SECTION27 SUBMISSION
Draft Regulations Relating to Minimum Norms and Standards for Public School Infrastructure

March 2013
INTRODUCTION

SECTION27 is a public interest law centre that uses and develops the law to advance human rights. As a law clinic, SECTION27 conducts research, advocacy and litigation to change socio-economic conditions that undermine the exercise of fundamental rights. One of our priority areas is the right to basic education. We advocate for the creation of safe physical learning environments that are conducive to teaching and learning and undisturbed quality education.

As such, we welcome the opportunity to engage with the Department of Basic Education ("the DBE") on the Draft Regulations Relating to Minimum Norms and Standards for Public School Infrastructure ("draft norms and standards").¹

This submission is structured as follows:

PART A

1. First we discuss the nature of the right to basic education;

2. Second, we discuss the obligations on the Minister of Basic Education ("the Minister") under section 5A(2)(a) of the South African Schools Act 84 of 1996 ("the Schools Act") to prescribe national uniform minimum norms and standards for school infrastructure;

3. Third, we discuss the requirement of certainty in regulation-making; and

4. Finally, we look at regulation-making as administrative action and the grounds for review thereof under section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

PART B

1. Under this part of the submission we comment on the substance of the draft norms and standards.

¹ Published in GN 6 of 2013, GG 36062, 8 January 2013.
² CESCR General Comment No. 13: The Right to Education (Art. 13) Adopted at the Twenty-first
PART A

1. The nature of the right to basic education

   a. Introduction

Section 29 of the Constitution guarantees the right to basic education. In terms of this section –

   (1) Everyone has the right -
       (a) to a basic education, including adult basic education; and
       (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

The right to basic education is particularly important because of our historical context and the role of education during the apartheid era as a tool to oppress the Black majority. During apartheid, learners from disadvantaged Black communities were given a low standard of education and few resources for the creation of a conducive learning environment. Today, 19 years after the adoption of the right to basic education for all in our Constitution, there are still enormous disparities in resources with millions of learners being forced to learn in dilapidated schools with wholly inadequate facilities.

Positive steps need to be taken to close the resource gap and to improve the quality of education provided to all learners throughout South Africa. Not only will this further the right to basic education, but it will promote the rights to dignity, equality and health as well.

   b. The link between education and other constitutional rights

As well as being a right in itself, education is a vehicle for the realisation of a host of other constitutional rights, including dignity and equality. General Comment 13 on the right to education by the Committee on Economic, Social and Cultural Rights describes the right to education as follows:
“Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”

Education is also one of the recognised social determinants of health. There are clearly-established links between adequate education and good health, and these two rights are mutually reinforcing. The World Health Organisation\(^3\) has accepted that integrating social and emotional learning in school curricula, as well as paying attention to children's physical and cognitive/language development improves their educational attainment and ultimately their health.

Feinstein\(^4\) indicates that education is an important risk factor for health outcomes: some effects of education on health are direct, informing changes in behaviour or preferences, while other effects are indirect, improving income which in turn has a positive effect on health. Quality education has both economic and psychosocial benefits and encourages healthy choices and behaviour, all of which have a positive impact on health.

There are also clear links between poor education and poor health. Low et al\(^5\) frame education as a strong-predictor of long-term health and quality of life, supporting arguments that good education causes good health. They also highlight the importance of


low socio-economic status – which also goes hand in hand with poor education – as one of the strongest predictors of poor health and development.

Where there are inequities in the social determinants of health – including education, income and wealth distribution, early childhood care, working conditions, job security, food security, gender, housing, access to safe water and sanitation and social safety nets – this will give rise to unequal health outcomes.\(^6\)

The provision of a quality basic education therefore has implications for the health of learners and their surrounding communities.

c. The importance of school infrastructure in realising the right to basic education

Infrastructure in particular has a unique impact on the health of learners and teachers. Some examples of this are:

- Learners who are forced to use unhygienic sanitation facilities are exposed to a higher risk of diarrhoeal disease, intestinal worms and other infection. Inadequate sanitation is also linked to a compromised ability to manage HIV.

