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COMMENT

**ON THE DRAFT REGULATIONS RELATING TO MINIMUM UNIFORM
NORMS AND STANDARDS FOR PUBLIC SCHOOL INFRASTRUCTURE
GG 36062; GN 6 of 2013; 8 JANUARY 2013**



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A) INTRODUCTION

1. This comment is prepared in response to the Minister of Basic Education’s invitation for submissions on the Draft Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (‘the Draft’).
2. The Draft was published on 8 January 2013 pursuant to a settlement agreement entered into between the Minister of Basic Education (‘the Minister’) and Equal Education (EE) on 19 November 2012. The Minister has until 15 May 2013 to consider this and other comments upon which date the final Regulations must be published.
3. This comment serves to provide a brief historical and legal context against which the content of the Draft ought to be assessed, to examine the need for norms in order to gauge whether the Draft is able to achieve these, and to comment on the shortcomings of the current Draft.
4. During the public comment period Equal Education received over 700 submissions on the Draft Norms and Standards. These came from learners, parents, teachers and community members across the country. 532 of these submissions have been drawn upon to create an appendix to this comment. The Appendix, which is attached separately, is based upon these individual submissions. It should be read with this submission; it is part of this submission. It quotes and weaves together many original observations and finds the trends and points of agreement and emphasis. Each individual submission is different. Some paint the brutal reality of inadequate provisioning in exquisite and excruciating detail, like that from Slindokuhle Mkhize of Maceba Secondary School in KwaZulu-Natal who wrote, “*We need more taps. Currently when it rains we pray and sing!*” Others engage compellingly with the draft text and skewer its many fundamental flaws, like Nobuhle Madikane a teacher from the Eastern Cape who wrote: “*‘Some form of connectivity’ is too vague; should specify fax, internet, telephone as we are really in need of them.*” All of them spoke directly to the Minister, imploring her to meet the needs of schools. “*Our future is lying in your hands minister,*” wrote Palesa Motlane of Mathukulula High School in KwaZulu-Natal. “*We are really hoping to get help from you. Seeing as you are the minister. Some of us might be a President of tomorrow.*”



B) CONTEXT & HISTORY

5. Unequal access to a quality education remains a reality for the vast majority of South African learners. This is reflected across a wide range of educational inputs and outputs. One of these – a very important one – is school infrastructure. Hundreds of thousands of learners continue to learn in schools with poor infrastructure incapable of facilitating effective teaching and learning. The Department of Basic Education’s (DBE’s) own statistics show that of the 24 793 public schools in South Africa 93% have no libraries, 95% no science laboratories, 46% still use pit latrine toilets and 2 402 schools have no water supply.¹ One of the many challenges facing the DBE is how best to transform this unjust state of affairs, inherited from apartheid, so that all South African children can learn in a safe and functional educational environment.
6. It was against this reality that in 2007 Parliament amended the South African Schools Act² (‘the Act’) through an Education Laws Amendment Act.³ This saw the introduction of section 5A into the Act. Section 5A provides for the Minister to make regulations prescribing minimum uniform norms and standards for school infrastructure.⁴ The

¹ The National Education Infrastructure Management System Report, (NEIMS) published by the DBE in May 2011. NEIMS is a database kept by the DBE since about 2007 containing information pertaining to infrastructure at South African public schools. Accessible at <http://www.equaleducation.org.za/sites/default/files/Annexure%20YD10.pdf>.

² 84 of 1996.

³ 31 of 2007.

⁴ Section 5A reads in relevant part:

“Norms and standards for basic infrastructure and capacity in public schools

(1) The Minister may, after consultation with the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for –

- (a) school infrastructure;*
- (b) capacity of a school in respect of the number of learners a school can admit; and*
- (c) the provision of learning and teaching support material.*

(2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:

- (a) in respect of school infrastructure, the availability of –*
 - (i) classrooms;*
 - (ii) electricity;*
 - (iii) water;*
 - (iv) sanitation;*
 - (v) a library;*
 - (vi) laboratories for science, technology, mathematics and life sciences;*
 - (vii) sport and recreational facilities;*
 - (viii) electronic connectivity at a school; and*
 - (ix) perimeter security.”*

Amendment Act simultaneously inserted section 58C which imposes mechanisms to ensure that the provinces comply with the norms required under Section 5A by requiring MECs to annually report to the Minister on provincial progress.

7. In addition, section 58C provides that Heads of Department (HODs) must comply with norms and standards by identifying resources to comply, identifying risk areas for compliance, developing a compliance plan for the province, developing protocols with the schools on how to comply with norms and standards and manage risk areas, and by reporting to the MEC on the state of compliance.⁵

⁵ Section 58C reads:

1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), ensure compliance with—

a) norms and standards determined in terms of sections 5A, 6 (1), 20 (11), 35 and 48 (1);

(2) The Member of the Executive Council must ensure that the policy determined by a governing body in terms of sections 5 (5) and 6 (2) complies with the norms and standards.

(3) The Member of the Executive Council must, annually, report to the Minister the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply.

(4) Any dispute between the Minister and a Member of the Executive Council in respect of non-compliance with the norms and standards contemplated in subsection (1) must—

(a) be dealt with in accordance with the principles of co-operative governance referred to in section 41 (1) of the Constitution and the provisions of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005); and

(b) whenever necessary, be settled in accordance with Chapter 4 of the Intergovernmental Relations Framework Act, 2005.

(5) The Head of Department must comply with all norms and standards contemplated in subsection (1) within a specific public school year by—

(a) identifying resources with which to comply with such norms and standards;

(b) identifying the risk areas for compliance;

(c) developing a compliance plan for the province, in which all norms and standards and the extent of compliance must be reflected;

(d) developing protocols with the schools on how to comply with norms and standards and manage the risk areas; and

(e) reporting to the Member of the Executive Council on the state of compliance and on the measures contemplated in paragraphs (a) to (d), before 30 September of each year.

(6) The Head of Department must—

(a) in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and

8. These amendments to the Act clearly indicate the conscious and deliberate intention of Parliament to ensure that all learners in South Africa attend schools where the infrastructure conditions meet the minimum standards required to enable effective teaching and learning,⁶ and that progress towards these should be reported to ensure accountability.
9. Unfortunately the reporting imperatives incumbent upon MECs and HODs in terms of section 58C are meaningless without comprehensive, clear and binding norms and standards.

(b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year.

⁶ The purpose and meaning of the sections of the Act that deal with norms and standards is also evident from the Preamble to the Act, which states that “it is necessary to set uniform norms and standards for the education of learners at schools ... throughout the Republic of South Africa”.

The need for norms is reinforced by Section 8 of the National Education Policy Act 27 of 1996 which states:

“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.”

