The Eastern Cape PED provided for the following: onsite support visits to help newly appointed teachers implement the National Curriculum and Assessment Policy Statement; a professional support forum; mentoring of educators; advice and guidance by subject specialists; external moderators; and subject

support for Grades R to 12. The North West PED, as part of its support package, considered the establishment of a professional subject forum.

Innovative interventions used by PEDs to assist underperforming schools in their respective provinces

Some provinces took an innovative approach to assisting underperforming schools. Mpumalanga is a noteworthy example. The holistic package of support provided in 2017 included: categorization of schools; tailored learner support, which included support for average, talented, progressed and repeating learners, and learners with barriers to learning; teacher and subject support; development and monitoring of SIPs at school; circuit, district and provincial level moderation of school based assessment; parent involvement; career guidance and subject coordination; and increased accountability by monitoring and analysis of reports by adopters of circuits and schools, subject advisors, SMTs and teachers in curriculum delivery and the implementation of the SIP. In 2017 the province reported improvements as a result of these interventions. 40 schools moved from below 60%, while 30 remained below 60%, and the pass rate went up to 73.7%.

Other provinces also used some innovative approaches. For example, Western Cape identified the use of lessons via YouTube and telematic programmes, which transmits lessons taught by lead teachers via satellite to learners at underperforming schools. In the Northern Cape, Curriculum Roadshows took place to provide guidance to teachers on diagnostic reports and the analysis of results. In Limpopo, the Department coordinated a programme for monitoring school reopening by the MEC, Executive and local Mayors and Councilors who monitored both best and underperforming schools across the province. The focus of the monitoring was to motivate and encourage the best performing schools to perform even better and underperforming schools to improve.

In the next section, we will consider measures used in practice for the management of so-called "chronically underperforming schools".

(v) Management of chronically underperforming schools

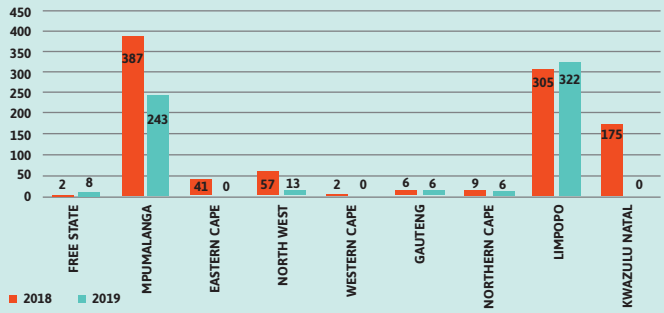
"Chronically underperforming schools" is not a category used in SASA. Rather, it is term found in the DBE circulars, to describe schools identified as underperforming by the province for a period of three consecutive years.

The fact that the DBE felt the need to define "chronically underperforming schools" tells its own story. It does not reflect well on the existing regulatory framework that there are schools whose academic performance remains so poor, year after year.

As it stands, the DBE circulars are the only source of the concept of a "chronically underperforming school". We have recommended that the DBE circulars should be retracted. We do not consider that there is any place for this concept in the regulatory framework. Rather, when a school is identified as requiring support under section 58B, a long-term plan should be put in place and remedial interventions reviewed and adjusted as necessary, until the school is back on track.

The PED reports reveal the number of chronically underperforming schools in the different provinces. Data was available for the following states: Free State, Mpumalanga, Eastern Cape, North West, Western Cape, Gauteng, Northern Cape, Limpopo and KwaZulu-Natal. Mpumalanga recorded the highest number of chronically underperforming schools in 2018, at 387, but this figure dropped to 243 in 2019. The Western Cape, by contrast, recording just two chronically underperforming schools in 2018.

Chronically underperforming schools in 2018 and 2019



**For the provinces with zero, no data was available. We did not receive PED reports for both years from all provinces.*

The general trend for interventions implemented in chronically underperforming schools is the identification of top performing schools within the province or district, which are used to support and assist underperforming schools in their respective regions. The provincial reports indicate that a wide range of support is provided to chronically underperforming schools, which includes: providing support for drawing up SIPs; training and capacitating SMTs; training and upskilling principals on management and leadership; use of mentors to assist school administration, management and curriculum management tracking; disciplinary proceedings being instituted against underperforming principals and teachers; provision of school infrastructure and scholar transport; quarterly reviews of SIPs.

Some province-specific interventions for chronically underperforming schools are as follows:

EASTERN CAPE

- Accountability meetings were held in each quarter to report progress and to share best practice.
- Monthly reports were submitted to monitor implementation of SPIPs.

- Chronically underperforming schools were twinned with top performing schools.
- Chronically underperforming schools prioritized the filling of vacancies and Quality Learning and Teaching Campaign structures[86] were revived to promote effective functionality.

NORTH WEST

- Some chronically underperforming schools were assigned mentors to assist with school administration.
- Some principals received a final written warning and were temporarily transferred to a performing school for mentoring while the deputy principal acted as principal during this time.
- Additional classrooms were provided to some schools.
- At one school the SMT got a written warning for poor management by the District Director.
- An accountability session with all identified underperforming schools was convened by the Labour Relations Directorate.
- The principals were informed that those who are identified as having contributed to the poor performance of these schools for the period of three years will receive warning letters; they will receive support to improve results; and if the performance does not improve, the department will take action.