- Learners at schools with insufficient classrooms who are forced to have lessons outside are exposed to the elements, which may have a negative impact on their health.

- In cases where school buildings such as classrooms and school toilets are dilapidated and not properly maintained, this poses a serious safety risk to learners making use of these facilities.

- Poor school infrastructure, and particularly inadequate sanitation, has been linked to a decrease learners’ ability to concentrate and their motivation to learn, leading

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to increased absenteeism from school, which will in turn have a negative impact on both education and health.

Providing learners with a basic standard of school infrastructure will therefore have a positive impact on both their health and their education.

Recognising the importance of school infrastructure in the right to basic education, Goal 24 of Action Plan 2014, Towards the Realisation of Schooling 2025, requires the DBE to provide every school with the physical infrastructure and an environment that inspires learners to want to come to school and learn, and teachers to teach.

The National Policy on an Equitable Provision of an Enabling School Physical Teaching and Learning Environment ("the National Policy") describes the significance of the physical teaching and learning environment as follows:

"There is a link between the physical environment learners are taught in, and teaching and learning effectiveness, as well as student learning outcomes. Poor learning environments have been found to contribute to students’ irregular attendance and dropping out of school, teacher absenteeism and the teacher and students’ ability to engage in the teaching and learning process. The physical appearances of school buildings are shown to influence student achievement and teacher attitude towards school. Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and student mental efficiency, increase the rate of student errors, increase teacher fatigue and the deterioration of work patterns, and affect student-learning achievement. Good lighting improves students' ability to perceive visual stimuli and their ability to concentrate on instruction. A colorful environment is found to improve students' attitudes and behavior, attention span, student and teacher mood, feelings about school and reduces absenteeism. Good acoustics improves student hearing and concentration, especially when considering the reality that at any one time, 15 percent of students in an average classroom suffer some hearing impairment that is either genetically based, noise induced or caused by infections. Outdoor facilities and activities have been found to improve student formal and informal learning systems, social development, teamwork, and school-community relationships." 

\[\text{Notice 1438 of 2008.}\]
Despite this, adequate school infrastructure remains an enormous challenge for many schools across South Africa.

SECTION27 carries out activities that seek to advance the right to basic education, particularly in Limpopo Province. Together with our partners we have come across the following challenges in relation to school infrastructure:

- **Sanitation**: approximately 80% of the public schools in Limpopo make use of basic pit toilets. The pits at many of these schools are full and the toilets cannot be used. They are unsafe, unhygienic and unclean. The structures are dilapidated and have collapsed completely at some schools. At most schools there are no handwashing facilities. There are also not enough toilets for all of the learners at many schools, forcing learners to line up for a long time or to relieve themselves in the bushes. This contributes to high rates of absenteeism, poor concentration in class and a violation of the rights to dignity, equality, health, privacy and basic education. The DBE has recognised that 215 schools in Limpopo are in urgent need of sanitation facilities, and that most of the facilities at the remaining schools in the Province should be replaced once the priority schools are addressed.⁸

- **Overcrowding and insufficient classrooms**: due to shortages in classrooms, some Limpopo schools have up to 135 learners in each class. Where Secondary School learners divide into separate classes for different subjects, one half of the class is held outside, exposing learners to the elements. Where the weather does not permit lessons to be held outside, the lessons are either cancelled, or two lessons are held concurrently at opposite ends of one classroom. These conditions are not conducive to effective teaching and learning.

- **Poorly-maintained classrooms**: at Jaji Secondary School in Madobi Village, Limpopo, the conditions of the roofs have deteriorated to such an extent that

⁸ See [http://www.section27.org.za/2013/03/12/the-department-of-basic-educations-plan-to-address-sanitation-in-limpopo-schools/](http://www.section27.org.za/2013/03/12/the-department-of-basic-educations-plan-to-address-sanitation-in-limpopo-schools/) for a copy of the sanitation plan provided by the Department of Basic Education.
teachers and learners require umbrellas inside their classrooms to keep dry during rainfall. Books, stationery and equipment stored inside classrooms have been damaged by rainwater.

