

The Means to Live

Free to Learn

A discussion paper on the
School Fee Exemption policy

Faranaaz Veriava
December 2005



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The *Means to Live* discussion paper series

This paper is one of a series that examine the targeting mechanisms of poverty alleviation programmes across different sectors. The papers form part of the *Means to Live Project*, based at the Children's Institute (CI), University of Cape Town (UCT). This project aims to evaluate the State's targeting mechanisms used to realise the socio-economic rights of poor children and their families.

The project is a collaborative project of the Child Rights and Child Poverty Programmes within the Institute, as well as a number of UCT and external collaborators.

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Abbreviations

CI	Children's Institute, University of Cape Town
CRC	(United Nations) Convention on the Rights of the Child
ELP	Education Law Project, University of the Witwatersrand
ICESCR	International Covenant on Economic Social and Cultural Rights
SASA	South African Schools Act
SAHRC	South African Human Rights Commission
SGBs	School Governing Bodies

1. Introduction

This paper, a review of the South African School Fee Exemption policy, is one of a series written for the Children's Institute's *Means to Live Project*. The project's aim is to evaluate the government's targeting mechanisms used to ensure the realisation of the socio-economic rights of poor children and their families. Put more simply, it seeks to establish whether current poverty alleviation initiatives are adequately designed and implemented to reach the poor, including children. By focusing on a number of elements of poverty alleviation with significant consequences for children, it will provide answers to the question of whether the poor are able to realise their socio-economic rights through access to these programmes. The research will be used to advocate for the necessary development or changes to government policies and programmes to ensure the realisation of these socio-economic rights.

Other poverty alleviation policies covered in this series include the:

- Free Basic Water policy (the right to water)
- National School Nutrition Programme (the right to basic nutrition)
- Free Primary Health Care (the right to health care services)
- Housing Subsidy Scheme (the right to basic shelter and housing)
- Child Support Grant (the right to social security)

The *Means to Live* is a multi-stage, two-year project. The first phase comprised this series of policy reviews on selected poverty alleviation programmes and their targeting. The second phase will be primary research conducted during the second half of 2005. The final research report will be released early in 2006.

This paper provides a policy overview of the School Fee Exemption policy, which seeks to give children in poor households' access to education. It starts with an overview of apartheid education, and provides an overview of the right to basic education in terms of Section 29 (1) (a) of the Bill of Rights. The paper does not restrict itself to a discussion of the School Fee Exemption policy alone, since this policy forms part of a broader regulatory framework for the funding of schools. Instead, a general overview of school funding is provided, while also highlighting other socio-economic targeting policies that are aimed at achieving equity in state funding to public schools. The paper furthermore gives a more detailed discussion of the School Fee Exemption policy, and finally provides an analysis of effectiveness and reach of the policy in achieving poverty alleviation.

2. Background to education policy in South Africa

Education is a basic right, an important component of development, and an opportunity to break out of cycles of poverty. Apartheid education prior to 1994 was structured along racial lines, with 15 different ministries of education. The purpose of this racially-segregated education system was to prepare learners of different race groups for the roles they were expected to serve in the apartheid society. The main characteristics of the apartheid education system included gross inequality in the financing of education,

differentiated curricula and standards of education, and restricted access of black people to higher education.¹

Since then, significant legislative and policy reform has occurred to give effect to the State's constitutional obligation under Section 29 (1) (a) to provide basic education. The *South African Schools Act 84 of 1996 (SASA)* and the *National Educational Policy Act 27 of 1996*, together with related regulations and notices, and supplemented by provincial legislation, create a *single system* of education that regulate, amongst others, the funding of schools, governance for schools, discipline of learners, and language and admission policies.

Significantly, this new system proposes the redress of apartheid education as a primary objective.² Since the main characteristic of apartheid education was the under-funding of Black education, redress would require ensuring equity in the funding of education and ensuring that learners who have historically struggled to gain access to an education are able to do this now.

The right to basic education

The right that is implicated by the School Fee Exemption policy is the right guaranteed by Section 29 (1) (a) in the Bill of Rights, which states that, "Everyone has the right to a basic education, including adult basic education". This right to basic education is a socio-economic right. In the case of *In Re School Education Bill of 1995 (Gauteng)*³ that dealt with the equivalent provision under the Interim Constitution, the Constitutional Court held:

Section 32 (a) [of the Interim Constitution] creates a positive duty that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.

Thus, the State is not only required to not interfere with an individual's enjoyment of the right to basic education, but the State is also obliged to provide basic education. The nature and extent of this obligation to provide basic education is yet to be determined by the Constitutional Court.

An important feature of Section 29 (1) (a) is its unqualified nature when compared to other socio-economic rights. These other rights – such as the rights of access to housing and health care services and the rights to food, water and social security – are qualified to the extent that these rights are made subject to the adoption of "reasonable legislative and other measures" and "progressive realisation" ... "within [the State's] available resources". In *Government of the RSA & Others v Grootboom & Others (Grootboom)*⁴, the standard of review established in respect of the qualified rights was to determine whether or not state measures were *reasonable* in progressively facilitating access to the right in question. The

¹ In 1994, South Africa had 15 ministries of education, including those in the homelands. Per capita expenditure was as follows: R5,403 for White children; R4,687 for Indian children; R3,691 for coloured children, and between R2,184 and R1,053 for African children (Department of Education 1995).