10. On 21 November 2008 the DBE (then the DoE under the leadership of Minister Naledi Pandor) published Draft National Minimum Uniform Norms and Standards for School Infrastructure (“2008 Draft”) in the Government Gazette, along with a call for public comment.⁷ This predecessor to the 2013 Draft was never promulgated into law, although presumably the public comments submitted at that time – not to mention the draft itself – would still be relevant and useful today. The 2008 Draft contained detailed norms and standards, set tangible urgent to long term goals, and provided clear timelines for meeting those goals. Also on 21 November 2008, the DBE released a call for comments on the proposed National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment.⁸ Once finalised, these two paired policy and legislative instruments would serve as the DBE’s authoritative pronouncements on what an enabling physical schooling environment ought to entail.
11. In 2009 Minister Angelina Motshekga (‘the Minister’) assumed the DBE reins. In June 2010 the Minister published the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (“the NPEP”).⁹ The NPEP did not undergo much watering down from its initially proposed form. Significantly, however, the current draft regulations reveals a radical retrogression in its content. The NPEP proclaimed that *“[e]quity in the provision of an enabling physical teaching and learning environment is therefore a constitutional right and not just a desirable state.”* It identified the development of norms and standards for school infrastructure as a *“first priority”*¹⁰ issue for purposes of strategic planning and monitoring by the DBE. The NPEP stated that norms and standards for school infrastructure *“[would] be developed and be fully adopted by the end of the 2010/11 financial year.”*¹¹ This date passed without the promulgation of these regulations.
12. Equal Education’s (EE) concern over the unacceptable state of school infrastructure in many of the country’s schools prompted it to initiate a sustained campaign to compel the Minister

⁷ Government Gazette No 31616 of 21 November 2008, Call for comments on National Minimum Uniform Norms and Standards for School Infrastructure, Notice 1439 of 2008.

⁸ Government Gazette No 31616 of 21 November 2008, Call for comments on NPEP Notice 1439 of 2008.

⁹ The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment. (“the NPEP”); Government Gazette No 33283 of 11 June 2010. Accessible at <http://www.equaleducation.org.za/sites/default/files/Annexure%20YD12.pdf> .

¹⁰ Above note 9, the NPEP at para 1.20.

¹¹ Above note 9, the NPEP at para 1.14.2.

to promulgate legally binding regulations for norms and standards for school infrastructure in line with her responsibilities under the Act. EE members have marched and picketed, petitioned, written countless letters to the Minister, gone door-to-door in communities to garner support for the campaign and have even gone so far as to spend nights fasting and sleeping outside of Parliament. EE lobbied Parliament and politicians, and on Human Rights Day in March 2011, it led 20 000 learners and supporters in a march to Parliament to demand that the Minister and the DBE keep their promise and adopt minimum norms and standards that will lay down the blueprint for ensuring that all learners in South Africa, regardless of race or wealth, are able to learn in schools with adequate infrastructure.¹²

13. In 2012 it became increasingly apparent that resorting to the courts to compel the Minister to promulgate the norms was necessary. EE is aware that section 29(1)(a) of the Constitution which provides that “everyone has the right to a basic education” and that, unlike other socio-economic rights, this right is unqualified and immediately applicable. Thus, on 2 March 2012 the Legal Resources Centre (LRC) on behalf of EE and the infrastructure committees of two applicant schools in the Eastern Cape, filed an application in the Bhisho High Court against the Minister, all nine MECs for Education and the Minister of Finance to secure national minimum uniform norms and standards for school infrastructure.¹³
14. The application addressed and described the widespread results of the government’s failure to provide adequate infrastructure standards for public schools in terms of section 5A of the Act, a problem that most harshly affects the poorest schools in the country by perpetuating systemic school infrastructural problems and gross educational inequalities. The application showed in detail how many learners and teachers have been left in unsafe environments that are not conducive to learning, and which have undermined the ability of the learners to achieve in the classroom and fully realise their rights to an adequate education, equality and dignity.
15. None of the nine MECs for Basic Education, nor the Minister of Finance, disputed the need

¹² The memorandum handed over to the DBE representatives at the 2011 March read: “*Once norms and standards [for school infrastructure] are in place, every school and community will be able to use them to hold circuits, districts and provinces accountable to deliver. Minister Motshemga has said that communities must be the ‘eyes and ears’ of education delivery; these norms and standards will be a powerful tool for that activism.*”

¹³ *Equal Education (EE) & two others v Minister of Basic Education and 12 others*, case number 81/2012. Accessible at <http://www.equaleducation.org.za/campaigns/minimum-norms-and-standards/court-papers> .

for binding minimum norms and standards for school infrastructure. Instead they all elected to abide by the Court's decision.

16. In May 2012, after EE had already launched its court case, the Minister published Infrastructure Guidelines,¹⁴ which have no legal effect, as they are not binding and therefore cannot ensure that schools be equipped with an adequate minimum core level of infrastructural facilities necessary for learners to learn in a healthy environment.
17. In response to EE's court application, the Minister stated that there was no need for regulations on school infrastructure, as distinct from guidelines. The Minister took the view that the May 2012 guidelines would therefore suffice. EE, however, deemed these Guidelines, which failed to carry the force of law, insufficient and continued to prepare for the court hearing which was set down for 20 November 2012 in the Bhisho High Court.
18. However, just days before the hearing the Minister acceded to EE's demands. On 19 November 2012 the Minister entered into a settlement agreement with EE in which she undertook to publish a draft of the regulations for public comment on or before 15 January 2013¹⁵ and to promulgate regulations on school infrastructure in terms of section 5A(1)(a) and 5A(2)(a) of the Act on or before 15 May 2013.

(C) THE NEED FOR NORMS AND STANDARDS

19. Thousands of schools in South Africa lack the infrastructure necessary to provide learners with the quality education which they are legally entitled to receive. The DBE's National Education Infrastructure Management System (NEIMS) Report, published in May 2011, indicates that schools in the Eastern Cape and KwaZulu-Natal are in the worst condition but that the problem of poor infrastructure is also found in other provinces.¹⁶ The NEIMS Report also provides detailed statistics on the lack of resources at public schools across the country. It is noted in NEIMS that, of the 24 793 public ordinary schools:

¹⁴ Guidelines Relating to Planning for Public School Infrastructure, May 2012.

¹⁵ The settlement agreement was noted by the Bhisho High Court on 20 November 2012. Accessible at [http://www.equaleducation.org.za/sites/default/files/2012%2011%2019%20signed%20settlement%20agreement%20\(1\).pdf](http://www.equaleducation.org.za/sites/default/files/2012%2011%2019%20signed%20settlement%20agreement%20(1).pdf).

¹⁶ NEIMS, above at note 1.