- **Furniture shortages**: the DBE has indicated that almost 200,000 learners in Limpopo do not have their own desks and chairs at school.\(^9\) They are forced to share furniture with their peers, sit on the floor or stand during lessons.

In addition, until recently, Tamaho Primary School in Gauteng was using industrial containers as classrooms. These are approximately half the size of standard mobile classrooms, and were therefore overcrowded and did not allow space for movement by the teacher or learners in class. These have since been replaced by the Gauteng Department of Education with standard mobile classrooms.

These cases of poor infrastructure at school are by no means isolated. The findings of the Census at School 2009\(^10\) indicate that only 60% of the 2,500 schools which took part in the Census had electricity and running water. Fewer than 25% of these schools had a library. While 53% had at least one computer, only 15% had access to e-mail and the internet.

A study conducted at the University of the Western Cape on underperforming secondary schools in the Western Cape\(^11\) found that 9.1% of the principals who participated in the study reported that the general condition of their school infrastructure was very weak and unsuitable for education. 18% of these principals reported that the general condition of the infrastructure was weak, while only 27% reported that they were satisfied with the condition of their school buildings.

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\(^9\) See [http://www.section27.org.za/2013/02/05/department-of-basic-educations-plan-to-address-school-furniture-backlogs-in-limpopo/](http://www.section27.org.za/2013/02/05/department-of-basic-educations-plan-to-address-school-furniture-backlogs-in-limpopo/) for a copy of the furniture plan provided by the Department of Basic Education.


In the same study, 63.6% of the principals participating reported that their schools did not have libraries, while 30% reported that they did not have science laboratories. Of the schools with libraries, not one library was reported to be adequate to serve the purpose of a school library. These are basic facilities required for the proper functioning of schools.

These statistics highlight the need for positive steps to be taken immediately to establish minimum norms and standards for school environments that are conducive to effective teaching and learning.

d. The absolute nature of the right to basic education

Unlike other socio-economic rights such as housing and health care services, the right to basic education is not subject to the limitation of progressive realisation within the State’s available resources.

In *Government of the Republic of South Africa and others v Grootboom and others*, a in the context of the right to housing, the Constitutional Court indicated that progressive realisation is a recognition that the right could not be realised immediately. However, “the goal of the Constitution is that the basic needs of all in our society be effectively met” and therefore that positive steps must be taken to achieve this. This must be done within the bounds of what the state’s available resources permit.

In *Mazibuko and others v City of Johannesburg and others*, the Constitutional Court confirmed this approach and stated that the right to sufficient water is not one that can be claimed in full and immediately.

In the context of the right to basic education, however, the Constitutional Court has rejected the argument that this right is to be progressively realised. In *Juma Musjid*

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12 2001 (1) SA 46 (CC).
13 Id at para 45.
14 Mazibuko and others v City of Johannesburg and others (Centre for Housing Rights and Evictions, amicus curiae) 2010 (3) BCLR 239 (CC).
Primary School and Others v Essay N.O. and Others 2011 (7) BCLR 651 (CC),15 ("Juma Musjid") the Court held the following:

"It is important... to understand the nature of the right to “a basic education” under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application, which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This right is therefore distinct from the right to “further education” provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible.”16

The Court’s comments deny any limitations on the right to basic education on the basis of progressive realisation and availability of resources. We recognise, however, that in the face of the prevailing inequalities and disrepair of thousands of schools described above, the DBE and the nine provincial departments of education cannot practicably bear an obligation to create optimal conditions in all schools across the country immediately.