WESTERN CAPE

- Two schools were identified as chronically underperforming in 2018: Waveren High School and Murraysburg School.
- For Waveren High School, the following actions were taken:
  - (i) Leadership and management were identified as the main issue. As such, the District Director and Circuit Manager intervened and had regular engagements with the principal and SMT for 2015 through to 2017 to discuss this. This continued in 2018.
  - (ii) The district was tasked with formulating a support plan for the SMT and had to decide on possible interventions for the school principal. Given that the principal was turning 60 in 2018, one possibility put forward was that the principal exit the system.
  - (iii) A new SGB was elected for the school.
  - (iv) It was decided that the school would change from combined school to primary school only.
  - (v) High school learners were to be moved to top a performing school: Tulbagh High School.
  - (vi) A support programme was put in place for extra classes for Grade 12 learners for 2018.
  - (vii) Compulsory district camps were implemented, with specific focus on identified subjects such as Mathematics and Business Studies.
- For Murraysburg High School, the following steps were taken:
  - (i) Poor leadership and management were identified as the main problems at the school. In 2018 the school had no principal, and the deputy accepted a post in Eastern Cape. An acting principal was appointed.
  - (ii) An investigation was conducted by Western Cape Education Department HOD, District officials, Deputy Director General, Chief Director and District Directors. Three teachers were removed from the school. One teacher who was regularly absent was dealt with.
  - (iii) Steps were taken to appoint a caretaker principal.
  - (iv) A code of conduct for educators put in place by the Circuit Manager.
  - (v) A comprehensive support programme for Grade 12 and Grade 11 learners was put in place, as well as Saturday support sessions.
  - (vi) Teachers from other schools, Bastiaanse and Beaufort High Schools, were identified to work with the learners to improve 2018 results.

NORTHERN CAPE (FRANCES BAARD DISTRICT)

Unfortunately, it does not seem like support was tailored to the specific schools, as the following support was given to all five chronically underperforming schools in the district:

- • Quarterly accountability sessions with the principals and/or SMTs.
- • Weekly/bi-weekly support visits by CMs and/or subject advisors.
- • On-site engagement with Grade 12 learners, parents, SGB, SMT, subject teachers and RCL.
- • Support provided to identified educators through provincial subject clinics.
- • Support provided to identified borderline and progressed learners through team teaching and Winter and Spring School.

What emerges from our analysis of the PED reports is this: while there seem to be many examples of good practice in managing underperforming schools, there is no consistency of approach across provinces or even across education districts. Some take a very punitive approach, often disciplining principals and teachers, but others appear to be more supportive and make use of innovative ways to address underperformance in their schools.

One reason for this patchwork of different approaches is surely the lack of binding norms and standards or even national guidance on implementing remedial interventions. While SASA read with the DBE circulars provides a non-exhaustive list of possible remedial interventions that could be used to manage and support underperforming schools, it is not sufficiently comprehensive and fails to give adequate guidance on *how* to use these mechanisms to manage and support underperforming schools. As it currently stands, there is too much scope for provinces to adopt a narrow, punitive approach, where the focus is solely on disciplining the principal. Further there is too much scope for blanket interventions across schools, which fail to take account of the circumstances of each individual school; this is illustrated by the practice of the Northern Cape, where the same support package was applied to all chronically underperforming schools in the province. There sometimes appears to be limited correlation between the challenges facing a school and the remedial interventions provided.

86. Quality Learning and Teaching Campaign is a national intervention intended to mobilise stakeholders to play a role in promoting a culture of teaching and learning in schools. It strives to bring into reality the delivery of quality learning and teaching through a collaborative effort between stakeholders.

EELC recommends that new norms and standards should promote a more consistent approach to remedial intervention across the provinces, whilst allowing space for adapting interventions to suit the unique needs and context of each school.

A related problem is the failure of the PED reports to reflect on the effectiveness of remedial interventions. While provinces detail their remedial interventions in their reports, almost no mention is made of whether the interventions were successful or not. Where there is a significant increase or decrease in the underperforming schools between years, no reasons are given. Where schools remain chronically underperforming despite remedial interventions, no indication is given as to what steps will be taken to address this. This makes it very difficult to say with any certainty whether some interventions were more useful than others.

The only province to give any account of the efficacy of remedial interventions is Gauteng in its 2019 report, where it notes that 13 of 23 (57%) intervention strategies were not effective in improving learner performance. This is figure is striking. The majority of interventions in Gauteng in 2019 were ineffective. This suggests that intervention strategies in other provinces may be similarly ineffective. But unless PEDs start evaluating interventions the full picture will remain obscured. Clearly, then, there is a pressing need for review of remedial interventions in all provinces to assess their efficacy and to allow for revision and improvement of methods of practice.

The recommended new norms and standards should include minimum requirements for reviewing remedial interventions to assess their efficacy and to facilitate the revision and improvement of methods of practice.

In addition to clear norms and standards for addressing underperformance – including the need the review remedial interventions to assess their efficacy – PEDs, HODs, districts and schools will of course need adequate resources and capacity to effectively implement remedial interventions. Indeed, school resourcing is a pressing and complex issue in its own right; one that is beyond the scope of this report. And yet resources alone are not enough. Dr Nic Spaull argues that there must be a paradigm shift on the part of all stakeholders within the community, from focusing on *illustrating* improvement in the short term to generating genuine and sustainable improvement in the long run.[87] Emphasis must be placed on implementing multi-disciplinary interventions that focus on sustainable change. Improving school performance is not just a question of the amount of resource injected into the schools. Quick technocratic fixes will not result in the level of sustained and systemic change required to improve the state of the education sector in South Africa. In fact, Spaull notes that evidence shows a "weak correlation between increased expenditures and improved educational outcomes".[88] To improve an underperforming school, we need to be cognizant of the causes of underperformance and respond accordingly. Resources will be wasted if not used wisely.