- 3 544 schools do not have electricity, while a further 804 schools have an unreliable electricity source;
- 401 schools have no water supply, while a further 2611 schools have an unreliable water supply;
- 913 do not have any ablution facilities while 11 450 schools are still using pit latrine toilets;
- 22 938 schools do not have stocked libraries, while 19 541 do not even have a space for a library;
- 21 021 schools do not have any laboratory facilities, while 1 231 schools have stocked laboratories;
- 2 703 schools have no fencing at all; and
- 19 037 schools do not have a computer centre, whilst a further 3 267 have a room designed as a computer centre but are not stocked with computers.

20. These figures are telling given that reputable international research reveals that there exists a causal relationship between the quality of school infrastructure and learner outcomes and performance; the causal relationship is stronger in disadvantaged schools where the state of school infrastructure is poor and inadequate; there is a strong relationship between a lack of adequate school infrastructure and learners' self-esteem; school infrastructure impacts on the importance learners place on school and impacts upon absenteeism among other things.¹⁷

21. The necessity for regulations on minimum norms and standards for school infrastructure is not only limited to the positive academic outcomes associated with adequate infrastructure. Clear, comprehensive and well framed regulations with sequenced priorities and tangible targets would also:

- provide a legal standard and mechanism for ensuring that government meets its constitutional obligation to fulfill the right to an adequate basic education;

¹⁷ These points were made in EE's Founding Affidavit in the case which resulted in the court settlement with the Minister. They are common cause. The DBE's NPEP states that "...recent studies show, there is a link between the physical environment learners are taught [in], and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learner irregular attendance and dropping out of school, teacher absenteeism and the teacher and learners' ability to engage in the teaching and learning process."

- provide a legal standard for ensuring an acceptable level of educational facilities is provided to every South African learner, as the right to equality requires;
- ensure that spending and development of infrastructure planning is guided by a clear policy framework with defined and measurable targets;
- enable national government to exercise its oversight and monitoring role in respect of provincial departments;
- enable provincial governments to meet their constitutional obligations within a clear framework of targets and priorities;
- in particular, ensure the urgent prioritisation of the neediest schools by facilitating the identification of schools in the most hazardous and worst physical condition; and
- facilitate participatory democracy by enabling communities, learners and educators, civil society organisations, and the public at large to know what they are entitled to require of government, thereby enabling better monitoring of government's performance and improved accountability.

(D) BROAD SUPPORT WITHIN THE STATE FOR BINDING NORMS AND STANDARDS FOR SCHOOL INFRASTRUCTURE

22. The South African Human Rights Commission (SAHRC) recently published the Charter of Children's Basic Education Rights (the Charter).¹⁸ The Charter expands on section 29(1)(a) of the Constitution, which provides that "everyone has the right to a basic education". The Charter gives content and definition to this right and the state's obligations in terms of it. The Charter makes explicit that norms and standards for school infrastructure must be in a legally binding form:

"[T]he downgrading of the norms into guidelines potentially frustrates the realisation of the key equity objective of the policy, given the weaker legal status of guidelines."

... [it is] *"critical that National Uniform Minimum Norms and Standards for School Infrastructure be legislated and implemented as required by the governing policy"*.¹⁹

¹⁸ South African Human Rights Commission (SAHRC) *Charter of Children's Basic Education Rights: The Right to Basic Education* (2012).

¹⁹ SAHRC p 21. The Charter further states at p 15: "[B]asic education must be made available by the state to all children. Availability of education refers to what must be in place before the right is accessed. This obliges the state

23. In an August 2011 Auditor General (AG) report to Parliament on the infrastructure delivery process, the AG identified wasteful and inefficient government expenditure as a major factor impeding delivery. The AG recommended:

“National norms and standards for infrastructure should be compiled and adherence to it should be promoted; the norms and standards should be incorporated into standard and uniform designs to reduce professional fees...; the department should finalise and promote adherence to the national minimum norms and standards for school infrastructure.”²⁰

24. The Public Protector has echoed the DBE’s own sentiments that norms and standards are needed to facilitate efficient resource use and ensure equity and quality in the provision of school infrastructure across the country. A report by the Public Protector concerning allegations of failure by the Eastern Cape Provincial Education Department to provide additional classrooms and toilets for a school in desperate need, relies explicitly on the DBE’s promises that binding national minimum norms and standards for school infrastructure were on the way.²¹ This, the Public Protector noted, would help to resolve the problem.

25. The Financial and Fiscal Commission, in its comment on the 2008 Draft Norms and Standards, recommended that norms and standards ought to “define minimum and optimum standards” and “should provide a clear and comprehensive picture ... of the education system’s ... future (infrastructure) environment.”²²

to take legislative, administrative and other steps to ensure a national education system that...[provides] functional education institutions”.

²⁰ Auditor-General of South Africa: Report of the Auditor General of South Africa to Parliament on the Performance Audit of the Infrastructure Delivery Process at the Provincial Departments of Education and Health (August 2011). Para 5.2; 5.3; 5.5 pg 47.

²¹ Public Protector of South Africa, Report No.50 of 2009/10. Report on an Investigation into Allegations of Failure by the Eastern Cape Provincial Department of Education to Provide Additional Classrooms and Toilet Structure for Ntekelelo Junior Secondary School at pg 4. Accessible at: http://www.pprotect.org/library/investigation_report/2010/docs/investigation%20report%20for%20media%20briefing%2009%20june/Ntekelelo%20Report%20No%20%2050%20Signed.pdf

²² Financial and Fiscal Commission: *Submission on Norms and Standards for School Infrastructure* (2009) at pg 3. Accessible at <http://www.ffc.co.za/docs/submissions/other/2009%20-%20Submission%20on%20Norms%20and%20Standards%20for%20School%20Infrastructure.pdf>.



26. The National Planning Commission in its National Development Plan (NDP) recognises that it is only through binding minimum norms and standards, carrying the force of law, that the Minister can ensure that provinces and officials involved in the planning, constructing and improving of school infrastructure do not deliberately ignore these standards. The NDP states that the DBE's guidelines on infrastructure, "...should be legislated to ensure that they are adhered to." ²³

27. The DBE's own Norms and Standards for School Funding²⁴ requires each province to identify where need exists for school infrastructural development when prioritising, planning and budgeting for new and improved schools. Section 86 of the Norms and Standards for School Funding states that provincial MECs for education are responsible for ensuring that there are enough places to enable children living in the province to attend school during the compulsory phase. If the relevant provincial education department is not in a position to fulfill this obligation, the MEC must take steps to remedy the situation and report annually to the Minister on the progress made. Section 88 of the Norms and Standards for School Funding provides further discretion to the provinces to plan, budget and prioritise the development of school infrastructure, providing that:

'[E]ach PED must:

a) maintain an accurate, prioritised, annually updated database of school construction needs, and;

*b) undertake annually updated long-term projections of new school construction targets and funding requirements, based on these norms.'*²⁵

28. The Norms and Standards for School Funding sets out a range of factors that provincial MECs for education must consider when planning and prioritising school infrastructural development in order to advance the policy that construction of new schools or additional

²³ National Planning Commission, *National Development Plan: 2030. Improving Education, Training and Innovation*, (August 2012) pg 313. Accessible at <http://www.npconline.co.za/medialib/downloads/home/tabs/ndp%202030-ch9-improving%20education,%20training%20and%20innovation.pdf> .