However, what they are obligated to do is to establish reasonable minimum conditions in schools in order to make them compliant with the right to basic education, and to continue to build upon these conditions so as to reach an optimal level. Clear norms and standards, which prescribe these minimum conditions and that are based on a recognition of what environmental factors are necessary to facilitate successful learning, are crucial to this process. It is only through these norms and standards that we can identify which schools provide an environment conducive to learning, which schools do not, and what steps must be taken and funds allocated to ensure that the minimum requirements of basic education are met.

15 Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (7) BCLR 651 (CC); BCLR 446 (CC).
16 Id at para 37
To the extent that there is any lack of clarity in the norms and standards, the minimum requirements for an environment conducive to learning are not clear, the content of the right to basic education is unknown, and the vast gap in resources between historically advantaged schools and historically disadvantaged schools will persist.

We therefore strongly support the necessity of prescribing minimum norms and standards for public school infrastructure in order to give effect to the right to basic education. However, we believe that for the draft norms and standards to be effective they need to provide comprehensive detail on what is required for an environment conducive to teaching and learning.

2. Obligations under section 5A of the Schools Act to prescribe norms and standards

In terms of section 5A of the Schools Act, the Minister "may" prescribe national minimum uniform norms and standards for school infrastructure. These norms and standards must address the following:

1.1 classrooms;
1.2 electricity;
1.3 water;
1.4 sanitation;
1.5 a library;
1.6 laboratories for science, technology, mathematics and life sciences;
1.7 sport and recreational facilities;
1.8 electronic connectivity at a school; and
1.9 perimeter security.

It is the responsibility of the Member of the Executive Council responsible for education in each province to ensure compliance with these norms and standards.
Section 5A of the Schools Act was enacted through the Education Laws Amendment Act 31 of 2007 ("the Amendment Act"), which came into effect on 31 December 2007. The Amendment Act was a legislative attempt to give content to the right to basic education through requiring defined norms and standards for school infrastructure that would create an environment conducive to teaching and learning.

This attempt has been thwarted by the executive branch of government, through its failure to prescribe binding norms and standards for more than five years.

In 2008, the then Minister of Basic Education published a draft set of National Uniform Minimum Norms and Standards for School Infrastructure ("the 2008 draft norms and standards"), detailing norms and standards for some – but not all – of the components of school infrastructure listed in section 5A of the Schools Act. The 2008 draft norms and standards were never finalised.

In 2012, the DBE published the Guidelines Related to Planning for Public School Infrastructure ("the Guidelines"), which create a set of specific but non-binding norms and standards for school infrastructure. The legislature, however, envisaged a binding and enforceable set of uniform minimum norms and standards to give content and effect to the right to basic education.

Clause 8 of the draft norms and standards allows for a period of 18 months from May 2013 for a technical framework, providing the required specifics, to be finalised. As we indicate below, the further 18-month delay in enforceable norms and standards as provided for in the draft norms and standards undermines the intention of the democratically-elected branch of government to define the infrastructure component of the right to basic education. This intention was made clear more than five years ago. The executive’s failure to give effect to it frustrates the realisation of the right to basic education.
The Minister has taken a decision to prescribe national uniform minimum norms and standards for school infrastructure, and must now do so in a way that both gives effect to the objectives of the draft norms and standards, and meets the requirements of regulation-making, and particularly the requirement of certainty.

The provision for minimum norms and standards in the Schools Act is necessary for the following reasons:

a. It gives content to the right to basic education, which includes adequate infrastructure and an environment which is conducive to teaching and learning;

b. It establishes a legal standard against which the conduct of the relevant government departments may be measured in order to ascertain whether or not these departments are discharging their constitutional obligations. As such, the content of these obligations is clarified and government departments may be held accountable. These departments are also aware of what is expected of them;

c. It ensures that a set of basic standards (minimum norms and standards act as a floor and not a ceiling) is available to every learner at every school across the country. This set of standards is non-negotiable and does not depend on availability of resources in a particular province or area; and

d. It accelerates the closing of the resource gap arising from the apartheid policies and ensures equality in education.