² This is stated clearly in the Preamble to the SASA, in terms of which:

*WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and
WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing provide an education for the development of our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organization, governance and funding of schools in partnership of the state.*

³ 1996 (4) BCLR (CC) Para 9.

⁴ 2001 (1) SA 46 (CC).

court then listed certain specific criteria which a state policy or programme would have to meet for that policy or programme to be reasonable.⁵

The unqualified nature of the right to basic education suggests that the constitutional drafters, when drafting the right to basic education, intended to confer on it a higher normative status than the other socio-economic rights. In particular, it is interpreted that the right to basic education enjoys a higher normative status as an immediately enforceable right. It is further suggested that the manner in which to assess whether the State has met its obligations in terms of the right, is to define the content of the right to basic education and to measure the actual level of achievement against the standard set by the right.

Determining the content of the right to basic education would require taking international law⁶ into consideration, as well as the particular South African context.⁷ A full discussion of South Africa's international obligations is set out later in this paper.

Interpreting the right to basic education in context first requires looking at the right in relation to other rights. Since education is a precondition for the exercise of other rights, the denial of access to education is also the denial of the full enjoyment of other rights that enable an individual to develop to his or her full potential and to participate meaningfully in society.

Secondly, a right must also be interpreted in its social and historical context. Giving content to a right would therefore require the creation of an education system that redresses apartheid education. The current education system already has as a stated objective the redress of apartheid education. This would require ensuring that education is both *physically* and *economically* accessible to those who have previously been denied such access. Education must also be of an adequate standard to ensure that learners are able to develop to their full potential and to compete on equal terms with each other for jobs and for access to institutions of higher learning.

⁵ For a policy or programme to be reasonable it must be:

- Comprehensive and co-ordinated with a clear delineation of responsibility amongst each sphere of government;
- Capable of facilitating the realisation of the right;
- Reasonable both in conception and implementation;
- Must be balanced and flexible and make appropriate provision for short-, medium- and long-term needs;
- Cannot exclude a significant segment of society; and
- Must respond to the urgent needs of those in desperate situations.

⁶ In terms of Sections 39 (1) (b) and (c), a court must consider international law and may consider foreign law when interpreting a right in the Bill of Rights.

⁷ *Grootboom*, para 22, Yacoob J stated:

Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.

3. The regulatory framework for the funding of education

General

Funding for public schools in South Africa is governed by the *SASA*, the *National Norms and Standards for School Funding (Norms and Standards)*⁸ and the *Employment of Educators Act*⁹, read with the *Regulations for the Creation of Educator Posts in a Provincial Department of Education and the Distribution of Such Posts to the Educational Institutions of such a Department*¹⁰.

The *SASA* directs that funds for public schools must be made available from public revenue according to the principles of equality and redress. It also stipulates that schools governing bodies (SGBs) must supplement this funding by charging fees and/or by undertaking other fundraising activities.¹¹

The *Norms and Standards* directs that 60% of available, recurrent non-personnel expenditure should go to 40% of the poorest schools in each provincial education department.¹² Allocation for recurrent expenditure is made by ranking schools from the poorest to the least poor, with subsequent resource allocation determined by the position of a school on the poverty index. Quintiles 1 and 2 will therefore be the poorest schools, while quintile 5 will be the wealthiest schools.

The *Employment of Educators Act* and its accompanying regulations set out a post-provisioning model that allocates posts according to a determined formula that gives certain 'weighted norms' to different grades and to particular areas of study once a learner has reached Grade 8. In 2002, a pro-poor weighting was introduced. However, this pro-poor weighting currently governs only 2% of all educators (Department of Education 2003).

Once state allocations are directed to schools, the remaining financial requirements in school budgets, in particular deficiencies in necessities such as basic provisioning and personnel, can only be provided through fees and fundraising.

While both the *Norms and Standards* for non-personnel expenditure and the post-provisioning model contain aspects of socio-economic targeting, some education specialists view it as being inadequate. Some of the concerns include the fact that, while the *Norms and Standards* are premised on redress, actual spending for non-personnel expenditure constitutes only 8-10% of school budgets. This means that only a very small portion of basic education allocation by the State is targeted towards redress (Porteus 2002:11-18). Except for the 2% pro-poor weighting, the balance of state spending on schools directed towards the payment of personnel continues to favour historically-advantaged schools (Porteus 2002:13).¹³

Another criticism is that, by targeting only the poorest schools, those schools that are located in the middle of the resource targeting table, the so-called 'middle schools' become

⁸ General Notice 2362 (Government Gazette 19347) October 1998.

⁹ 76 of 1998.

¹⁰ Government Notice R1676 (Government Gazette 19627) December 1998.

¹¹ See Sections 34-36.

¹² Non-personnel expenditure includes maintenance of school buildings, municipal services and utilities, and learner support materials.

¹³ Firstly, because several curricular areas which enjoy added value according to the 'weighted norms' are applied to special fields of study including agriculture, technology, etc. These curricular areas were primarily offered in historically-advantaged schools. Secondly, historically-advantaged schools enjoyed educators with higher qualifications. Thus, in practice, historically-advantaged schools would enjoy higher per capita personnel expenditure than historically-disadvantaged schools.

neglected and impoverished. According to Wilderman (2001:7), implementation of the funding policy for these schools means that, “these schools qualified for less state funding and, in the absence of strong socio-economic parent communities, they face the danger of real financial deterioration”. Thus, these ‘middle schools’, as schools that do not exist in abject poverty but which nevertheless lack stable income from user fees, become financially vulnerable because of insufficient funds, and are therefore unable to maintain themselves and provide adequate services to learners.