²⁴ Not to be confused with the Draft Minimum Uniform Norms and Standards for Public School Infrastructure with which this submission mainly deals. The 'Norms and Standards for School Funding' are in force and relate mainly to non-capital expenditure.

²⁵ National Norms and Standards for School funding, Government Gazette, Volume 400, No. 19347, 12 October 1998, Government Notice 2362 of 1998. Accessible at <http://www.education.gov.za/LinkClick.aspx?fileticket=ZYYtOiXHTeE%3D&tabid=188&mid=498> .

classrooms and learning facilities be targeted to the neediest. The regulation requires MECs to consider factors such as overcrowding, conditions of schools and the level of poverty in the surrounding communities. This direction is very limited, however, in that it does not define how many learners should be in a classroom; how much physical space should be provided for each learner; what classroom conditions call for new schools or additional classrooms to be developed; what facilities, such as libraries, science and computer laboratories, must be made available at new and existing schools, and what must be provided in terms of toilet facilities, school security, water and electricity. This is precisely why the need for specific norms and standards relating to school infrastructure were recognised by the 2007 amendment to the Act which inserted section 5A.

29. In addition, the Forum of South African Directors General (FOSAD) Management Committee (MANCO) has identified the need for “appropriate comprehensive national minimum norms and standards” to be legislated in areas of concurrent service delivery in order to ensure “adequate monitoring, reporting, support and intervention processes are in place at local, provincial and national level to enable provincial and national monitoring of compliance”²⁶ with these set standards.
30. It bears repeating that even the nine provincial MEC’s for Education, and the Minister of Finance, after being cited in EE’s court case against the Minister, chose not to contest the need for binding norms and standards for school infrastructure. Significantly all of these government officials tasked with delivering adequate school infrastructure chose rather to abide by the Court’s decision, a powerful act of acknowledgement that the need for nationally set, clearly framed and binding basic standards on school infrastructure is uncontestable.
31. As these institutions have recognised, it is only in the presence of clear, comprehensive and well framed regulations, with sequenced school infrastructure priorities and tangible targets that the norms and standards will ultimately achieve what Parliament so clearly intended. The current draft, however, falls far short of meeting any of the needs for binding norms.

²⁶ Department of Performance Monitoring and Evaluation in the Presidency, Norms and Standards for Concurrent Functions and Related Monitoring and Reporting Processes, Terms of Reference.

(E) THE CONTENT OF THE DRAFT: NO MINIMUM STANDARDS

32. Of much concern to EE is that although the Draft purports to be Draft Minimum Norms and Standards for School Infrastructure, it does not appear to be this in substance. The Draft in many facets, suggested even in its name, “*REGULATIONS RELATING TO MINIMUM UNIFORM NORMS AND STANDARDS FOR PUBLIC SCHOOL INFRASTRUCTURE*” (*emphasis added*), fails to set any legal standard in terms of section 5A of the Act.
33. In order for the infrastructure norms to truly serve as a useful document that will ultimately aid the DBE and the provinces in addressing the poor and inadequate infrastructure conditions in many schools, the standards contained therein must be clear. Whilst the Draft offers virtually nothing in the way of minimum standards even those “standards” that do exist are so vague and obscure that they offer the user no guidance at all, thus rendering them completely meaningless. The vagueness of the Draft is illustrated through reference to specific sections in the Draft, below.

(a) “Educational Spaces”

34. “[E]ducational spaces”²⁷ are defined as:

“critical teaching and learning places in a school, that are essential to carry the core teaching and learning functions in a school and include classrooms”.²⁸

35. The Draft says nothing about how many learners there should be in each classroom, how many classrooms should be in a school and how much space should be available for a learner (something which was dealt with explicitly in the 2008 Draft).
36. Significantly, the current Draft does not require that classrooms be of a certain quality or size, nor that classrooms contain adequate lighting, ventilation and acoustics in order to ensure that the classroom space is capable of facilitating effective teaching and learning. In essence no standard whatsoever is set in relation to the infrastructure quality of a classroom.

²⁷ Section 1 of the Draft.

²⁸ Same as above.

37. In stark comparison, the 2008 Draft provides minimum requirements for the classroom size, average space per learner, lighting, acoustics, and comfort levels.²⁹

38. If the current Draft passes into law it will offer no assistance to learners and teachers who find themselves in a classroom at risk of collapse, overcrowded, without windows and with holes in the roof. The need for norms and standards to enable communities, learners, educators and the public at large to know what they are legally entitled to, so that they can hold provincial officials accountable if they fails to meet the basic standards, is therefore completely defeated by the vague nature of the Draft. In addition the vagueness of the Draft means that no direction is given to the provinces to aid them in their planning.

(b) “Electricity”

39. The 2013 Draft merely states that a “*school should be provided with some form of energy which complies with all relevant laws.*”³⁰ (emphasis added.) Whereas the 2008 Draft explicitly charges the state with an obligation to provide “electricity”³¹ the words “some form of energy” is broad enough that schools could escape an actual requirement to provide electricity. As currently written, the 2013 Draft fails to illuminate any specific requirements for the provision of electricity.

40. The 2013 Draft states that the Minister must issue guidelines that address lighting and electrical power outlets, however these guidelines will not be binding.

41. Whilst the 2013 Draft states that “some form of energy” must comply with all relevant laws, which may impose additional requirements, it is difficult to ascertain what laws the Draft references. Complying with “relevant laws” is not sufficient direction because the norms and standards are supposed to shed light on the basic level of legal entitlement to all stakeholders rather than requiring learners, parents, and school officials to scour municipal, provincial and national legislation to try to decipher the facilities to which they are entitled by law.

²⁹ 2008 Draft, above note 7 at paras 3.25-3.29.

³⁰ 2013 Draft at section 4(5).

³¹ 2013 Draft at section 4.5; 2008 Draft, above note 7 at para 3.21.

(c) Water

42. The Draft states that a “*school must be provided with basic water supply which complies with all relevant laws.*”³² As with electricity, this definition in the 2013 Draft holds very little water as it fails to make an adequate water supply, appropriate for drinking, and sufficient for various other uses, a specific requirement in all schools.
43. In comparison, the 2008 Draft included specific requirements for water supply, referring to Section 3 of the Water Service Act, 1997, and prohibiting schools from functioning without potable clean water.
44. A similar critique regarding a lack of a clearly set standards and a failure to provide the user with sufficient direction can be made in relation to the reference to “all relevant laws”. It would be unfair to expect the general public to possess the skills and expend the energy needed to locate these “relevant laws” in order to ascertain whether there is in fact any meaningful content to the basic water supply standard in the 2008 Draft.