Similarly, a study by education researchers Crouch and Mabogoane shows that it is difficult to fight the negative impact of poverty with 'mere' resources unless they are well managed and unless more attention is paid to the qualitative nature of resources.[89] Furthermore, Taylor et al postulate that there is no linear relationship between resources and quality: increments in resources are not necessarily linked with improvement in quality of education and thus the outcomes of education.[90]

The problem is systemic. Compartmentalizing issues of underperformance and focusing on singular aspects of the education system will not result in sustainable change on the scale hoped for. An excessive focus on academic performance in isolation from other issues is unhelpful. Our analysis of the provincial reports makes this apparent. Instead, a holistic approach is likely to be more effective. Studies of underperforming schools in the US showed that those which used multiple coordinated strategies tailored to their particular circumstances, and which continually revised their methods of practice, showed signs of improvement.[91] We in South Africa can draw important lessons from this experience.

The recommended norms and standards for remedial intervention must prescribe a **holistic, multi-disciplinary** and **tailored** approach, which takes account of the contextual factors affecting the functionality of the school in question.

V.C. STAGE 3: REPORTING AND ACCOUNTABILITY

Stage 3 of the process for addressing underperformance is a reporting and accountability mechanism that goes beyond school principals and HODs. At this stage, MECs and the Minister for Basic Education have a crucial role to play. The accountability mechanism involves four steps:

(i) Step 1: MECs submits reports to the Minister of Basic Education

All MECs must, within three months of the end of an academic year, report to the Minister on "the action taken by the Head of Department in regard to underperforming schools."[92] Section 58B(7) contemplates a bottom-up reporting and accountability mechanism that engages all of the pertinent role-players tasked with ensuring that underperforming schools are improved.

87. Spaull, N. (2014). Accountability in South African Education. Ch4 in "Transformation Audit 2013: Confronting Exclusion" p51-65 Institute for Justice and Reconciliation. Cape Town.
88. N Spaull "Accountability and Capacity in South African Education" 2015 p116.
89. Crouch, L and Mabogoane, T (2001) "No Magic bullets, just tracer bullets: The role of learning resources, social advantage, and education management in improving the performance of South African schools" Social Dynamics, 27(1): 60-78.
90. Taylor, S (2011) "Uncovering indicators of effective school management in South Africa using the National School Effectiveness Study". Stellenbosch Economic Working Papers 10/11.
91. Roberts, J (2012) "Mapping school reform initiatives in South Africa: An overview of 12 school reform projects." JET Education Services.
92. Section 58B(7) SASA.

The reports by MECs ultimately inform the Minister for Basic Education's approach to discharging her obligations as contemplated in section 8 of NEPA, to ensure that the state of education delivery in each province is properly monitored and evaluated on an annual basis.

(ii) Step 2: The Minister must investigate and assess the effectiveness of PEDs interventions

The Minister, through the MECs' reports, must investigate and assess the effectiveness of the PEDs' remedial interventions aimed at supporting the worst performing schools in the country.[93]

(iii) Step 3: The Minister compiles her own reports

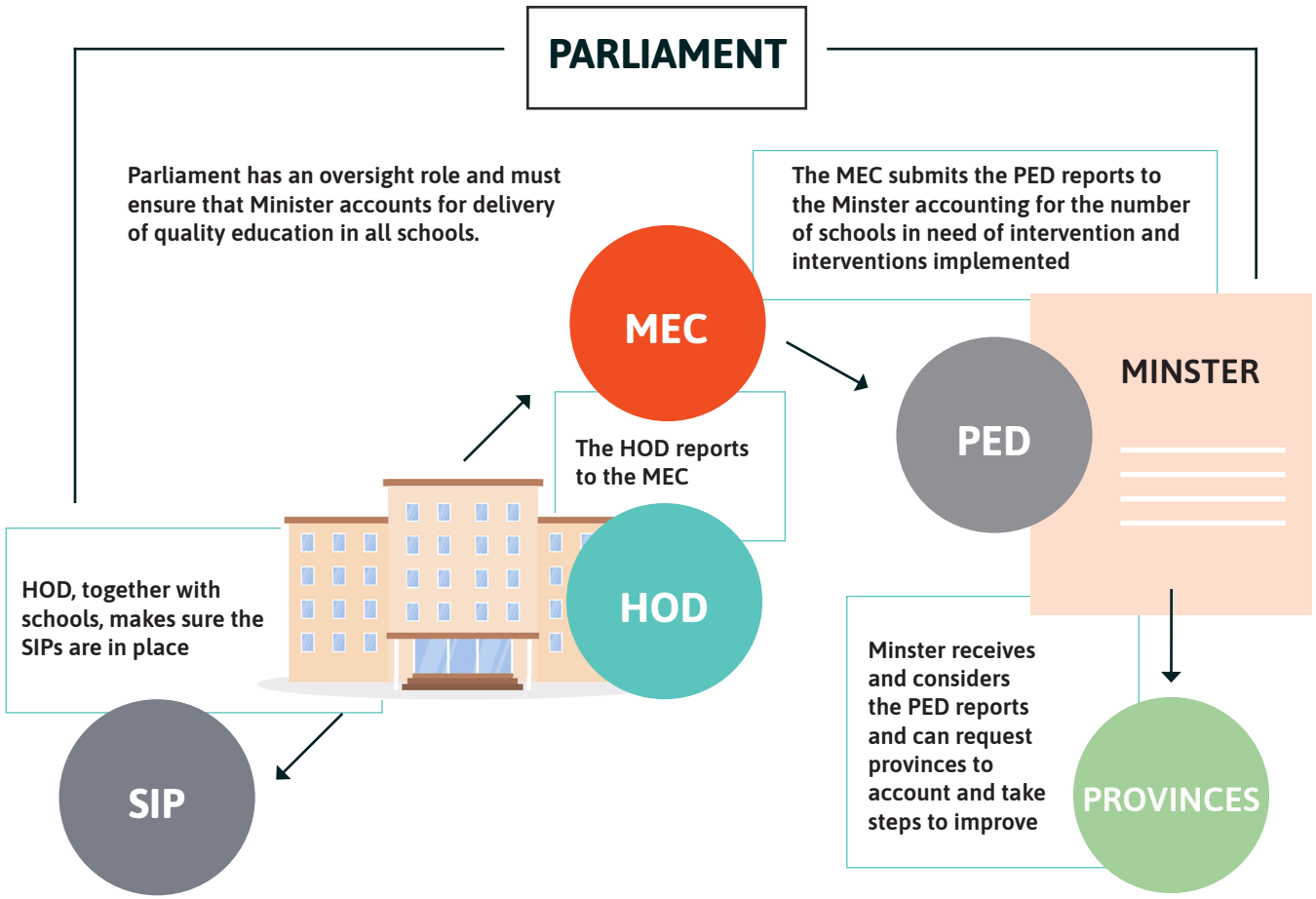
The Minister of Basic Education must compile her own reports,[94] detailing the extent of the DBE's compliance with its constitutional and statutory obligations.