The School Fee Exemption policy

The legislative framework for school funding, while allowing schools to charge school fees, acknowledges that there are many parents that cannot afford to pay these fees. It attempts to address this through a policy that facilitates parental involvement in decisions about whether individual schools should charge school fees, as well as through the *School Fee Exemption policy* that relieves very poor learners from paying school fees. Section 39 of the *SASA* provides that a school may only charge school fees when a majority of parents attending an annual budget meeting adopts a resolution in favour of school fees. Therefore, in principle, there may be schools where parents decide that the school should not charge school fees.

Section 39 of the *SASA* also provides that parents must determine the school fee amount and the criteria by which to exempt parents who are unable to pay. *The Exemption of Parents from the Payment of School Fees Regulations, 1998 (Regulations)* set out a mandatory *means test* for granting full and partial exemptions that individual schools have to use when determining their exemption policies.¹⁴ This states that:

If the combined annual gross income of the parents is less than ten times the annual school fees per learner, the parent qualifies for full exemption; and if the combined annual gross income of the parents is less than thirty times but more than ten times the annual school fees per learner, the parent qualifies for a partial exemption.

The *Regulations* also place other, additional, duties on individual schools in respect of exemptions to protect the interests of parents who cannot afford to pay school fees. These include informing parents of their right to apply for an exemption¹⁵ and obliging school governing bodies to consider specific factors when considering an application for an exemption.¹⁶ In terms of the *SASA*, a school can sue the parents for the school fees if it has duly complied with the procedures to determine its fees and exemption policy, and where parents have not applied for an exemption but have failed to pay the fees.¹⁷

Reforms to the regulatory framework

On 16 September 2002, the previous Minister of Education, Professor Kader Asmal, announced a review of all policies related to school funding. The following year, the Department of Education published the *Plan of Action: Improving Access to Free and Quality Education for All* (2003a). This Plan promised an array of reforms to facilitate

¹⁴ Regulation 3 (1) (a) as read with 5 (3).

¹⁵ Regulation 4 (1) (a) obliges the school governing body to notify parents in writing of the amount of fees charged by the school, and of the criteria and procedures for exemptions.

¹⁶ See Regulation 5 (2). These include, inter alia; the total annual necessary expenses of the parents; their assets and liabilities; the number of dependants of the parents; their standard of living and any other information relevant to the granting or denial of an exemption.

¹⁷ Section 40-41 of the *SASA*

better access to schools that include, among other things, regulating the cost of uniforms and books and improved systems for schools to administer their budgets. The Plan also suggested that school fees would be abolished in quintile 1 and 2 (the poorest schools). It suggested a system for the closer monitoring and enforcement of the School Fee Exemption policy for the majority of schools where school fees will continue to be charged. It also suggested a "basic minimum package" of state funding to bring about adequate funding of schools.

In October 2004, the *Education Laws Amendment Bill* was published. This was followed by amendments in early 2005 to the *Norms and Standards* and the *Regulations*. These amendments set out the proposed legislative reforms in respect of schools fees and exemptions. The amendments are expected to be implemented in 2006.

The amendments create a complex two-tiered regime of fees and funding in public schools that distinguishes between *fee-paying* schools and 'no-fee' schools. Some of the key-features include:

- A shift from provincially-determined to nationally-determined quintiles.
- The establishment of national per learner funding norms and minimum standards. This will see the national department setting the amount that provinces ought to allocate per learner in each quintile. The national department also sets an 'adequacy benchmark', which it considers the minimally-adequate amount to enable the realisation of a learner's right to a basic education. For example, in terms of the national norms, the poorest quintile schools ought to receive an allocation of R703 per learner in 2006 and the wealthiest quintile R117. The adequacy benchmark for 2006 is set at R527.
- The establishment of 'no-fee' schools, which means that schools fees will not be charged in the poorest schools that receive an 'adequate' school allocation from Government. Where schools receive less than the adequacy benchmark from the provincial department, "a plan would be drawn up to deal with the problem" The national minister will determine which quintiles will be considered 'poor' and therefore fee free. It is also implied in the amendments that the removal of school fees will only occur in grades R to 9. Thus, learners in grades 10-12 will continue to pay school fees despite attending a school that is considered to be poor.
- Finally, where school fees continue to be charged, the amendments seek to improve the exemption policy and strengthen anti-discrimination provisions aimed at protecting poor learners.

4. General comments related to the School Fee Exemption policy

Rationale for the Programme's targeting

The rationale for the School Fee Exemption policy is to set criteria and provide a procedure to assist poor parents who cannot afford to pay school fees by exempting them from paying such fees. As indicated before, the School Fee Exemption policy sets out a means test that explicitly states which parents are eligible for a school fee exemption. In terms of the definition, 'parents' are the *targeted beneficiaries* of the School Fee Exemption policy.

The application form for an exemption that is included as an annexure to the Regulations defines parents broadly. Parents include guardians, legal custodians of a learner, as well as other persons undertaking the role of parent and assuming the responsibility of a learner's education. This could include, for example, a grandparent who may not have been formally granted legal custody, but who nevertheless assumes full responsibility of the child in the absence of her/his parents. The Norms and Standards further states that foster parents, foster homes and places of safety must be fully exempted.