In giving content to the right to basic education, the draft norms and standards must set requirements for the realisation of the right to basic education so as to provide an objective standard against which to measure the extent to which the right is being realised, and what steps need to be taken in the event that it is not. Where there are measurable requirements in place, it becomes possible for the holders of the right and the bearers of obligations to have certainty and clarity as to where they stand and what their
responsibilities are. In addition, clear legal requirements create a legal basis on which to enforce obligations and to ensure realisation of the right to basic education in practice.

The prescription of clear norms and standards further empowers school governing bodies to ensure that learners at their schools, and in the broader communities to which they belong, receive quality basic education.

This is further emphasised by the the National Policy. One of the key aspects of the National Policy is the development of the minimum norms and standards for school infrastructure to ensure equity in the provisioning of school infrastructure. The National Policy goes further in emphasising the need for norms and standards that not only define, regulate and formalise the provision of school infrastructure but also provide guidelines for the equitable provision of an enabling physical teaching and learning environment for all learners in South Africa, indicating clear roles and responsibilities of all role players and unifying accountability in the provision of school infrastructure.

What is required by section 5A, therefore, is a degree of specificity in setting basic minimum requirements for school infrastructure.

3. Vagueness as a ground to nulify regulations

This section of the submission sets out the requirement of certainty in regulation-making. We submit that the draft norms and standards as presented are vague and lack substance.

Regulations, like any other laws, require a level of certainty in order to allow those who are bound by them to exercise their duties effectively. Where regulations are vague, they do not meet the purpose for which they were created. The regulations should be able to create a legal standard against which the conduct of the holders of obligations may be measured in order to ascertain whether they are discharging their obligations.
In the Affordable Medicines Trust and others v Minister of Health and another,\textsuperscript{17} Ngcobo J (as he then was) stated the following:

"The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."\textsuperscript{18}

In Rex v Jopp and Another,\textsuperscript{19} Broome JP, after referring to other decided cases, summarised the test to be applied to subordinate legislation when considering whether or not it is invalid for vagueness, is thus:

"These cases are based upon the principle that a by-law or regulation must indicate with reasonable certainty to those who are bound by it the act which is enjoined or prohibited so that they may regulate their conduct accordingly."

He continued:

"Having ascertained the meaning, the Court must then ask itself whether the by-law or regulation so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; that is the end of the matter."

The draft norms and standards as they stand do not make clear what legal obligations arise in relation to the right to basic education and how the holders of these obligations should conduct themselves to fulfil their obligations. Stakeholders such as learners, teachers and parents cannot know whether the obligations are met and their rights are fulfilled.

\textsuperscript{17} 2006 (3) SA 247 (CC).
\textsuperscript{18} Id at para 108.
\textsuperscript{19} 1949 (4) SA 11 (N),
The draft norms and standards, which are intended to provide content to section 5A of the Schools Act, therefore place the holders of rights and the bearers of obligations in no better position than if they did not exist.

We accordingly submit that the draft norms and standards fall short of the requirement of certainty and may fall to be set aside on grounds of vagueness.

4. Regulation-making as administrative action

This section of the submission examines the draft norms and standards as administrative action, and considers the applicable grounds of review in terms of section 6(2) of PAJA.

According to Minister of Health and Another v New Clicks South Africa (Pty) Ltd,\(^\text{20}\) regulation-making falls within the scope of administrative action. In this case, Chaskalson CJ stated that:

“To have excluded the implementation of legislation from PAJA would have been inconsistent with the Constitution. The implementation of legislation, which includes the making of regulations in terms of an empowering provision, is therefore not excluded from the definition of administrative action.”

We submit that the draft norms and standards in their current form would fall to be reviewed on the following grounds:

- They are materially influenced by an error of law, and may therefore be set aside under section 6(2)(d) of PAJA. The draft norms and standards limit all infrastructure requirements to progressive realization within the state’s available resources. Even that which is considered central to creating a learning environment is made conditional upon the availability of resources. However, as discussed in full above, the right to basic education under the Constitution is not subject to progressive realisation. Framing the draft norms and standards on the

\(^{20}\) 2006 (8) BCLR 872 (CC).
premise that the limitation of progressive realization is applicable indicates a material error of law upon which the draft norms and standards were based.