(d) Sanitation

45. The 2013 Draft requires that schools “*must be provided with adequate sanitation facilities that promote health and hygiene standards and that comply with all applicable laws.*”³³ The applicable law is the Water Service Act, 1997, which simply states that “*everyone has a right of access to...basic sanitation.*” Unlike the 2008 Draft, the 2013 Draft would appear not to make it unacceptable to use pit and bucket latrines.
46. In the absence of any national legislation detailing norms and standards for school sanitation, this begs the unanswered questions: how many students should have to share one toilet or tap to comply with the vague “adequate” legal standard? 50, 100, 1000? Do these toilets need to be maintained? And, if so, how frequently? Unfortunately the Draft, instead of providing clarity on basic standards, simply fosters more uncertainty.

³² 2013 Draft at section 4(4).

³³ 2013 Draft at section 4(3).

(e) Libraries

47. The 2013 Draft defines “educational support spaces” as “some form of a library OR laboratory OR media centre;” (Emphasis added.)
48. The 2013 Draft does not guarantee a library because any one of a library or laboratory or media centre will suffice as “educational support spaces.”
49. The tables contained in the 2008 Draft indicated a library or media centre for every school over a certain size, although the 2008 Draft acknowledged that some schools may struggle to provide a library and provided for flexibility to create alternative approaches while not abdicating any responsibility or accountability. Provisions in the 2008 Draft that allowed for provinces to deviate from the norms and standards required provincial MECs to report to the Minister indicating the reason for the deviation, and thus provided accountability mechanisms ensuring that alternative approaches would be both adequate and justified. The 2008 draft fulfilled the NPEP’s requirement that “the provision of adequate library stocks in hard and/or electronic form to *all* learners is an equity imperative”.³⁴

(f) Laboratories

50. As with libraries, the 2013 Draft does not require a laboratory as schools only need a “library or a laboratory or media space” to meet the criteria of providing educational support spaces.
51. The 2008 Draft, on the other hand, listed, in its tables, science laboratories as a requirement for all schools, primary and secondary, small, medium, and large. Yet, they do allow for a school that doesn’t have a science laboratory to use a science kit as a means to “afford[] the system time to plan without dramatically risking the core principle of equal educational opportunity.”³⁵ The 2008 Draft contained a degree of flexibility while still requiring that provinces work towards the creation of science labs in each school.

³⁴ 2008 Draft, above note 7 at para 2.13.1.

³⁵ 2008 Draft, above note 7 at para 2.40.

(g) Sports and Recreational Facilities

52. The 2013 Draft states that “[w]here reasonably practicable, a school should have a sport field for soccer or rugby or another selected sport and ground or a court for netball or volleyball.”³⁶ The blanket “where reasonably practicable” proviso completely collapses any attempt at setting a minimum standard in relation to sport and recreational facilities and commits nothing to the majority of black learners who continue to be disenfranchised by very few formal opportunities to engage in sports.

53. The 2008 Draft created a framework for poorer schools to achieve minimum norms and created maximum norms as eventual targets. The 2008 Draft therefore established clear minimums whilst the 2013 Draft blatantly evades any form of accountability by requiring fields only when reasonably practicable.

(h) Electronic Connectivity

54. The 2013 Draft requires that “[w]here reasonably practicable, a school should be provided with some form of connectivity for purposes of communication.”³⁷ (emphasis added). Again, the reasonably practicable qualification severs any attempt at establishing a clear minimum legal entitlement.

55. The 2008 Draft provided much more detailed requirements, including the provision of “telephone, fax, internet access, intercom reticulation / public address system” in addition to “some form (wired or wireless) of connectivity”.³⁸ It is clear in the 2008 Draft that by “connectivity” is meant Internet, in addition to various other forms, but the wording in the 2013 Draft need not mean Internet, or any specific mode of communication.

³⁶ 2013 Draft at section 6(1).

³⁷ 2013 Draft at section 4(6).

³⁸ 2008 Draft at para 3.22.

(F) THE FRAMEWORK DOCUMENT INTENDED TO PROVIDE GUIDELINES IN 18 MONTHS TIME

56. Equally troubling is that the Draft appears to defer the substantive content of the norms and standards to a later non-binding “*framework document*”.³⁹ That the actual norms and standards will be reflected in this later document and that there has been no attempt to place it in the regulations itself is apparent from the wording of the Draft. The Draft states that the norms and standards for basic safety and minimum functionality will be contained in the framework whereas “*other minimum requirements [are] contained in these regulations.*”⁴⁰

57. The Draft then goes on to list “*technical information*”⁴¹ that must be contained in the framework document, rather than in the actual Norms and Standards. This technical information must include “*norms for education support spaces, educational support spaces, and norms for administration spaces.*”⁴² (emphasis added). It is clear then that the very heart of the norms and standards has been migrated to the non-binding framework document.

58. That later framework document, as stated above, is intended to be non-binding and as the Draft itself states would merely “*serve as guidelines.*”⁴³ What the Draft therefore does is commit to the later adoption of non-binding guidelines on school infrastructure. However, during the exchange of court papers EE explicitly stated that non-binding guidelines (then in the context of the May 2012 guidelines) for school infrastructure were insufficient, and it was on this basis that the Minister agreed to settle the case.

59. The deferral of norms and standards content to a later date, and the intended non-binding nature of that later document – the framework document – therefore contravenes and evades the Minister’s commitments in terms of the settlement agreement, which was to introduce regulations on minimum uniform norms and standards for school infrastructure by 15 May 2013. There is an unfortunate appearance of bad faith.

³⁹ 2013 Draft at section 8.

⁴⁰ 2013 Draft at section 7(b).

⁴¹ 2013 Draft at section 8(2).

⁴² 2013 Draft at section 8(e).

⁴³ 2013 Draft at section 8(3).

(G) ANY SCHOOL, NO MATTER HOW BAD, IS ACCEPTABLE IN TERMS OF THE CURRENT DRAFT NORMS AND STANDARDS

60. On a close examination of the norms and standards it is clear that virtually any school, no matter how poor or hazardous the infrastructure, can satisfy the vague and meaningless norms and standards currently contained in the Draft. For example, without addressing basic safety, the norms and standards will do nothing to ensure the eradication of schools that present safety and health hazards to students, such as those with decaying walls and collapsing ceilings. The lack of specificity wholly undermines the purpose of having nationally-set binding regulations on school infrastructure and in so doing renders the document unenforceable and completely worthless.
61. A compounding concern is that the Draft appears to sanction “temporary structures” as an alternative to permanent school buildings that meet norms and standards. The Draft states that “nothing in the draft prohibits MECs from providing temporary structures that are suitable and safe for use as additional spaces.” However the Draft fails to define what a suitable and safe temporary structure means and how long a temporary structure can be used before it would need to be considered permanent and therefore subject to being tested against the norms and standards regulations. If “temporary structures” are outside the purview of the norms and standards, as the Draft seems to suggest, and can be provided without any limiting timeframe, such temporary structures could become a way for provinces to permanently avoid the requirements of the norms and standards.
62. The complete lack of any meaningful or clear standard in the Draft renders a point by point comment on the Draft futile. In essence EE’s comment on the substance of the Draft is that there is little to comment on.