(iv) Step 4: Failing PEDs submit plan on remedying delivery of education in the province

Should the delivery of education in a particular province not comply with the Constitution, the Minister is obligated to inform the MEC concerned and request that the MEC submits a plan aimed at remedying the problem.[95] The MEC's plan must be formulated in conjunction with the DBE and must be tabled in the National Parliament.[96]

Section 8 NEPA mirrors the 58B monitoring mechanism in that MECs are put on notice to prepare provincial improvement plans and the Minister must ultimately report to Parliament on the state of South Africa's education system. Sections 16A and 58B of SASA read in conjunction with section 8 of NEPA form a system by which the legislature has sought to create more accountability within the schooling system. The aim is to ensure that underperforming schools receive the support needed in order to improve the learning conditions at their schools through proper monitoring, from school level all the way up to the Minister. At least in principle, then, there is a clear mechanism for public accountability in the way schools and the state plan and take action towards improving the schools attended by the most vulnerable learners in the country.

It is not enough, however, for this mechanism to be enshrined in law and policy. There needs to be robust oversight and supervision in practice. Increased resources will only tangibly improve the quality of education if there is proper oversight of expenditure, effective and transparent contract agreements, and a curbing of corruption and nepotism in educator and principal appointment. Currently, accountability systems are in place but are not being fully utilised or applied for resulting improvement.



93. Section 58B read together with section 8 of NEPA.
94. Section 8(5) of NEPA.
95. Section 8(6) of NEPA.

EELC recommends that one of the DBE's key performance indicators should be the actions taken in respect of school "underperformance", pursuant to duties under section 8 NEPA. The DBE's annual report must set out what steps it has taken to support schools identified in terms of section 58B. Further, the DBE should ensure that the MEC reports are of sufficient quality and contain sufficient information to allow for comprehensive understanding of the situation of schools across provinces.

Improving accountability within schools and within the education sector is vitally important in improving education delivery and reversing poor performance across the country. Dr Nic Spaull identifies professional accountability and bureaucratic accountability as two areas requiring particular attention in the South African education system.[97] However he specifically notes the importance of improving capacity alongside implementing proper accountability measures.

Effective accountability at school level can also come from the parent body of an underperforming school. Currently, parents are not supplied with information that would allow them to determine the performance of the school in comparison to other schools in the area. This type of knowledge would empower the parent body to place increased pressure on principals and teachers.[98]

The EELC considers that accountability mechanisms at the local level should be improved. SGBs should be trained and capacitated to provide effective oversight. Parents should be supplied with information that will allow them to hold the school to account. This could be done in the form of expanded school reports which detail not only how the child is performing, but how the school is functioning according to set criteria, such as enrolment numbers and teacher turnover, both in absolute terms and in comparison to other schools in the district.

Improving underperforming schools in poor communities is not a hopeless endeavor. Spaull's research shows that there are well performing schools within poorer communities and underperforming districts. This means that schools can be turned around. Schools can attain quality educational outcomes, in spite of an undesirable environment and detrimental socio-economic context. The fact that equally poor provinces with similar geographical, social and historical profiles have different conversion rates of Grade 2 enrolments into matric passes[99] is testament to the fact that schools and provincial departments can make a difference, when working collaboratively with enough capacity, support, and will to alleviate the plight of pupils in underperforming schools.[100]

97. Spaull 120.
98. Spaull 135.
99. This is a term coined by Stephen Taylor in 2012. It refers to the rate of students who enroll at Grade 2 level and progress to pass their Grade 12 NSC. Grade 2 enrollments were captured as opposed to Grade 1 because there is always high rate of repetition at Grade 1 level, causing a larger number of enrolments. Thus, the conversion rate of Grade 1 enrolments into matric passes paints an inaccurate picture.
100. N Spaull (2013) "South Africa's Education Crisis: The Quality of education in South Africa 1994-2011".

V. RECOMMENDATIONS

Throughout this report, the EELC has made recommendations to improve the existing regulatory framework and ensure that schools who need it are able to unlock effective, sustainable support in offering quality education to all learners. This section sets out our full set of recommendations and the justifications for them.