- The draft norms and standards fail to take account of relevant considerations and therefore fall to be set aside under section 6(2)(e)(iii) of PAJA. No consideration was given to the nature of the right to basic education as an unqualified right, or to the urgent nature of infrastructure challenges, some of which have been described above. Taking these challenges into account, it is not rational to delay the prescription of binding and specific norms and standards for a further 18 months when a technical framework is finalised.

- The draft norms and standards are irrational and therefore fall to be set aside under section 6(2)(f)(ii)(aa) and (bb). They are not rationally connected to the purpose for which the power to prescribe norms and standards under section 5A was given to the Minister. The power under section 5A of the Schools Act to prescribe norms and standards was conferred on the Minister to define the right to basic education and to realize each of the components of this right through, *inter alia*, the provision of appropriate school infrastructure. The draft norms and standards do not achieve this; they do not define what precisely is required to realize the right to basic education. We are not placed in a position better than that which we are in without the draft norms and standards. The draft norms and standards do not further the purpose for which the power to prescribe norms and standards was given. They therefore fall to be set aside on the basis of irrationality.

On these grounds we submit that the draft norms and standards fall short of the requirements of administrative justice as set out in PAJA.

**PART B**

This section considers and provides comments on the substance of the draft norms and standards by their specific clauses.
Preamble

The Preamble secures the draft norms and standards in the context of progressive realisation and availability of resources, limitations that do not apply to the right to basic education. As discussed above, the right to basic education under section 29 of the Constitution is an unqualified right and is not subject to progressive realisation and availability of resources. We therefore submit that that the premise on which the draft norms and standards are based is flawed.

2. Objectives of the Regulations

In addition to the objectives mentioned in the draft norms and standards, we submit that the following further objective should be included:

"(6) To provide a legal standard with which infrastructure at all schools should comply."

3. Scope and Application

As it stands in the draft norms and standards, the word “ordinary” implies that special schools may be excluded from the scope of the regulations.

There is no basis for excluding schools for learners with special education needs from the draft norms and standards. Section 5A of the Schools Act provides for national uniform minimum norms and standards for school infrastructure in all public schools, which, in terms of section 12(3)(a) of the Schools Act, includes –

(i) ordinary public schools;
(ii) public schools for learners with special educational needs; and
(iii) public schools providing education with specialised focus on talent, including sport, performing arts or creative arts.
We submit that the word “ordinary” should be removed to ensure the inclusion of all schools including special schools, within the scope of the Schools Act. The necessity for national uniform minimum norms and standards for school infrastructure applies equally to all public schools. The exclusion of special schools and public schools providing education with specialised focus on a particular talent from the ambit of the draft norms and standards has no legal or rational basis.

In this regard we recognise that the infrastructure needs of public schools for learners with special educational needs may differ from those of ordinary schools. These needs must also be taken into account in prescribing national uniform minimum norms and standards for school infrastructure.

4. Provision of teaching and learning environment

a. Clauses 4(1) and (2)

Clause 4(1) of the draft norms and standards states that a school must have “an enabling teaching and learning environment for teaching and learning to take place”. It further states that the “enabling teaching and learning environment in school comprises educational spaces, education support spaces and administration spaces”. Despite listing these necessary categories of educational spaces, the draft norms and standards give no guidance on what must be done to ensure each of these environments is “enabling”.