(H) THE DRAFT CANNOT BE IMPLEMENTED: FAILURE TO EMPOWER MINISTER

THE DRAFT FAILS TO PROVIDE THE MINISTER WITH THE POWERS NEEDED TO ENSURE IMPROVEMENT OF SCHOOL INFRASTRUCTURE AT THE PROVINCIAL LEVEL

63. EE strongly urges the DBE to reconsider the Draft with respect to the document's lack of specificity, binding substance and targets for implementation. As the DBE has emphasised on multiple occasions, provincial administrations have played a prominent role in the persistent poor state of school infrastructure as a result of inadequate prioritisation, planning and budgetary provisioning for the improvement of school infrastructure.⁴⁴

64. In her foreword to the NPEP, the Minister emphasised that persistent challenges to the provisioning of infrastructure in schools remain, as inequalities still exist where some schools are still without basic services, laboratories, computers and adequate classrooms. The Minister stressed that "*progress in infrastructure provision has taken place without specific national or provincial policies, norms or strategies to guide and support the development of the physical teaching and learning environment*"⁴⁵ and that the absence of clear national policy and norms has led to:

- Constraints on planning as there was little consensus on targets or precise specification of targets;
- A lack of guidance to provinces and school districts on what is required and what the best approaches would be;
- Difficulty in assessing the current environment as adequate or inadequate against clear benchmarks which had been pre-set;
- Difficulty to find robust evidence for the assessment of technical efficiency and substantive responsiveness of the current environment.⁴⁶

⁴⁴ See for example First Respondent's Affidavit, Shunymugam Govindamy Padayachee at para. 12.

⁴⁵ Above note 9, Minister's foreword to the NPEP at pg 6.

⁴⁶ Above note 9, Minister's foreword to the NPEP at pg 6.

65. As described above, the Draft fails to provide any substantive direction to the provinces on what minimum core level of infrastructural facilities must be present at all schools throughout South Africa. Moreover, the Draft neglects to set out meaningful targets which could be used to direct provinces in terms of when certain standards must be met to ensure that adequate and efficient prioritisation, planning and budgeting takes place. By failing to set specific binding minimum standards and meaningful targets for implementation, EE is concerned that the DBE is not fulfilling its mandates pursuant to Sections 5A and 58C of the Act and that these shortcomings will continue to result in inadequate and ineffective school infrastructure development at the provincial level.
66. The semi-federal or semi-autonomous system of government as laid out in the Constitution, whereby the national government exercises concurrent jurisdiction, with provinces, over education, limits the extent to which the national government may be directly involved with the *implementation* of law and policy. However, the national government is empowered to set law and policy with respect to the provision of basic education; law and policy which it is then incumbent upon provincial education departments to execute. The Constitutional Court in the *Hoerskool Ermelo case*⁴⁷ characterised the structure of the South African education system under the Act as follows:

‘An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. (emphasis added) The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.’

⁴⁷ *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others* 2010 (3) BCLR 177 (CC) at 196.

67. The DBE's own Norms and Standards for School Funding⁴⁸ recognises the Constitution's construct of concurrent powers amongst the national and provincial governments in terms of planning and budgeting for education expenditures. Section 41 of that policy states:

*'In terms of our Constitution and the government's budgeting procedure, the national Ministry of Education does not decide on the amounts to be allocated annually for provincial education departments. This is the responsibility of provincial governments and legislatures, which must make appropriations to their education departments from the total revenue resources available to their provinces. Thus, each province determines its own level of spending on education, in relation to its overall assessment of needs and resources.'*⁴⁹

68. It is precisely because of the constraints on national government that it is important for the Minister to set specific and binding norms and standards for school infrastructure. Treasury would also then have the benefit of the norms and standards, and what they demand, when planning and budgeting, and would, *inter alia* under the powers of the Public Finances Management Act (PFMA), better be able to ensure that provinces do the same.

69. For the reasons set out earlier in this comment, the 2013 Draft fails to expand upon which infrastructural facilities provinces must ensure are available at all schools, as well as fails to provide targets and time frames for when the provinces must ensure that all schools are functioning properly. As a result of these severe shortcomings, EE is very concerned that the provinces will continue to perpetuate the poor state of school infrastructure by continuing to fall short in their prioritisation, planning and budgeting for school infrastructure.⁵⁰

⁴⁸ As noted above, these are not to be confused with the Draft Minimum Uniform Norms and Standards for Public School Infrastructure with which this submission mainly deals.

⁴⁹ Norms and Standards for School Funding, above note 25 at section 41.

⁵⁰ It is likely that clearly defined norms and standards may help with the exercise of section 100 of the Constitution. This section empowers the national government to intervene when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation by taking any appropriate action, including issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations. Section 100(1)(b) further authorises the national government to assume the responsibility for a non-complying province for the relevant obligation to the extent necessary to (i) maintain essential standards or meet established minimum standards for the rendering of a service. Without the existence of clear and binding standards and targets for implementation, the DBE will be unable to determine whether or to what extent a Section 100 intervention may be necessary because it will be unclear to national, provincial and local governments, as well as other stakeholders, whether obligations have been fulfilled, what steps would be required to fulfil these unclear obligations and whether established minimum standards have been met.