No.	Recommendation	Justification
1	Section 58B(1) should be reformed to make clear that HODs must take account of all relevant information when assessing underperformance, not just information about academic performance and use of school resources. Further, section 58B(1) should include a non-exhaustive list of other reports which may be relevant, such as reports on teacher quality and teacher retention, learner drop-out rates, and problems around management and leadership at the school.	The EELC considers that a wide interpretation of section 58B(1) is correct as a matter of law and appropriate as a matter of policy. HODs must take account of all relevant information when assessing underperformance, not just information about academic performance and use of school resources. This should, however, be made clearer. Reports on issues such as learner drop-out rates may contain vital information about the specific way in which a given school is struggling. The HOD must take account of these reports in order to build a comprehensive and accurate picture, and to correctly identify schools in need of support.
2	Section 58B(2) should be reformed to ensure that there are clear criteria for accessing additional support.	The existing criteria – especially subsections (b) and (c) – are vague. The lack of clarity means that schools who need it may be locked out of section 58B support. Clear, but broad, criteria are needed.
3	The existing section 58B criteria should be fundamentally reconsidered to ensure that schools who most need it are able to access support. Further, the legislature should consider dropping the language of 'underperformance' and moving from a paradigm of blame towards a paradigm of support.	As well as being vague, the section 58B criteria are both under-inclusive and, in some cases, over-inclusive. The criteria require a fundamental rethink. Dysfunction takes a variety of different forms. Many seriously dysfunctional schools desperately need the support unlocked by section 58B. But, because the existing criteria do not take account of all the dimensions of dysfunction, such schools may not be able to access support. To realise the Constitution's transformative vision and achieve quality education across the board, reimagined criteria are urgently required.
4	The DBE circulars should be retracted. Instead, the Minister for Basic Education should prescribe new norms and standards. These norms and standards should include requirements for the identification of schools in need of support under section 58B. The requirements should not be limited to academic performance but should instead take a holistic view of school functionality.	Existing DBE guidance compounds the confusion caused by the unclear section 58B criteria. Whereas the section 58B criteria cover (1) academic performance, (2) breakdown in governance and management and (3) school safety, the DBE guidance addresses only the first of these. Clarity requires new norms and standards, addressing all criteria – including any new or reformed criteria, enacted in line with our recommendations.
5	The recommended new norms and standards should ensure that all relevant contextual factors are taken into account when identifying schools in need of support under section 58B.	Though the legacy of apartheid is pervasive, each school is embedded in its own unique context. These contextual factors must be taken into account when identifying schools in need of support, to ensure that no school is overlooked or left behind.
6	The requirements under section 16A should not be limited to academic performance. Rather, section 16A should require that the SIP addresses school functionality more generally, taking account of contextual factors. The school must then report on steps taken in relation to this holistic plan.	We know that the problem of underperformance is systemic and multi-faceted. Academic outcomes cannot be addressed in isolation. Therefore, section 16A must require a holistic plan to address underperformance, and reporting on every aspect of the plan.

7	When a school is identified under section 58B as requiring intervention, the HOD should develop the SIP in collaboration with the school management team to guarantee its effectiveness. Further, the HOD should take steps to capacitate the principal to successfully perform this vital function.	School principals will not always have the capacity to develop an effective SIP. Indeed, in a dysfunctional school, the principal may be part of the problem. Therefore, the SIP should be a collaborative effort, with the HOD involved from the outset. Further, the HOD should take steps to capacitate the principal, to ensure that the principal can be an equal partner in the development of the SIP, and to promote ownership of the SIP at school level.
8	We do not consider that there is any place for the concept of a "chronically underperforming school" in the regulatory framework. Rather, when a school is identified as requiring support under section 58B, a long-term plan should be put in place and remedial interventions reviewed and adjusted as necessary, until the school has improved.	The fact that the DBE felt the need to define "chronically underperforming schools" tells its own story. It does not reflect well on the existing regulatory framework that there are schools whose functioning remains so poor, year after year. Improving a dysfunctional school will be a long-term process. Quick fixes are unlikely to result in meaningful change. It is crucial that remedial interventions are reviewed and adjusted, to ensure that they are effective in addressing the school's specific problems (see also Recommendation 10, below).
9	The recommended new norms and standards should promote a more consistent approach to remedial intervention, with schools across the provinces benefitting from best practice, whilst allowing space for adapting interventions to suit the unique needs and context of each school.	There are many examples of good practice when it comes to effective remedial interventions, with innovative solutions being adopted in provinces such as Mpumalanga. But deployment of such solutions is patchy. This is unsurprising given the absence of clear and detailed guidance. The situation calls for norms and standards to promote consistency across provinces. No school, and no learner, should be left behind.
10	The recommended new norms and standards should include minimum requirements for reviewing remedial interventions to assess their efficacy and to facilitate the revision and improvement of methods of practice.	The lack of reflection on the efficacy of remedial interventions was remarkable. This represents a huge missed opportunity to learn from mistakes and improve upon existing methods of practice. The new norms and standards must include guidance on monitoring and reviewing remedial interventions to ensure effectiveness.
11	The recommended new norms and standards must promote a holistic, multi-disciplinary and tailored approach to remedial interventions, which takes account of the contextual factors affecting the functionality of the school in question.	In line with our findings on the systemic, multi-faceted nature of school dysfunctionality, the new norms and standards must promote holistic approaches which respond accordingly.
12	To promote accountability, one of the DBE's key performance indicators should be the actions taken in respect of school 'underperformance', pursuant to duties under section 8 NEPA. The DBE's annual report must set out what steps it has taken to support schools identified in terms of section 58B. Further, the DBE should ensure that the MEC reports are of sufficient quality and contain sufficient information to allow for a comprehensive understanding of the situation of schools across provinces.	In principle, there are clear accountability mechanisms running from school level up to the Minister for Basic Education. But these mechanisms are not working well in practice. If actions taken in respect of 'underperformance' were one of the DBE's key performance indicators, this would enhance accountability. It is also crucial that the DBE is provided with good information from the provinces.
13	Accountability mechanisms at the local level should be improved. SGBs should be trained and capacitated to provide effective oversight. Parents should be supplied with information to allow them to hold the school to account. This should be done in the form of expanded school reports detailing how the school is functioning according to set criteria, such as enrolment numbers and teacher turnover, both in absolute terms and in comparison to other schools in the district. Minimum requirements for school reports to parents should be set out in the recommended new norms and standards.	While SASA and section 8 of NEPA together provide a mechanism for oversight at the MEC and Ministerial level, more must be done to facilitate oversight at the local level. If parents and SGBs are properly capacitated and given the necessary information, they can be a powerful voice in holding the school to account.