This is problematic because it sets no standard for compliance. For example, clause 4(2) states that “an enabling teaching and learning environment in a school comprises an educational space which is defined as a classroom that is essential to carry out the core teaching and learning functions in a school.” The draft norms and standards do not provide any specificity as to the requirements for the classroom, its size, capacity, or number of doors and windows.
That the draft norms and standards do not specifically define the minimum norms and standards for the components of infrastructure referred to in section 5A of the Schools Act amounts to a backward step from the Guidelines. The Guidelines provide specific criteria for school infrastructure; for example, they stipulate minimum classroom sizes and the minimum number of classrooms required based on the number of learners at a school and the minimum size of food gardens. The Guidelines also detail the number of toilets and handwashing facilities required based on the size of a school and the number of male and female learners at the school. This is clear from the attached table marked “A”, taken from the Guidelines.

More detailed norms and standards are also contained in the 2008 draft norms and standards, which, although they also do not address all of the elements listed under section 5A of the Schools Act, detail the requirements in respect of those aspects which they do address. For example, the 2008 draft norms and standards detail the number of education spaces needed depending on the size of the school and the size norms for educational spaces. As with the Guidelines, the draft norms and standards indicate a backward step from the 2008 draft norms and standards.

\( b. \) **Clause 4(3)**

Clause 4(3) states that a school must be provided with adequate sanitation facilities that promote health and hygiene standards and that comply with all applicable laws. Again, the draft norms and standards are vague and it is not clear what “adequate sanitation facilities” are. The draft norms and standards do not take us any further than we are under our existing laws, which do not address school sanitation specifically.

The World Health Organisation (“WHO”) has set out guidelines for low cost toilets in schools in its ‘Water, Sanitation and Hygiene Standards for Schools in Low-cost Settings’. \(^{21}\) According to these requirements, school toilets must at least comply with the following:

\(^{21}\) Available at [http://www.who.int/water_sanitation_health/publications/wash_standards_school.pdf](http://www.who.int/water_sanitation_health/publications/wash_standards_school.pdf)
• A sufficient number of toilets is available;
• Toilets are easily accessible to all;
• Toilets provide privacy and security;
• Toilets are appropriate to local cultural and social conditions, are age and gender appropriate and accessible for children with disabilities or suffering from chronic diseases (i.e. toilets are child friendly);
• Toilets are hygienic to use and easy to clean;
• Toilets have convenient hand-washing facilities close by; and
• A cleaning and maintenance routine is in operation, and ensures that clean and functioning toilets are available at all times.

The Water Services Act 108 of 1997 ("Water Services Act") prescribes minimum standards of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic wastewater and sewage from households, including informal households, and requires that household toilets –

• must be safe;
• must be easy to keep clean;
• must be reliable;
• must be environmentally sound;
• must provide privacy and protection against the weather;
• must keep smells to a minimum; and
• must prevent the entry and exit of flies and disease-carrying pests.

In order for the draft norms and standards to meet the desired objectives, they must specify details as to what requirements must be met for sanitation facilities to be considered adequate. Both the WHO requirements and those set by the Water Services Act are set in different contexts but they can be helpful in formulating requirements for the draft norms and standards.
In addition, the draft norms and standards must specify the quantity of toilets required depending on school size. The Guidelines, in the attached table marked “A”, again create a standard that can be measured, as opposed to the draft norms and standards which say nothing substantive about the sanitation facilities to be provided to schools.

c. **Clause 4(4)**

Clause 4(4) of the draft norms and standards states that a school must be provided with basic water supply, which complies with all relevant laws. This again does not provide a standard that can be measured. The Guidelines, however, already specify in the attached table marked “A”, how many taps should be provided depending on the size of the school.

d. **Clause 4(6)**

Clause 4 (6) of the draft norms and standards states that “where reasonably practicable, a school should be provided with some form of connectivity for purposes of communication”. Communication, especially in the school context, is essential. It cannot be said that learners are receiving a quality basic education if they are not taught computer skills and they do not have access to the internet. These skills are key to equipping them to become active and involved citizens in their societies. Communication infrastructure needs to be prioritized in order for it to be realized in the shortest possible time.

The Census at School Results 2009 indicate that in 2009, while 53% of the 2 500 schools included in the survey reported that they had at least one computer, only 15% had access to e-mail and the internet. This significantly compromises their communication abilities.