70. As has been stressed throughout this commentary, promulgating quality, substantive regulations governing minimum norms and standards for school infrastructure would strengthen the DBE's ability to ensure that provinces prioritise, plan and budget properly for the development of school infrastructure. Quality regulations that are specific in terms of the areas of school infrastructure set out in Section 5A of SASA would direct provinces in terms of which schools need upgrades or additions or where new schools must be built. In addition, clear targets for implementation would enable provinces to clearly understand how much to budget for improvements and would force them to plan appropriately and build the capacity needed in order to ensure that phases of development are met.
71. Of further significance is that clear, substantive regulations would empower the Minister and the DBE to exercise appropriate oversight with respect to the development of school infrastructure in each province. Section 58C of SASA requires the HOD for each province to comply with norms and standards and in so doing (1) identify resources which will be utilised to comply with norms and standards; (2) identify the risk areas for compliance; (3) develop a compliance plan for the province, in which all norms and standards and the extent of compliance must be reflected; (4) develop protocols with the schools on how to comply with norms and standards and manage risk areas; and (5) report to the MEC on the state of compliance and on these measures by 30 September each year. The respective education MECs must then report to the Minister on the extent to which minimum norms and standards have not been met, and where the standards have not been complied with, report on measures that will be taken to comply. These 58C oversight mechanisms would enable the DBE to monitor where provincial school infrastructure development capacity is lacking, as well as the efficiency by which infrastructural budgets are being developed and utilised to build new schools and upgrade existing schools that fail to meet the minimum standards. These monitoring abilities would further enable the national government to develop a clear understanding of the extent to which infrastructural development is needed in a province and to assess whether struggling provinces have the capacity to meet established norms and standards, as well as whether prioritisation, planning and budgeting are effective.
72. Unfortunately though this monitoring and enforcement of compliance will be impossible against the current Draft due to its vague and empty nature. The current Draft in fact makes

Section 58C essentially unimplementable and thereby frustrates the intending functioning of the Act.

(I) THE DRAFT CANNOT BE IMPLEMENTED: VAGUENESS AND LACK OF TARGETS

THE DRAFT FAILS TO COMPLY WITH THE NATIONAL POLICY (NPEP) AND PALES IN COMPARISON TO THE 2008 DRAFT

73. The Draft is wholly insufficient as it:

- is vague to the extent of being unenforceable, as practically any school would satisfy the extremely low threshold set;
- lacks targets and time frames for implementation and therefore cannot be used by the Minister to hold provinces accountable if they fail to deliver;
- fails to apprise stakeholders, including learners, parents, teachers, principals and school communities of the infrastructural facilities to which they are entitled and as a result lacks measures of transparency and accountability that could otherwise be utilised to ensure that provinces are acting efficiently and appropriately to develop school infrastructure;
- will likely cause the shortcomings in prioritisation, planning and budgeting at the provincial level to continue to plague the provisioning of school infrastructure; and
- fails to promulgate norms and standards that are consistent with those contemplated and demanded in Sections 5A and 58C of the Act.

74. The detailed norms and standards contained in the 2008 Draft were far more specific in terms of the requirements for facilities that must be made available at all public schools. Moreover, the targets in the 2008 Draft provide a workable framework for provinces to prioritise, plan and budget, and allows for greater enforcement and oversight by the national government. The 2008 Draft set clear targets for the development of adequate infrastructure across all provinces whilst the current Draft avoids any such commitment. As already noted, the current Draft merely directs the Minister to release guidelines which, by their non-binding

nature, avoid any mechanism for ensuring accountability and providing proper redress for failing to meet standards.

75. The NPEP demands the creation of “*a well-defined basket of inputs*” to constitute the minimum norms and standards⁵¹ The 2008 Draft precisely defined these “*well defined basket of inputs*” while the current Draft fails to fulfill the requirements of the NPEP and the Act. The stark contrast, in every respect, between these two draft regulations highlights the current Draft’s failure to provide for a framework that is capable of enforcement and implementation oversight. These failures will likely see a continuation of the problems with provincial implementation that the Minister identified in her preamble to the NPEP.
76. One of the concerns raised by the DBE in its Responding Affidavit, during the legal process which resulted in the court settlement with EE, was that specific and binding norms and standards would not allow for local variation, innovation and flexibility. EE responded in its Replying Affidavit that there is no reason why binding norms and standards could not provide for exceptions, and that in fact they should encourage innovation and flexibility, provided that basic norms and standards are met. In this regard it is important to note that the 2008 Draft would have enabled provinces to adapt requirements to their local needs as long as the result is not “*a diminution of the minimum norm*”.⁵²
77. Whilst the 2008 Draft allows for MECs to deviate from certain terms in the regulations, they would have continued to provide for mechanisms of oversight by requiring MECs to report and explain deviations to the Minister, thus assuring that deviations are both adequate and justified. The 2008 Draft established minimum and maximum capacities for schools, and instructed that MECs should intervene and either merge or divide a school when it falls above or below these requirements to ensure “*viability and efficiency*”.⁵³ Yet, MECs would have been able to exercise discretion to retain schools or establish alternative solutions as long as they reported to the Minister as to why discretion was exercised.⁵⁴

⁵¹ Above note 9, the NPEP at para 4.10.

⁵² 2008 Draft, above note 7 at para 1.10. For instance, the 2008 Draft at para 1.6 required that “the proposed norm for the size of a regular classroom is 48 to 60 square meters. Within this set range of the norm, provinces may pick a suitable class size.”

⁵³ 2008 Draft, above note 7 at para 3.14.

⁵⁴ 2008 Draft, above note 7 at para 3.14.

78. The NPEP called for the norms and standards to be set at the national level by the DBE along a four-step continuum which begins at ‘basic safety’ and proceeds through ‘minimum functionality’, ‘optimum functionality’ and ‘enrichment’ levels. The NPEP further committed the DBE to setting targets for the achievement of each level.⁵⁵ It also embodies a spirit of urgency which the current Draft lacks totally; the NPEP, for example, explains that *“basic safety entails the bare minimum inputs below which a school will be deemed inoperable and immediately closed”*.⁵⁶
79. In line with the policy in NPEP, the 2008 Draft compartmentalised norms and standards into safety, functionality, and effectiveness levels. Examples of violations of safety requirements include lack of safe water or sanitation facilities, toxic substances, unsafe and crumbling building structures, and extremely overcrowded classrooms.⁵⁷ Functionality inputs enable schools to carry out their core functions, they include such necessities as adequate classrooms, ablution facilities, textbooks. The NPEP makes clear that the goal is to reach a level where schools are effective and meet *“recommended, not just tolerable class size, specialized teaching spaces, a staff preparation room, administration block, multipurpose learning resource center... laboratories and/or alternatives... library or library stocks that are regularly renewed, accessibility for all...”*.⁵⁸
80. The importance of referring back to the NPEP at this time is due to two main reasons. Firstly, as already noted, the NPEP identifies the development of norms and standards for school infrastructure as the *“first priority”*⁵⁹ for purposes of strategic planning and monitoring by the DBE.⁶⁰ Secondly the Draft NPEP was gazetted on the same day, 21 November 2008, as the 2008 Draft Norms and Standards. They were clearly intended as part of the same policy and legislative package to address the challenges in school infrastructure.
81. The 2008 Draft recognised the importance of setting targets. In so doing it calls for ‘basic safety’ to be addressed immediately and for ‘minimum functionality’ to be attained in every

⁵⁵ Above note 9, the NPEP at para 1.14.1.

⁵⁶ Above note 9, the NPEP at para 4.10.1.

⁵⁷ Above note 9, the NPEP at para 4.10.1.

⁵⁸ Above note 9, the NPEP at para 4.10.3.