VII. CONCLUSION

Two decades since the end of apartheid, racial inequality remains a defining feature of South Africa's education system. 80% of schools are dysfunctional and most of these schools serve black and coloured learners. Though laudable efforts have been made to address this problem through legislation and policy, there is still a very long way to go. As it stands, the regulatory framework for school underperformance has not succeeded in turning things around, but it does represent an opportunity. If the framework is reformed in the ways the EELC recommends, it could unlock effective, sustainable interventions for all schools who need them.

TO ACHIEVE THIS AIM, THE EELC ENVISIONS TWO LAYERS OF REGULATION:

1. broadened and clarified legislation, in the form of sections 58B and 16A SASA;
2. new norms and standards giving more detail on the identification of schools in need of support and appropriate remedial interventions.

The reformed regulatory framework would be grounded in the reality of the South African education system and its history. In particular, it would recognize three things:

- first, though the legacy of apartheid is pervasive, each school is embedded in its own particular context which permeates all aspects of its performance and functionality;
- second, the school is a finely balanced ecosystem comprising learners, parents, teachers, school leadership, and the state, all of whom have a role to play in addressing dysfunction; and,
- third, there are many schools which face persistent problems, 'underperforming' year after year, and which desperately require deep-rooted change.

In short, the EELC is calling for a clear-sighted, reflective, tailored and holistic approach to improving school functionality. In this way, the transformative vision of the Constitution can be realized, and truly equal education achieved.

APPENDIX 1

EXCERPTS FROM SOUTH AFRICAN SCHOOLS ACT NO. 84 OF 1996

16A. Functions and responsibilities of principal of public school

(1)

(a) The principal of a public school represents the Head of Department in the governing body when acting in an official capacity as contemplated in sections 21(1)(b) and 24(1)(j).

(b) The principal must prepare and submit to the Head of Department an annual report in respect of—

(i) the academic performance of that school in relation to minimum outcomes and standards and procedures for assessment determined by the Minister in terms of section 6A; and

(ii) the effective use of available resources.

(c)

(i) The principal of a public school identified by the Head of Department in terms of section 58B must annually, at the beginning of the year, prepare a plan setting out how academic performance at the school will be improved.

(ii) The academic performance improvement plan must be—

(aa) presented to the Head of Department on a date determined by him or her; and

(bb) tabled at a governing body meeting.

(iii) The Head of Department may approve the academic performance improvement plan or return it to the principal with such recommendations as may be necessary in the circumstances.

(iv) If the Head of Department approves the academic performance improvement plan the principal must, by 30 June, report to the Head of Department and the governing body on progress made in implementing that plan.

(v) The Head of Department may extend the date contemplated subparagraph (iv) on good cause shown.

[...]

58B. Identification of underperforming public schools

(1) The Head of Department must, annually, from the report contemplated in section 16A(1)(b) and from other relevant reports, identify any public school that is underperforming in relation to any matter referred to in subsection (2)(a), (b) or (c).

(2) The Head of Department must issue a written notice to the school contemplated in subsection (1), if he or she is satisfied that—

(a) the standard of performance of learners is below the standards prescribed by the National Curriculum Statement and is likely to remain so unless the Head of Department exercises his or her power in terms of this Act;

(b) there has been a serious breakdown in the way the school is managed or governed which is prejudicing, or likely to prejudice, the standards of performance; or

(c) the safety of learners or staff is threatened.

(3) The written notice contemplated in subsection (2) must inform the school that it must—

(a) within 14 days after delivery of the notice, respond to the notice; and

(b) as soon as possible after that response, provide the Head of Department with a plan for correcting the situation.
(4) The Head of Department must take all reasonable steps to assist a school identified in terms of subsection (1) in addressing the underperformance.

(5) Without limiting the nature and extent of the steps contemplated in subsection (4), the Head of Department must consider—

(a) implementing the incapacity code and procedures for poor work performance referred to in section 16 of the Employment of Educators Act, 1998 (Act No. 76 of 1998);

(b) withdrawing the functions of the governing body in terms of section 22; or

(c) appointing persons in terms of section 25 to perform the functions or specified functions of the governing body.

(6) The counselling of the principal as contemplated in Item 2(5)(b)(ii) of Schedule 1 to the Employment of Educators Act, 1998 (Act No. 76 of 1998), may include the appointment of an academic mentor to take over the functions and responsibilities of the principal for the period determined by the Head of Department.

(7) In order to assist the Minister in carrying out his or her duties referred to in section 8 of the National Education Policy Act, 1996 (Act No. 27 of 1996), the Member of the Executive Council must report to the Minister within three months after the end of a school year on the action taken by the Head of Department in regard to an underperforming public school.

