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**SUBMISSIONS ON THE DEPARTMENT OF BASIC EDUCATION'S
GUIDELINES FOR THE SOCIO-EDUCATIONAL INCLUSION OF DIVERSE
SEXUAL ORIENTATION, GENDER IDENTITY, EXPRESSION AND SEX
CHARACTERISTICS (SOGIESC) IN SCHOOLS**

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“So long as people face criminalization, bias and violence based on their sexual orientation, gender identity or sex characteristics, we must redouble our efforts to end these violations”¹

INTRODUCTION

1. SECTION27 (Incorporating the Aids Law Project), the Centre for Applied Legal Studies (“CALS”) and Centre for Child Law (“CCL”) welcomes the opportunity to make submissions on the Department of Basic Education’s (“DBE”) Draft Guidelines for the Socio-Educational Inclusion of Diverse Sexual Orientation, Gender Identity, Expression and Sex Characteristics (SOGIESC) in schools (“Draft Guidelines”).
2. SECTION27 is a public interest law organisation that works to influence, develop, and use the law to further the constitutional rights of people in South Africa. Specifically, SECTION27 uses research, advocacy, and litigation to further access to the rights to healthcare and basic education.
3. The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice and brings together legal theory and practice. CALS operates across a range of programme areas, namely: business and human rights; environmental justice; civil and political rights; land, home, and rural democracy; and gender justice.
4. CCL is a children’s rights organisation registered as a Law Clinic with the Legal Practice Council. CCL contributes to the establishment and protection of children’s rights through litigation, legislative and policy advocacy, research as

¹ United Nations Secretary-General António Guterres, 25 September 2018.

well as education. CCL's mission is to set legal precedent to improve and strengthen laws pertaining to children and ensure that constitutional rights are realised.

5. Our submission responds to the Draft Guidelines, where we support and provide further justification for their introduction and implementation. We also request the DBE to consider stricter regulation of SOGIESC in schools and call on the DBE to adapt the Draft Guidelines into Regulations.

HISTORICAL BACKGROUND AND IMPORTANCE OF INCLUSIVITY IN SCHOOLS

6. Although the Constitution protects the right to equality and the right not to be discriminated against on the basis of their sexual orientation and gender, the reality is that people who identify beyond stereotypical gender norms face discrimination, violence and harassment. An individual's expression of their gender may defy stereotypical gender norms and imposed binaries, and evidence shows that acquiring gender characteristics congruent with the self-identified gender identity generally improves health, well-being and quality of life. Conversely, not being able to live according to one's self-identified gender identity is likely to exacerbate other forms of ill health and erode dignity.
7. Stories about queerphobic discrimination in schools continues to be far too familiar for a nation that prides itself on a Constitution committed to ensuring non-discrimination and diversity. Although there is limited data on the prevalence of SOGIESC discrimination in South African schools, a 2016 report by OUT LGBT Well-being reported that 56% of LGBTQ+ South Africans experienced

discrimination based on their queerness. Verbal bullying and threats of violence are the two most common forms of discrimination.²

8. Media headlines over the past few years support these statistics as schools remain brazen about the extent to which they are willing to discriminate against queer children. This discrimination and persistent form of systemic violence has culminated in tragic deaths, and conduct that dehumanises and demonises queer children. Our schools are either discriminating against queer learners or failing to act to protect queer learners by perpetuating or developing exclusionary policies which denigrate sexual and gender diversity.³
9. For example, earlier in August 2022, Hoërskool Rustenburg punished a student for attending a drag show by finding the student guilty of “immorality”. As a result, the student was stripped of her role as the chairperson of a school society. However, after social media outrage, the school eventually reversed their punishment.⁴ This incident illustrates how schools continue to revert to their conservative values.
10. Prior to the Gauteng High Court’s decision in *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart* (“*OGOD*”),⁵ schools would assert that queerness does not align with their “Christian” ethos. After the *OGOD* case, public schools can no longer promote a single religion or brand itself. In any event,

² Hate Crimes Against Lesbian, Gay , Bisexual and Transgender (LGBT) People in South Africa, 2016 at p 6.

³ See <https://mg.co.za/thoughtleader/opinion/2022-09-08-teen-suicides-are-a-clarion-call-to-protect-queer-children/>.

⁴ See <https://mg.co.za/thoughtleader/opinion/2022-09-08-teen-suicides-are-a-clarion-call-to-protect-queer-children/>.

⁵ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ).

we submit that to state an individual's gender identity or sexual orientation is ungodly, is discriminatory.