⁵⁹ Above note 9, the NPEP at para 1.20.

⁶⁰ The NPEP also states that norms and standards for school infrastructure *“[would] be developed and be fully adopted by the end of the 2010/11 financial year.”* Above note 9, the NPEP at para 1.14.2.

school within a decade.⁶¹ After schools are functional, the 2008 Draft provides for the DBE to determine a target date by which schools will meet each level of provision with an ultimate aim of having all schools reach an effective physical teaching and learning environment.⁶²

82. Through its targets the 2008 Draft would have compelled the provinces to comply with norms and standards in a transparent manner which, together with the 58C monitoring framework described above, would have empowered the national government and stakeholders such as parents, principals, SGBs and learners to ensure that the provinces complied with their mandates to plan, prioritise and budget appropriately. Absent clearly identifiable targets for the development of school infrastructure, the 2013 Draft is a mere suggestion that provinces can ignore while failing to address the severe backlog of inappropriate schools.

(J) THE DRAFT CANNOT BE IMPLEMENTED: NO MECHANISMS FOR ACCOUNTABILITY

83. EE is very concerned with the Draft's lack of accountability mechanisms, which has the potential of enabling provinces to evade their responsibility to develop adequate schools. In contrast, the 2008 Draft established a clear framework for reporting and monitoring. Under the 2008 Draft, provinces would have been responsible for implementing the clear and binding norms and standards contained therein and would have been required to report back to the Minister.

84. Accountability mechanisms are completely lacking in the 2013 Draft. The only mention of oversight is that the DBE "must periodically review the norms and standards" to ensure that they remain current.⁶³ There is no mechanism for monitoring and reporting, a lack of oversight which when combined with the lack of specificity, binding minimum thresholds and targets for implementation, renders the 58C monitoring and oversight mechanisms essentially meaningless and incapable of ensuring that provinces are acting appropriately and efficiently to develop school infrastructure.

⁶¹ 2008 Draft, above note 7 at para 1.15.

⁶² 2008 Draft, above note 7 at para 1.15.

⁶³ 2013 Draft at section 10.

(K) THE DRAFT CANNOT BE IMPLEMENT: UNDERSPENDING LIKELY TO CONTINUE

85. Some might say that specific and binding norms and standards would unduly burden the fiscus. On the one hand, yes, the implementation of norms and standards cannot take place without adequate funding. In this regard clear norms and standards would assist in communicating school infrastructure budgetary needs to Treasury. However, in the main, a lack of funding is not a problem facing school infrastructure; indeed underspending is a pressing problem at present.⁶⁴ Provinces and the DBE are failing to spend grants that are provided to them specifically for school infrastructure. The failure to spend funds that have been marked for school infrastructure reveals just how severe the prioritisation and planning shortfalls are, especially in light of the massive development backlogs that exists.
86. The implementation of the ASIDI programme serves as an example of the extent to which underspending persists. Following nearly a decade of failed undertakings to replace mud schools and pursuant to an R8.2bn court settlement, the DBE implemented the Accelerated Schools Infrastructure Delivery Initiative (ASIDI). Per that initiative, the first 49 schools were scheduled to be complete by the end of March 2012. By March 2013 a total of 98 schools were to have been handed over. The latest Parliamentary report, however, suggests that four schools are complete and that 10 have reached “practical completion”.⁶⁵
87. In the 2011/2012 financial year only R76 million of the R700 million under the direct control of the DBE was spent. At the end of the third quarter of the 2012/2013 financial year just R476 million of the R2.3bn allocated had been spent. The Medium Term Budget Statement of October 2012 confirmed this underspending, stating that *“As a result of slow spending on the schools infrastructure backlogs grant, R7.2 billion has been taken away from this programme over the medium term. These funds will be used to increase the education infrastructure grant to provinces and the community library grant, and to support the*

⁶⁴ This is why, as already noted, the Auditor General saw fit to state: “National norms and standards for infrastructure should be compiled and adherence to it should be promoted.”

⁶⁵ Parliament of the Republic of South Africa Research Unit ‘An Analysis and Summary of the Accelerated Schools Delivery Initiative (ASIDI) Progress Report 2013’ 19 February 2013 accessible at: <http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/wyEmAmNx3R52coKhZ26gg-5upLzuv6md1INqu9GY14M/mtime:1361536543/files/docs/130220asidi.pdf>. A different source, The Annual Performance Plan of the DBE 2013/14, states at page 59 that 12 schools have been replaced under the Backlogs Grant since its inception in 2011.

construction of new universities in Mpumalanga and the Northern Cape.”⁶⁶ The reallocation was recently confirmed by Finance Minister, Pravin Gordhan, who rebuked those departments that “*struggle to spend their full infrastructure budgets*”, saying that “*money has been taken away from programmes that are not performing ... and given to programmes that are delivering as planned.*”⁶⁷ Underspensing on school infrastructure poses a serious threat to the realisation of the right to a basic education, and the right to equality, as many schools in South Africa continue to operate under dire conditions while funds sit idle.

88. At the same time, while some funds go unspent, the lack of clear directives and accountability mechanisms leaves open opportunities for corruption and inefficient overspending to occur because without knowing exactly what facilities must be available at all schools, it will be difficult for the DBE, Treasury and Chapter 9 institutions to assess whether funds that have been spent and have been spent appropriately.

(L) CONCLUSION

89. As has been outlined throughout this comment there continue to be massive backlogs and vastly unequal distribution of resources in school infrastructure provisioning. EE is concerned that the Draft will do little to curb the overall failure of the provinces’ planning, prioritising and budgeting for school infrastructure. Without binding minimum norms and standards that provide a clear vision and blueprint of what functioning schools must look like along with targets setting timeframes for when these standards must be realised, the DBE will continue to be unable to hold provinces accountable for their shortcomings. Moreover, provinces will continue to fall short on their delivery mandates and communities will not be empowered to play their role as informed citizens. Poor school infrastructure unsuitable for teaching and learning will persist because there will continue to be uncertainty in terms of what must be delivered, how long implementation should take, what the expected and appropriate costs will be and the extent to which capacity must be improved for adequate, efficient and timely development of school infrastructure to take place.

⁶⁶ National Treasury, *Medium Term Expenditure Framework and Division of Revenue* (2012) pg 43. Accessed at <http://www.treasury.gov.za/documents/mtbps/2012/mtbps/Chapter%204.pdf>.

⁶⁷ National Treasury, *Budget Speech 2013* (February 2013) pg. 23 Accessed at <http://cdn.bdlive.co.za/images/pdf/Budget2013.pdf>. However, the DBE’s Annual Performance Plan 2013-2014 (tabled in Parliament in March 2013) states that the DBE still has funds for the ASIDI programme. It is therefore possible that funds were not taken away, but that the completion date has been extended from 2013/14 to 2015/16.