Thus, in theory, the School Fee Exemption policy is aimed at the most vulnerable learners. In practice though, the policy has been difficult to enforce. The policy also does not explicitly make provision for children living in child-headed households.

Parents are legally liable for the payment of schools fees unless they are eligible for an exemption from paying school fees; they are therefore the direct recipients of the benefit. Since the purpose of the School Fee Exemption policy is to ensure that children from poor families are able to access schooling, children may be deemed to *benefit indirectly* from the School Fee Exemption policy.

The *means test* is a formula to be used by individual schools according to the fees charged; as such it does not determine eligibility based on a particular income level. This is because fees in public schools are diverse and are set by individual schools. According to some estimates, fees vary between R50 per year in the poorest schools, to as much as R15,480 per year in a good suburban public school (Fiske & Ladd 2004:57, 61; Roithmayr 2003:382, 391). This means that public schools cater for a wide variety of learners across the income class spectrum. The rationale for the means test is therefore to allow individual schools a degree of autonomy in setting school fees, and in determining which parents will be granted exemptions.¹⁸

Programme plans, budgets, implementation and monitoring

Fee exemptions are processed and granted by individual school governing bodies. No compensation is provided to the school where exemptions to parents are granted. This appears to be the primary reason for the non-enforcement of the policy on the part of many schools. There is currently also no formal requirement that schools determine their budget for the year by taking into account the number of exemptions likely to be granted. The School Fee Exemption policy furthermore has not been accompanied by any targets for implementation, budgets, etc.

According to the Plan of Action, the purpose of “the school allocations flowing to quintile 5 (the richest public schools) are intended to make it possible and fair for these schools to enrol poor learners to a level where 25% of learners would be granted full exemption from school fees” (Department of Education 2003a:19). This has not been followed through in any fundamental way in the Education Laws Amendment Bill. The Bill does contain a provision that will require schools continuing to charge schools fees to estimate the cumulative effect of exemptions on the school budget. It does not however prescribe any form of cross-subsidisation in wealthier schools. Instead, the rationale for this provision appears to be more towards ensuring efficient financial planning.

The Plan of Action also put forward the idea of the establishment of an Education Complaints Office (ECO), which would receive complaints from parents and other role-

¹⁸ According to Fiske & Ladd, the charging and setting of school fees and hence giving SGBs discretionary control over such funds, was seen as a way of promoting local control in education (2004:62-65).

players regarding the rights of learners to 'free basic schooling'. This office was to be operational from 2003, but the idea has not been instituted yet (Department of Education 2003a:27). The Regulations currently also fail to contain any provisions for sanctioning schools failing to implement the exemption policy.

In terms of the regulatory framework, decisions regarding the implementation of the School Fee Exemption policy are shared between parents, school governing bodies and the Department of Education. Parents are required to attend an annual general meeting to decide whether or not to charge school fees, determine the fee amount and determine the criteria for the exemption of parents from the payment of school fees.¹⁹ Furthermore, the individual school exemption policies must comply with the means test set out in the Regulations. It is therefore theoretically possible that individual schools may provide more generous criteria for determining eligibility for an exemption than set out in the means test. A school cannot however set an exemption policy that provides less than what is provided for in terms of the means test. For example, an exemption policy at a particular school that enables only orphans to be granted exemption from paying school fees will clearly be contrary to the means test set out in the Regulations.

The Regulations oblige school governing bodies to inform parents in writing of the amount of schools fees to be paid, and the procedure for obtaining an exemption. The Regulations further require that the SGBs process applications for exemptions, and also set out the process for this.²⁰ An appeal against the SGB decision must be sent to the Head of the Department of Education in the province involved.²¹ The Regulations also stipulate that, where a parent requires assistance to apply for an exemption or to lodge an appeal, an educator or similar person must assist the parent. If such assistance is not available, the principal must assist the parent. This is important in instances where, for example, a parent is unable to read or write. It is, however, unlikely that principals and school governing bodies will assist parents in processing exemptions, as the general trend in many schools is the failure to enforce the Regulations.

While the Regulations appear to be theoretically sound, the letter of law is not often applied in practice. In many instances principals themselves determine exemption policies, or schools do not even have exemption policies in place. Individual school fee exemption policies also often do not always comply with the Regulations. Finally, indigent parents are rarely aware of the right to an exemption and the right to appeal; hence these procedures are not used to benefit such parents to the full extent. According to Fiske & Ladd's interrogation of school fee exemption patterns, only 2.5% of families with children in primary schools and 4.1% of families with children in former White schools receive fee exemptions. At secondary school level, only 3.7% of families and 5.7% at former White schools receive exemptions (2004:72-74).

¹⁹ Section 29 of the SASA.

²⁰ In terms of Regulation 5, a parent who cannot afford to pay school fees must apply to the SGB in writing for an exemption from school fees. The parent can request an application form from the school. The SGB must make a decision in respect of the application within 14 days of having received the application. The SGB must then notify the parent of its decision within seven days of having made its decision.

²¹ In terms of Regulation 7, a parent who is dissatisfied with a decision may appeal in writing to the head of the Department within 30 after receipt of notification of the decision.

5. Analysing the targeting mechanism

General

An overview of existing research, coupled with experiences gained from participatory processes such as the Poverty Hearings, and the experience of the Education Law Project (ELP), suggest that the practice of *charging school fees is making schooling inaccessible for many poor learners*. Furthermore, schooling in ‘fee-poor’ schools is inadequate because such schools cannot raise additional funds for improved schooling conditions and for a sufficient numbers of teachers. This section also explores whether or not the School Fee Exemption policy accords with international practice regarding free education.