11. The long-standing exclusion of SOGIESC learners from schools has perpetuated cis-heteronormative ideals and should be acknowledged as gender-based violence. We welcome the initiatives by the DBE to respect and promote diversity and to create educational spaces inclusive of all persons regardless of their gender, sex, sexual orientation, religion, culture and belief and ethnicity. The Draft Guidelines is one such initiative, which aims to make schools safe, non-discriminatory, and inclusive for SOGIESC learners.

THE INTERNATIONAL, REGIONAL, CONSTITUTIONAL AND STATUTORY OBLIGATIONS TO PROTECT SOGIESC LEARNERS

12. Inclusive education relates to practices, policy and procedures that recognise the unique requirements of all learners by enhancing their involvement in learning, communities, and cultures, as well as diminishing exclusion within and outside of education.⁶ We note that the Draft Guidelines sets out a legal framework. However, we recommend that the DBE consider the international and regional instruments that South Africa ratified, which includes the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and domestic legislation, the Childrens Act 38 of 2005 more carefully.

⁶ United Nations Educational, Scientific and Cultural Organisation. Available at <https://www.unesco.org/gem-report/en/inclusion>.

13. We further recommend that the DBE consider the Yogyakarta Principles (2006) in finalisation of the Draft Guidelines. The Yogyakarta Principles address a broad range of international human rights standards and their application to SOGIESC issues.

14. *The United Nations Convention on the Rights of the Child (UNCRC)*

It is important to emphasise that the UNCRC includes protection from discrimination based on sexual orientation, gender identity, or expression. The best interests of the child should be the primary consideration in all actions concerning SOGIESC learners.⁷⁸ Additionally, it recognises the right of children to express their views freely and have them considered.⁹ This applies equally to SOGIESC learners, who may have unique perspectives on how to create a safe and inclusive learning environment. Schools should actively seek and incorporate the views of SOGIESC learners when developing policies and practices that affect them.

15. *The African Charter on the Rights and Welfare of the Child (ACRWC)*

ACRWC is an important instrument that promotes the rights and welfare of all children on the African continent, including SOGIESC learners. It is important to recognise that these learners may face challenges when it comes to accessing education on an equal basis, and that special measures may be necessary to address these challenges. Inclusive education requires a fundamental shift in thinking,

⁷ United Nations Convention for the Rights of the Child: art 3.

⁸ Ibid at article 13.

⁹ Section 28(2) of the Constitution of the Republic of South Africa.

from a focus on individual differences to a focus on systemic barriers that prevent some learners from accessing education. Schools must take a human rights-based approach to education and actively work to eliminate discriminatory attitudes and practices. Article 11 of the ACRWC¹⁰ provides that every child shall have the right to education and such education must be directed to “the promotion and development of the child’s personality, talents and, mental and physical abilities to the fullest”.¹¹ The ACRWC further provides that member States should take appropriate and special measures in respect of disadvantaged children, to ensure equal access to education in all sections of the community.¹²

16. *Children's Act*

The Children’s Act is a crucial piece of legislation that places the best interests of the child at the forefront of decision-making processes. It is important to note that the Act does not only consider a child's age, maturity, and gender, but also their culture, language, and any special needs or vulnerabilities. These factors must be considered when creating rules for schools that promote inclusivity and non-discrimination. It further highlights the importance of child participation and the need to respect children as individuals with distinct personalities and rights. It is essential to ensure that the voices of SOGIESC learners are heard and given due weight in matters that concern them, including the development of school policies and practices.

¹⁰ The African Charter on the Rights and Welfare of the Child.

¹¹ Ibid at article 11.

¹² Ibid at article 11(3)(e).

THE NECESSITY FOR BINDING REGULATION

17. The adoption of comprehensive sexual orientation and gender identity-inclusive sexuality education can significantly reduce the physical and psychological health risks for SOGIESC youth, including sexual and reproductive health, and help them to avoid secondary effects, such as substance abuse, mistrust of health services and self-medication and also will ensure a form of societal change.¹³

18. We note that the DBE has adopted the format of a guideline. Guidelines are non-binding documents. Guidelines are used to assist an institution to implement certain legislative objectives. We are of the view that guidelines are weak, especially to implement such an important task. The DBE has an opportunity to ensure that the rights of a vulnerable group of learners are protected. The DBE has an obligation in terms of 7(2) to protect the learners' rights to in terms of section 29 read together with sections 9, 10 and 16 of the Constitution. Guidelines do not serve this purpose as they are non-binding.

19. We note that the Draft Guidelines states that it has an obligation in terms of the Constitution to ensure such a guideline is implemented. However, the non-binding nature of a guideline diminishes the importance for such intervention. Regulations would be binding on schools and is mandatory for schools to implement.