This was also a challenge identified by Prof Metcalfe in her report on the verification of textbook deliveries to Limpopo in 2012. Schools’ access to communication infrastructure is recorded in the table below:
Table 4: percentage of schools by province and school ICT in 2009 and 2010

<table>
<thead>
<tr>
<th>Province</th>
<th>2009 Email</th>
<th>2010 Email</th>
<th>2009 Fax</th>
<th>2010 Fax</th>
<th>2009 Landline</th>
<th>2010 Landline</th>
<th>Principal’s cell phones 2009</th>
<th>Principal’s cell phones 2010</th>
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Communication infrastructure remains wholly inadequate, despite its importance in educating learners and ensuring that schools run efficiently. We submit therefore that connectivity for the purposes of communication must be prioritized for all schools.

e. Clause 4(8)

Clause 4(8) of the draft norms and standards states that notwithstanding the provision of this regulation, the provision of these facilities shall be progressively realised upon availability of resources. This is problematic in that the facilities listed in section 4 of the draft norms and standards, are essential facilities, which are prerequisites to realization of the right to basic education. It is also problematic because the right to education is not subject to the limitation of progressive realization. This is dealt with above.

The lack of detailed specifications in the draft norms and standards means that the draft does not take us any further than our present position in defining the rights of learners and the obligations of the DBE and the provincial departments of education.

5. Technical framework regarding provision of facilities

The draft norms and standards indicate that a technical framework, containing the details of the norms and standards themselves, will be finalized within 18 months of the draft norms and standards coming into effect.
The purpose of the draft norms and standards, however, is to create a legal standard against which the conduct of the relevant government departments may be measured in order to ascertain whether they are discharging their statutory and constitutional obligations. As such, the content of these obligations is clarified and government officials may be held accountable. The technical framework should be incorporated into the draft norms and standards themselves; it is not clear what the purpose is of the draft norms and standards if they do not contain the detailed and specific norms and standards for school infrastructure. They do not take us any further than section 5A of the Schools Act.

It is also not clear why there is a delay of eighteen months in finalising the technical framework. The obligation to prescribe norms and standards arose with the Amendment Act in 2007. The 2008 draft norms and standards, the Guidelines and the National Policy already define with some specificity the norms and standards for school infrastructure. These can be used as a basis for the Technical Framework to be developed.

Should a delay in finalising the technical framework be completely necessary, we submit that the Guidelines should be enforced as an interim measure, pending finalisation of the Technical Framework.

**Conclusion**

The quality of the school environment plays an important role in a child’s education. Poor learning environments have been found to contribute to learner absenteeism and drop out rates, teacher absenteeism and the teacher and students' inability to engage in the teaching and learning process. The physical appearance of school buildings is shown to influence student achievement and teacher attitude toward school. It is therefore necessary to have norms and standards for school infrastructure that deal appropriately with the infrastructure needs of schools.

We submit that the draft norms are inadequate for the following reasons:
• They provide no detail on exactly what norms and standards will apply to school infrastructure. They simply repeat the requirement under the Schools Act that such norms and standards should be prescribed.

• The draft norms and standards are vague. They do not clarify for members of the public what they can expect the DBE and the provincial departments of education to provide in terms of providing infrastructure to schools.

• They characterise the right to a basic education as progressively realisable. The right is, however, not subject to progressive realisation: it is enforceable in full and immediately.

• There should be a level of specificity and certainty in the draft norms and standards to allow the holders of obligations to ascertain what is expected of them.

• The draft norms and standards as they stand would also be subject to review under PAJA.

We submit that the DBE should consider the existing Guidelines and the 2008 Draft Norms and Standards in formulating a revised set of norms and standards, which provide the level of detail necessary for the identification of rights and obligations flowing therefrom.
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<th>Boys WC</th>
<th>Boys Urinals</th>
<th>Boys Basin</th>
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<th>Female Staff WC</th>
<th>Female Staff Basin</th>
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