Enrolment and attendance

It has been suggested that the existence of school fees affects enrolment and attendance at schools. Internationally, arguments in favour of abolishing school fees are based on the fact that school fees are the primary cause of non-enrolment of learners and that, once school fees are abolished, enrolment increases drastically. Evidence of this emerged in countries such as Uganda, Malawi and, most recently, Kenya. Proponents of a school fees regime maintain, however, that this is not borne out by the South African experience, which has an extremely high enrolment figure despite the existence of school fees (Fleisch & Woolman 2003). Estimates of the level of enrolment in South African schools vary between 93 – 97% (Fiske & Ladd 2004).²²

At the same time, the Fiske & Ladd study (2004:69-71) also notes that while enrolment rates are generally high in primary school, these figures drop significantly at secondary level. They suggest that one of the reasons for this could be the higher cost of school fees at secondary level.

Other commentators such as Roithmayr and Wilson suggest that, while enrolment in South Africa may be high, the link between fees and attendance needs consideration. Roithmayr, in her article on the constitutionality of school fee financing in public education (2003:398), discusses the findings of the ‘Education for All’ (EFA) assessment in 2002. In particular, she notes that the EFA assessment states that inability to pay for school fees, uniforms and transport were among the primary causes for non-attendance at schools. Wilson (2004) also argues strongly for a distinction between enrolment and attendance. He suggests that many children are temporarily or permanently barred from school because of school fees despite being enrolled (2003: section 2.5).

Enforcing the School Fee Exemption policy

Linked to the argument that a fees policy results in informal exclusion of learners is the fact that the Department of Education has not been able to *enforce* the exemption policy. Cases in support of this have been documented by the Education Law Project, while the Department of Education has also acknowledged that learners whose parents have not paid school fees are often denied admission to schools or schooling activities, despite the *SASA* prohibiting such discrimination. The majority of the ELP cases involve complaints from parents about schools failing to adopt and implement exemption policies. As a result, learners are denied access to education in various ways, such as withholding learners’ reports or sending learners home until school fees have been paid. ELP cases also suggest

²² The average net enrolment for all countries being 84%.

that schools fail to comply with their obligation to make parents aware of the exemption policy, and fail to grant exemptions to parents who qualify. In many of the ELP cases, parents who are eligible for exemptions have been handed over to debt collectors, or have judgements debts against them without ever being told of their right to apply for an exemption, or were denied an exemption where they applied for one.

ELP cases also suggest that schools find other more covert ways to exclude poor parents. In some schools, parents are required to pay registration fees that act as an access barrier at the outset, since a poor learner cannot afford the registration fees and therefore cannot register. Schools also turn poor learners away at admissions by claiming that a school is full, or because they do not have the required identity documents.

There is also evidence to suggest that, in some schools, learners who have been granted exemptions are treated differently and are stigmatised as poor learners. Testimonies of parents and children during the Poverty Hearings conducted throughout South Africa, as well as the South African Human Rights Commission (SAHRC) investigation into racism in schools, reflected the differential treatment of learners who cannot afford to pay school fees. This included learners being forced to sit on stairs as opposed to desks in classrooms (Liebenberg & Pillay 1998:38-39; Vally & Dalamba 1999:47-50).

The burdensome cost of schooling

Roithmayr (2003:400) also cites other reasons why the School Fee Exemption policy is inadequate and therefore hinders access to education. According to her, many families who are eligible do not apply because the process is too time consuming, while the cost of dignity in terms of how parents and learners may be treated at school is regarded as too high.

Secondly, the exemption policy fails to address adequately the burdensome cost of school fees together with other secondary fees, such as the costs of transport, uniforms and textbooks. This cost burden can force poor parents to keep their children at home.²³ Proponents of a fees policy, while disagreeing that fees solely act as a barrier to education, do concede that fees coupled with other access costs constitute a barrier to education (Fleisch & Woolman 2003:3).

The ELP experience suggests that the School Fee Exemption policy is inadequate, even where utilised because it fails to cater adequately for parents who do not qualify for exemptions but who are poor enough to struggle to make ends meet but. The exemption policy also does not adequately cater for persons with more than one child at school, as the formula is worked out per learner. Finally, where the SGB has discretion, such as in granting a partial exemption, this is often abused by the SGB as a granted exemption is often marginal, even where a parent has just missed qualifying for a full exemption.

Restricted access in terms of what is affordable

While enrolment has not dropped in South Africa, school fees, according to Fiske & Ladd, do affect enrolment patterns because learners are sorted into schools based on what parents can afford. This means that wealthier parents or parents who can afford to make financial sacrifices will send their children to wealthier schools, while poorer learners are forced to

²³ Research conducted in the Sol Plaatje settlement in Gauteng also attests to this burden: 'Education access costs in Sol Plaatje are regressive. The proportion of household income spent on costs normally associated with sending a child to school is inversely proportional to the level of household income. Except in the very poorest households, transport costs make up between fifty and seventy percent of the access burden'. (Wilson 2003:26)

attend schools that charge low fees. This is because collection rates and fees are generally higher in wealthier schools. (Fiske & Ladd 2004:57, 61; Roithmayr 2003:282-400)

Exemption rates, as mentioned before, are very low at these wealthier schools. Fiske & Ladd therefore interpret this to mean that these schools are generally open to those who can afford them. They further state that, while race inequalities have been replaced by class inequalities, there continues to be a strong correlation between the former department in which a school was located and the race of the learners it served (2004:72-74).