20. The South African Schools Act 84 of 1996 ("the Schools Act") was created to provide for a uniform system for the organisation, governance and funding of

¹³ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz (2022) at para 34.

schools and its preamble lists a number of important objectives of the Schools Act, including:

- 20.1. that the country requires a new national system for schools which will redress past injustices in educational provision,
 - 20.2. provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities,
 - 20.3. 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,
 - 20.4. protect and advance our diverse cultures and languages,
 - 20.5. uphold the rights of all learners, parents and educators, and
 - 20.6. promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State.
 - 20.7. This accords with the constitutional imperatives under section 9 of the Constitution.
 - 20.8. Section 61 of the Schools Act empowers the Minister of Basic Education may make regulations. Section 61(a) empowers the Minister to make regulations to provide for safety measures at public and independent schools.
 - 20.9. Further, section 61(i) provides that the Minister of Basic Education may make regulations on any matter which may be necessary or expedient to prescribe in order to achieve the objects of this Act.
21. We submit that a Regulation would be advancing the objects envisaged in the Schools Act and recommend that the Draft Guidelines be adapted to Regulations.

OUR SUBMISSIONS

22. It is against this backdrop that we make submissions on the following:
 - 23.1 Clause 4: Guiding Definitions
 - 23.2 Clause 6: Human Rights Culture
 - 23.3 Clause 7.12 Bathrooms and Change Room Facilities
 - 23.4 Clause 7.14 Gender Affirming Health Care and Gender Affirming Practices (Or Social Transitioning)
 - 23.5 Clause 7.17 Sport
 - 23.6 The Addition of Clause 7.3
 - 23.7 Gender-Responsive Budgeting
 - 23.8 Implementation of the Draft Guideline

CLAUSE 4 GUIDING DEFINITIONS

23. An appropriate, progressive and inclusive definition clause is essential for the effective implementation of this policy. It provides clarity on what the policy aims to achieve and to whom it applies. This could reduce misunderstandings and ensure that all learners are included and protected. A well-crafted definition clause could also create a safe and inclusive learning environment that is free from discrimination and harassment based on SOGIESC. We therefore submit the following amendments:

- 23.1. The definition of **‘lesbian’** has been excluded. We recommend that lesbian be included and defined as *a woman who is physically and romantically attracted to other women.*¹⁴
- 23.2. The definition of **‘gender-affirming health care’** has been excluded. While definitions for ‘social gender affirmation’ and ‘gender affirming action’ have been provided, they describe practices and action taken by trans and gender diverse persons. However, clause 7.14 deals with gender-affirming health care, which places an obligation on schools to be supportive and accommodating to the best interest of learners undergoing medical treatment, dealing with gender dysphoria or may be in the process of transitioning – whether socially or medically. We recommend the inclusion of a definition for ‘gender-affirming health care’ as defined by the World Health Organisation, which *includes any single or combination of a number of social, psychological, behavioural or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual’s gender identity.*
- 23.3. The definition of **‘gender diverse’** appears to be repeated. We recommend the latter definition. Therefore, ‘gender diverse’ means a person whose gender identity and/or gender expression is different from or more diverse than the gender norms and expectations in their society or community.

¹⁴ Jade Jacobs and Letlhogonolo Mokgoroane “Media Guide and Reference Guide for Media Practitioners” November 2019 https://www.iranti.org.za/wp-content/uploads/2019/11/Iranti_Media-Guide_22-November-2019-.pdf (Accessed on 25 April 2023).

- 23.4. The definition of **‘bisexual’** appears to have two definitions in the Draft Guidelines. We propose the latter definition. ‘Bisexual’ means *a person who is emotionally and/or sexually attracted to persons of the same gender and persons of a different gender.*
- 23.5. The term **‘queer’** has been generally accepted by the SOGIESC and progressive academic communities;¹⁵ it is, however, omitted from the definition clause. In critical queer theory, the term "queer" is used to challenge and disrupt dominant cultural and societal norms surrounding gender and sexuality.¹⁶ Rather than being a fixed or stable identity, "queer" is an umbrella term that can encompass a range of non-normative identities and experiences, including those that do not fit into traditional categories of sexual orientation or gender identity.¹⁷ Furthermore, the term “queer” can refer to a political stance and a critical response to power relations that marginalise the SOGIESC community.¹⁸ Queer thought additionally emphasises the fluidity and complexity of identities, as well as the need to resist restrictive and oppressive social norms. We therefore propose that the term “queer” should be added to the definition clause, and be used in the Guidelines interchangeably, in appropriate contexts, with the other terms in “SOGIESC”. Therefore, the term

¹⁵ Halberstam, J. (2005) ‘Introduction: Queer Temporality and Postmodern Geographies’ In J. Halberstam & I. Livingston (Eds.), *The Queer Art of Failure* (pp. 1-28). Duke University Press. <https://caringlabor.wordpress.com/2010/07/30/judith-halberstam-queer-temporality-and-postmodern-geographies/>. Accessed on 13 April 2023.