APPENDIX 2

EXCERPTS FROM NATIONAL EDUCATION POLICY ACT NO. 27 OF 1996

8. Monitoring and evaluation of education

(1) The Minister shall direct that the standards of education provision, delivery and performance throughout the Republic be monitored and evaluated by the Department annually or at other specified intervals, with the object of assessing progress in complying with the provisions of the Constitution and with national education policy, particularly as determined in terms of section 3(3).

(2) Each directive issued in terms of subsection (1) shall comply with the provisions of any law establishing a national qualifications framework, and shall be formulated after consultation with the bodies referred to in section 5(1).

(3) The Department shall undertake the monitoring and evaluation contemplated in subsection (1) by analysis of data gathered by means of education management information systems, or by other suitable means, in co-operation with provincial departments of education.

(4) The Department shall fulfill its responsibilities in terms of subsections (1) to (3) in a reasonable manner, with a view to enhancing professional capacities in monitoring and evaluation throughout the national education system, and assisting the competent authorities by all practical means within the limits of available public resources to raise the standards of education provision and performance.

(5) The Department shall prepare and publish a report on the results of each investigation undertaken in terms of subsection (3) after providing an opportunity for the competent authority concerned to comment, which comment shall be published with the report.

(6) If a report prepared in terms of subsection (5) indicates that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with the policy determined in terms of section 3(3), the Minister shall inform the provincial political head of education concerned and require the submission within 90 days of a plan to remedy the situation.

(7) A plan required by the Minister in terms of subsection (6) shall be prepared by the provincial education department concerned in consultation with the Department, and the Minister shall table the plan in Parliament with his or her comments within 21 days of receipt, if Parliament is then in ordinary session, or, if Parliament is not in ordinary session, within 21 days after the commencement of the first ensuing ordinary session of Parliament.

APPENDIX 3 – DBE CIRCULAR D1 OF 2014

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REPUBLIC OF SOUTH AFRICA

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To: MECs FOR EDUCATION
HEADS OF PROVINCIAL EDUCATION DEPARTMENTS
DEPUTY DIRECTORS-GENERAL RESPONSIBLE FOR DISTRICTS
CHIEF DIRECTORS RESPONSIBLE FOR DISTRICTS
DISTRICT DIRECTORS
SCHOOL PRINCIPALS
SCHOOL GOVERNING BODIES

CIRCULAR D1 OF 2014

COMPLIANCE WITH SECTION 58B OF THE SOUTH AFRICAN SCHOOLS ACT

1. Introduction

This circular addresses compliance with the provisions of section 58B of the South African Schools Act, 1996 (Act No. 84 of 1996) (SASA), in respect of the management of underperformance at schools. It also outlines the process for managing and supporting underperforming schools.

2. Background

Ever since the insertion of section 58B into the SASA in 2007, the Provincial Education Departments (PEDs) have struggled to comply adequately with the provisions of this section. In particular, the PEDs have not complied adequately with the identification and management of underperforming schools and the submission of reports to the Minister of Basic Education (the Minister), detailing how underperformance is managed in each province, as prescribed in section 58B (7).

Section 58B (7) provides that the Member of the Executive Council for Education (MEC) must, within three months after the end of the school year, report to the Minister on the actions taken by the Head of Department (HoD) with regard to managing underperforming schools in the province.

3. Purpose

The purpose of this circular is to set out for PEDs the process that they have to follow to comply with the provisions of section 58B of the SASA.

4. Legislative framework

a) Chapter 2 of the Bill of Rights [section 29(1) of the Constitution of the Republic of South Africa, 1996], provides that everyone has the right to basic education.

b) Sections 3(4) and 8 of the National Education Policy Act, 1996 (Act No. 27 of 1996) mandate the Minister to determine national policy for the planning, provision, financing, coordination, monitoring and evaluation of education to ensure the delivery of quality education.

c) The SASA, as amended:

i. Section 16A outlines the roles and responsibilities of principals in regard to planning, reporting, accountability and the performance of schools; and

ii. Section 58B, subsections (1) to (7), refers to the identification of underperforming schools.

5. Process for managing underperforming schools

As mentioned above, two sections of the SASA make reference to underperforming schools. Furthermore, in December 2012, the Department of Basic Education sent all the MECs a letter referring to the management of underperforming schools in the system.

(a) A primary school is deemed to be underperforming if, using Literacy as a proxy; it has more than 50% of learners performing at level 3 and below in the Annual National Assessment in Grades 3 and 6.
(b) A secondary school is deemed to be underperforming if its percentage pass in the National Senior Certificate examination falls below 60%.

The following process, based on the letter of December 2012 and the guidelines set out in the SASA, must be applied for the successful management of underperforming schools. The HoD must –

a) identify underperforming primary and secondary schools using the report contemplated in section 16A or any other relevant report;

b) issue a written notice to the principals of the schools identified as underperforming, requesting them to submit their plans for improving their performance;

c) insist on academic performance improvement plans from the principals of those schools;

d) evaluate the Academic Performance Improvement Plans received from principals and approve them, if satisfied, or return them to the principals with recommendations; and

e) Insist on a report from the school principals on the progress made in implementing the Academic Performance Improvement Plans.

The MEC must, on or before 31 March of each academic year, submit a report to the Minister on actions taken by the HoD in managing underperformance at schools.

6. Management plan in regard to underperforming schools

Nr	Activity	Timeframe	Responsible person
1.	Identify underperforming primary and secondary schools	**2nd Week of January**	HoD
2.	Issue written notices to the principals of the underperforming schools	**Last week of January**	HoD
3.	Prepare and submit the Academic Performance Improvement Plan	**Within 21 calendar days** after receipt of notice of underperformance	School principal
4.	Evaluate Academic Performance Improvement Plans	**Within 14 calendar days** after receipt of the Academic Performance Improvement Plan	HoD
5.	Submit a report to the Minister on actions taken by the HoD when managing underperforming schools	On or before **31 March** of each academic year	MEC

The management of underperformance is important for compliance with legislation, and plays a crucial role in ensuring that learners receive quality education across the country. It also helps the system to function optimally and assists the Department in determining the level of support that must be provided to a certain group of learners.