Providing an adequate education

It was stated earlier that, while non-personnel expenditure is equity driven, the amount of education spending actually distributed in terms of an equity formula is minimal.

Furthermore, schools that rely on wealthier parents and communities are able to charge higher schools fees to make up deficits in state funding, and hence to provide a sufficient number of teachers and services necessary to meet basic learning needs. On the other hand, schools in poor communities, even after the distribution according to the equity formula, will not receive sufficient income to make up the deficits in school budgets, thus perpetuating apartheid inequalities. According to a report²⁴ of the Systemic Evaluation of the Foundation Phase (Department of Education 2003b:69):

The goal of achieving equity in schools too has not been attained. The wide disparity in the fees levied by schools indicates that schools have inequitable access to private contributions. There is a clear distinction between 'rich' schools and 'poor' schools when comparing school fees. Although the policy on norms and standards for funding of schools is designed to reduce inequity, this study has not been able to demonstrate the extent to which it has been effective as an instrument of redress.

As a result, there are few resources to upgrade services in poor schools that have historically operated in conditions of abject poverty. This is reflected in a comparison between the state of South African schools in 1996²⁵ and in 2002.²⁶

Adequate resourcing and upgrading of poor schools is essential in addressing inequalities and in ensuring that learners attending these schools can compete on equal terms with their wealthier counterparts. The current system of funding fails to do this but instead perpetuates apartheid inequalities.

²⁴ This report is a baseline study of Grade 3 learners to assess progress of the education system in achieving the transformation goals in respect of access, redress, equity and quality.

²⁵ The 1996 *School Register of Need Survey* reflect the conditions in South African schools as follows: Schools without telephones – 6,666 (61%); secondary schools with science labs – 2,429 (31%); with biology labs – 1,779 (23%); condition of school buildings – 1,713 (6%) not suitable for education, 3,090 (11%) need major repairs, 785 (40%) need minor repairs and 11,095 (41%) are in good/excellent condition; schools with libraries – 4,638 (17%); schools with no water on site – 6,516 (24%); schools with no electricity – 14,145 (52%); schools without toilet facilities – 3,288 (12%), schools with bucket systems – 335 (1%); classroom shortage – 57,499; 62% of schools were adequately provided with stationery and 49% with textbooks; 82% had no media equipment; 72% had no media collections; 73% had no learning equipment and 69% had no materials.

²⁶ The following statistics reported by the South African Human Rights Commission (2003:258) reflect the conditions in the 27,148 schools in 2002: 2,280 (8.4%) schools with buildings in state of disrepair; 10,723 (39%) schools have a shortage of classrooms; 13,204 (49%) schools have inadequate textbooks; 8,142,195 learners reside beyond a 5km radius from the school; 10,859 (40%) schools are without electricity; 9,638 (36%) schools are without telephones; 2,496 (9%) schools are without adequate toilets; 19,085 (70%) schools lack access to computer facilities; 21,773 (80%) lack access to library facilities and 17,762 (65%) lack access to recreational and sporting facilities.

Fiske & Ladd (2004:78) compared school results with the quality and quantity of teachers and suggested that a higher number of teachers and better teaching quality in terms of teachers' qualifications *improve learner outcomes*. Thus, "relative to the teacher characteristics in an average school, a higher learner-to-teacher ratio is associated with a lower (weighted) pass rate; a more highly-qualified group of teachers is associated with a higher pass rate; and finally, a larger proportion of SGB teachers raises the pass rate".

The findings of the report on the Systemic Evaluation of the Foundation Phase (Department of Education 2003b) also support this.

International and comparative law

The School Fee Exemption policy is not what is intended by international definitions of the free education guarantee. South Africa is failing to meet its obligations in international law, particularly in respect of those instruments that it has ratified at an international and regional level.

Education, at least at primary level, should be free and compulsory.²⁷ Article 28 (1) (a) of the United Nations Convention on the Rights of Child (CRC), which has been ratified by South Africa, requires that state parties "make primary education compulsory and available free to all". Article 28 (1) (b), by contrast, provides that state parties should make secondary education "available and accessible to every child, and take appropriate steps such as the introduction of free education and offering financial assistance in the case of need". This suggests that states take steps such as an exemption system only with regard to secondary education, and not primary education, which should be completely free.

Paragraph 7 of General Comment No. 11 on the interpretation of the term 'free of charge' in Article 14 of the International Covenant on Economic Social and Cultural Rights (ICESCR) also suggests an understanding of the term 'free education', which does not entail schemes such as a fee exemption system, and which is broad enough to encompass other access costs such as fees and stationery:

*The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are often highly regressive in effect. Their elimination is a matter, which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. This provision of compulsory primary education in no way conflicts with the right recognised in article 13(3) of the Covenant for parents and guardians "to choose for their children schools other than those established by the public authorities".*²⁸

²⁷ Article 26 (1) of the United Nations Universal Declaration on Human Rights (1948) guarantees that education shall be free, at least in the elementary stages. Elementary education is also compulsory. Article 13 (2) (a) of the ICESCR guarantees free and compulsory primary education and article 13 (2) (b) makes provision for the progressive introduction of free secondary education. Article 11 (3) (a) of the African Charter on the Rights and Welfare of the Child requires state parties to take all appropriate measures to "provide free and compulsory basic education". South Africa has ratified both the CRC and the African Charter on the Rights and Welfare of the Child.

²⁸ See also the *Dakar Framework for Action, Education For All: Meeting Our Collective Commitments*, Adopted by the World Education Forum, Dakar, Senegal, 26-28 April 2000. One of the stated goals of the conference was to achieve by 2015 "complete free and compulsory education of good quality" for all. See also the observations of the UN Committee on the Rights of the Child when examining South Africa's initial report on the implementation of the CRC. The

In the United States, legal challenges to ‘fee waiver schemes’ – the American equivalent of the South African exemption system – suggest that such schemes do not comply with the free education guarantee where it exists in a particular state. In the case of *Hartzell v Connell*²⁹, while parents were not required to pay school fees for general tuition, they were required to pay fees for their children’s extra-curricular activities at the school. A fee waiver policy was instituted by the Districts School Board to ensure that these fees would not prevent children from participating in extra-curricular programmes at the district schools. A parent challenged the fee waiver scheme on the basis that it violated the State’s constitutional guarantee of free education.

The court first considered whether or not extra-curricular activities formed part of the free education guarantee and came to the conclusion that it did. The defendant then argued that the fee waiver scheme satisfied the requirement of the free education guarantee. The court rejected this argument and held that the imposition of fees for educational activities violated the free education guarantee. Its reasoning was firstly based on the importance attached to education, which required that individual choice could not be relied upon to ensure that a child received an education:

The free school guarantee reflects the people’s judgement that a child’s public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and non-needy families. Individual families, needy or not, may value education more or less depending upon conflicting budget priorities.

The court also emphasised the effects of stigmatisation when categorising certain students as needy, and declared that participation in any such procedure is a “degrading experience”.³⁰

Applying a constitutional analysis of the School Fee Exemption policy

It was suggested earlier that the unqualified nature of the right to education required that compliance with the right had to be determined according to a higher standard than set by the *Grootboom* case in respect of qualified socio-economic rights. Thus, the content of the right to basic education had to be determined as a first step. The School Fee Exemption policy would then have to be measured against the identified content indicators in determining whether there was compliance with the right to basic education. Suggested indicators of the content of the right include: compliance with international law; the extent to which the regulatory framework facilitates both physical and economic accessibility for all learners; and adequacy of schooling.

The discussion in respect of school fees and the exemption policy suggests an extremely low level of enforcement of the policy, resulting in parents having to pay school fees even though they cannot afford to. This, coupled with other access costs, as well as schools using different forms of discrimination to exclude non-fee paying learners, has resulted in a significant number of learners not having access to schools. Furthermore, the inability of the regulatory framework to achieve equity in education has resulted in an inadequate standard in education at ‘fee-poor’ schools. The School Fee Exemption policy is clearly also not what is intended by international law. Thus, in terms of what is required to give effect to the unqualified right to education, the policy fails to meet this standard.

Committee, “while noting that the law provides for compulsory education between the ages of 7 and 15, is concerned that education is not free”.

²⁹ 679 P. 2d 35 (Cal. 1984).

³⁰ Ibid 29. See also *Chandler v South Bend Community Corp* 312 N.E. 2d 915.

Even by utilising the less onerous standard of *reasonableness* as set out in *Grootboom*, the low level of enforcement and the difficulties in accessing schools for non-fee-paying learners and communities suggest that the exemption policy fails to provide for those most in need, while not reaching all the poor.

Analysing the amendment in the Education Laws Amendment Bill, 2004

The proposed reforms to the education laws do not go far enough in addressing many of the concerns in the current regulatory framework to improve access to education for all living in South Africa. Some of the main concerns are addressed below.³¹

Free schools

Since the Department of Education first made its Plan of Action public in June 2003, media attention has focused on the promise that 40% of schools in the country will provide free schooling. Under the current system, each province determines which schools fall within this 40% by considering indicators such as the physical condition of the school, or the relative poverty of the community serviced by the school. This system has however not been uniformly implemented across provinces and whether or not a school falls within the 40% is dependent on how the indicators are determined and applied provincially.

In terms of the new amendments, the quintiles will now be determined nationally by poverty levels of the schools, which are determined by each school's community profile, in particular the income levels of the community. While this system appears to make sense, the actual amendments however suggest a system that is much more complex, uncertain, subject to qualification and unlikely to provide free schooling for 40% of the poorest learners in the country.

In terms of the amendments to the *SASA*³², the minister will determine annually in which quintile a particular school falls, and whether or not such a school may levy school fees. The minister can only declare that a school is a free school if that school has received sufficient funding in terms of the adequacy benchmark level of funding per learner discussed earlier. If a school does not receive the adequate benchmark funding, it must continue to charge school fees, even if it falls in the lowest two quintiles.

It therefore appears that these amendments are likely to create a system that will introduce uncertainty for many poor schools and parents. Neither schools nor parents will know from one year to the next whether or not a school will be a free school or a fee paying school. This system may be prone to abuse from schools and SGBs who continue to charge school fees despite being declared free schools, since parents in poor communities are unlikely to know whether a particular school has been declared as free school or a fee paying school. Parents may also have to move their children to different schools from the one year to the next, particularly where they cannot afford to pay school fees and the status of the school has changed from free to paying.