You are kindly requested to bring this information to the attention of all officials responsible for these processes to ensure the smooth management of underperforming schools in the system.

Yours sincerely

MRS AM MOTSHEKGA, MP
MINISTER
DATE: 04 November 2014

APPENDIX 4 – DBE CIRCULAR D2 OF 2017

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To: **MECs FOR EDUCATION**
HEADS OF PROVINCIAL EDUCATION DEPARTMENTS
DEPUTY DIRECTOR-GENERALS RESPONSIBLE FOR DISTRICTS
CHIEF DIRECTORS RESPONSIBLE FOR DISTRICTS
DISTRICT DIRECTORS
SCHOOL PRINCIPALS
SCHOOL GOVERNING BODIES

CIRCULAR D2 OF 2017

IDENTIFICATION, MANAGEMENT AND SUPPORT OF UNDERPERFORMING SCHOOLS

1. Introduction

This circular sets out criteria and processes for the identification, management and support of underperforming schools, in terms of sections 16A and 58B of the South African Schools Act 84 of 1996.

2. Background

2.1 The management of underperformance in schools, as stipulated in sections 16A and 58B of the South African Schools Act (Act 84 of 1996), is at the core of the sector's efforts of ensuring that all learners receive quality education, irrespective of their geographical location.

2.2 In 2014, I provided guidelines through Circular D1, outlining the processes required for the identification, management and support of underperforming schools.

2.3 In the three years of implementation, we have gained valuable insights from provincial best practice.

2.4 It is now time to utilize these insights to further improve performance in the sector. Therefore, with this circular, I wish to withdraw Circular D1 of 2014.

3. Purpose

3.1 The purpose of this circular (Circular D2 of 2017) is to:

3.1.1 set out the criteria and processes that must be followed in the identification, management and support of underperforming schools; and

3.1.2 replace Circular D1 of 2014.

4. Scope and application

This circular applies to all public schools.

5. Legislative Framework

5.1 Chapter 2 section 29(1) of the Constitution of the Republic of South Africa;

5.2 Employment of Educators Act, 1996 (Act 76 of 1998), as amended;

5.3 National Policy on Whole-School Evaluation, No. 22512 of July 2001;

5.4 Sections 3(4) and 8 of the National Education Policy Act, 1996 (Act 27 of 1996); and

5.5 Sections 16A and 58B of the South African Schools Act, 1996 (Act 84 of 1996), as amended.

6. Identification, Management and Support of Underperforming Schools

6.1 After reflecting and consulting with key stakeholders in the sector, I have decided that the following criteria must be applied in the identification of underperforming schools, with effect from 01 January 2018:

i. **Primary schools**: In the absence of standardised national assessments, individual school/circuit/district assessment results should be used. Primary schools must be deemed to be underperforming if, using Literacy and Numeracy as proxy, less than 60 per cent of their learners perform at Level 4 and above in Grade 6.

ii. **Secondary schools**: A secondary school should be deemed to be underperforming if its pass percentage in the National Senior Certificate examination falls below 65 per cent, and it has produced less than 30% bachelor and diploma passes, combined.

iii. **Chronically underperforming schools**: A school shall be deemed as chronically underperforming if it underperforms for a period of three consecutive years.

6.2 However, for a school to be deemed as chronically underperforming, the following must have happened to turn the school around:

i. The school must have been assessed and supported in terms of the nine whole-school evaluation focus areas and reasons for underperformance clearly identified.

ii. The school must have been provided with consistent and targeted support for three years or more to assist it to improve performance.

iii. Relevant stakeholders (i.e. school governing body and parents) must have been involved from the beginning in the efforts to try and turn the school around. For instance, section 16A (ii) of the SASA states that the academic performance improvement plan must be tabled at a school governing body meeting for discussion

7. Consequence Management

7.1 I believe that underperformance cannot be eliminated by support only, and that appropriate consequence management processes may need to be applied to deal with underperformance, where applicable.

7.2 Therefore, in pursuit of improved quality of outcomes, the system must use available policies and instruments to strengthen consequence management:

i. Section 16A of the SASA provides mechanisms to enhance accountability amongst school principals through outlining clearly their roles and responsibilities in terms of performance.

ii. Section 16 and Schedule 1 of the Employment of Education Act (EEA) 76 of 1998 provides procedures on how to deal with cases of educators who are unfit for duties attached to the educator's post or incapable of carrying out those duties efficiently.

iii. Schedule 8 of the Labour Relations Act (LRA) 66 of 1995) contains the code of and procedures for good practice which deals with key aspects of fair dismissal for reasons related to conduct and capacity. The basic principle is that while employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.

8. Utilisation of Top Performing Schools

8.1 The National Development Plan urges us to recognise the value of top performing schools as national assets. Strategies to improve learning outcomes in a province, district or circuit must therefore include the creative utilisation of local top performing schools.

9. Reports to the Minister

9.1 The MEC for Education must, on or before 31 March of each academic year, submit a report to me on the actions taken by their Provincial Head of Department to manage and support underperforming schools.

You are requested to bring the content of this circular to the attention of all officials responsible for the identification, management and support of underperforming schools.

Yours sincerely,

MRS AM MOTSHEKGA, MP
MINISTER
DATE: 25-11-2017

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