There appears to be no certainty that all schools in quintiles 1 and 2 will be free. Within the context of restraints on social spending, it is more than likely that many schools falling within these quintiles will not receive the adequate benchmark level of funding per learner from the state. Furthermore, the implementation of a system of nationally-determined quintiles is likely to lessen the number of schools that will fall within quintiles 1 and 2 than

³¹ For a full discussion of the Bill, see *Comment on the Department of Education's Education Laws Amendment Bill, 2004* (Education Law Project 2004).

³² See Sections 37 (7) – (10) of the Bill.

currently exists nationally. This is because fewer schools in the richer provinces, although having poor learners, will fall into quintiles 1 and 2. Therefore, many schools that service poor communities will not benefit from free school provisioning. Instead, they will be excluded, and school fees for these communities will continue to be a barrier to basic education for these communities.

By declaring only certain schools free, many communities will be in the situation where they cannot access these free schools. Instead, they will be forced to make use of the middle of the range schools where they must pay school fees. The ELP experience suggests that many informal settlements often do not provide sufficient schooling for communities living in these areas, and this often results in the communities having to attend schools in neighbouring areas. For example, no school is available for children living in the Gauteng community of Thembelihle. Learners therefore attend schools in the surrounding township of Lenasia, which caters for a historically Indian middle class community.

Public schools are scarce and face severe overcrowding in certain areas, forcing parents to send their children to schools in neighbouring areas. For example, in the Johannesburg inner city, one of the main problems of parents – most of whom are unemployed – is the absence of a sufficient number of inner city schools. This forces parents to send their children to private schools in the area (many of which are unregistered), or to find schools in the outer-suburbs of Johannesburg, resulting in children having to travel long distances to school.

The School Fee Exemption policy

The amendments to the School Fee Exemption policy improve some elements of the policy and strengthen anti-discrimination provisions that protect poor learners. Significant changes include:

- Prohibiting a school from charging anything in excess of a single compulsory fee, subject to strict exemptions criteria. Amongst other things, this will effectively outlaw registration fees.
- A clear and unambiguous elucidation prohibiting the more pernicious forms of discrimination against children of non-fee paying parents.³³
- Placing an onus on a school to prove that it has implemented the regulations before taking legal action against a parent.
- Prohibiting a SGB from attaching a parent's home to recover fee costs unless alternative accommodation is made available to the parent.
- Extending the scope of automatic exemptions to include not only orphans and learners in some form of foster care, but also where the government pays a grant linked to a learner, such as a Child Support Grant. In the past the national department has advised parents to use their Child Support Grants to pay for school fees.
- Devising a new formula for the calculation of a partial exemption that firstly requires that a SGB, when calculating exemption entitlements, takes into account the number of children that a parent is paying fees for; and that secondly limits the discretion of a SGB in the calculation of the amount of the partial exemption.

³³ In terms of the proposed amendments, Section 41 (5) of the SASA states, " a learner has the right to participate in the total school programme despite non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to (a) suspension from classes; (b) verbal or non verbal abuse; (c) denial of access to cultural, sporting or social activities of the school; or (d) denial of a school report or transfer certificates".

While the new formula attempts to factor in the number of children a parent is paying fees for, this new formula is ridiculously convoluted. At its simplest it looks something like this:

$$\frac{[(E=F + T + fyo)]}{[(Y + yo)]^{34}} / [I] \geq [10\%]$$

The more children you have at a school, the more difficult it gets to use the formula to calculate a partial exemption. Parents are already struggling to calculate their eligibility for an exemption with the current formula and will therefore be baffled by the proposed new formula. They are likely to rely on schools to assist them with the calculation of exemptions. Even if SGBs and principals can be expected to unpack the new formula, experience suggests that they are likely to hide behind its complexity in order to charge parents more than they are required to pay.

6. Conclusion

Based on the outcomes of this review, it seems that the School Fee Exemption policy, while existing solely for the purpose of facilitating access to schools for poor learners, has failed in achieving this objective. Furthermore, the extent to which it has been implemented and enforced has been negligible when compared to the number of poor learners in South Africa. It can thus be said to be flawed both at the stages of conception and implementation. It has also failed to assist significant segments of poor people in South Africa.

It is unlikely that the pending reforms will facilitate improved access to schools for poor learners. The reforms also still do not accord with South Africa's obligations in international law to provide free education. The way in which it is determined whether schools will be free is taking place in an *ad hoc* and qualified manner, depending on whether or not a particular school has received an adequate benchmark of funding per learner. This loophole in the reforms suggests that, while there may be schools that ought to be free, these schools can continue to charge school fees because they have not received the adequate benchmark of funding per learner.

Finally, parents and learners will have to increase their reliance on schooling authorities to assist them with either the calculation of their exemptions or by informing them from year-to-year on whether the school is regarded a no-fee or fee-paying school, depending on the benchmark of funding per learner received. This situation is unlikely to benefit parents and learners since schools generally have failed to enforce the regulatory framework in the past, and it meant that they would continue to be cash-strapped and under-funded.

³⁴ E = per learner expenditure by parent in a school; F = annual school fees charged to any parent in the school; T = additional monetary contributions explicitly demanded by the school; f = the lowest of the ff three values; (1) the adequacy benchmark for the current yr (2) the average fee charged to the parent in the school (3) the average non-discounted annual fees charges in other schools; yo = the number of learners in other schools; Y = the number of learners for which a parent is charged annual school fees in the current school; I = combined gross income of parents; 10% is of the gross income used towards education expenditure.

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