¹⁶ Sedgwick, E. K. (1990) ‘Epistemology of the Closet’ University of California Press. <https://www.ucpress.edu/book/9780520254060/epistemology-of-the-closet-updated-with-a-new-preface>. Accessed on 13 April 2023.

¹⁷ Munt, S. (2013) ‘Queer Attachments: The Cultural Politics of Shame’ Ashgate Publishing, Ltd. <https://www.routledge.com/Queer-Attachments-The-Cultural-Politics-of-Shame/Munt/p/book/9780754649236>. Accessed on 13 April 2023.

¹⁸ Mkhize, N. (2019) ‘The Politics of Visibility: Transgender Rights Activism in South Africa’ Wits University Press.

“queer” means an *umbrella term that encompasses a range of non-normative sexual and gender identities, and the diverse experiences and practices that challenge normative conceptions of gender, sexuality, identity and expressions.*¹⁹

- 23.6. We recommend the following definition for "**gender identity**". Gender identity reflects a deeply felt and experienced sense of one's own gender. Most people have a gender identity, which is part of their overall identity. A person's gender identity may or may not be aligned with the sex assigned to them at birth.
- 23.7. We recommend the following definition for "**gender expression**". Gender expression is the way in which we express our gender through actions and appearance, including dress, speech and mannerisms. A person's gender expression is not always linked to the person's biological sex, gender identity or sexual orientation.²⁰
- 23.8. 'All' or 'different' genders should be considered without, assuming that intersex people automatically have a non-binary gender identity or that having a nonbinary gender identity means someone is intersex. Questioning whether or not a person identifies with LGBT is unacceptable. Assumptions that people with a specific intersex variation identify with a specific gender should be avoided, as should assumption that surface characteristics define an intersex student's gender. We recommend the following definition for "**intersex/sex characteristics**".

¹⁹ See note 14 above.

²⁰ See note 14 above.

Sex characteristics refer to each person's physical characteristics relating to sex, including genitalia and other reproductive anatomy, chromosomes and hormones, and secondary physical characteristics emerging from puberty.²¹ The word 'hermaphrodite' is also regarded as stigmatising by several intersex people.²² It is preferable to use the word 'intersex', or refer to sex traits, variations or characteristics. Most intersex people are not trans or gender variant either. Making assumptions that intersex people have, want to, or need to, transition should be avoided. Referring to intersex people using language that describes trans people, such as transgender, or 'gender diversity' should be avoided altogether. Intersex people are born with physical sex characteristics that do not fit the normative definitions for male or female bodies. For some intersex people, these are apparent at birth, while for others they emerge later in life, often at puberty. Intersex persons may have any sexual orientation and gender identity.

CLAUSE 6 CREATING A HUMAN RIGHTS CULTURE

24. We welcome the DBE's endorsement of the importance of creating a human rights-based school culture. However, we are concerned about the lack of clarity on how the Draft Guidelines will be applied in practice. We would like to emphasise that the Schools Act governs school education in South Africa, including both public and independent schools. We also recommend that training be conducted to various stakeholders in implementation of the Draft Guidelines.

²¹ Id.

²² Id at p. 13.

25. *Enforcement in Independent Schools*

26.1 The Draft Guidelines should extend to independent schools. It is concerning that some independent schools argue that they are not bound by the provisions of the Constitution, and that their policies are not in line with public policy. This is contrary to the case of *AB and Another v Pridwin Preparatory School and Others*.²³ In this case, the Court held that there is a standard of basic education that the State is required to provide, and independent schools must also maintain. This means that even if the school provides more than the required standard, they cannot disregard the rights and obligations under the Constitution. Independent schools must be held accountable for ensuring a human rights-based school culture that protects and promotes the rights of all learners, especially those who may face unfair discrimination based on their sexual orientation and gender identity.

26.2 Therefore, it is crucial that the Draft Guidelines reflect this position. We recommend that the Draft Guidelines make it explicit that independent schools are required to incorporate SOGIESC rules into their policies, so as to align with the Constitution. This will ensure that all learners are protected and given equal opportunities to receive a quality education, free from discrimination.

²³ *AB and Another v Pridwin Preparatory School and Others* 2001 (1) SA 1 (CC).

26. *Training and Education*

We understand that not everyone may be familiar with the terminology used in the document and we propose that there is training done for the management, caretakers and educators of the schools in order to ensure that they are aware of the changing landscape of queer human rights and discourse and to ensure that they do not perpetuate discrimination.

CLAUSE 7 WHOLE-SCHOOL APPROACH TOWARDS INCLUSIVE LEARNING ENVIRONMENTS FOR LEARNERS WITH DIVERSE SEXUAL ORIENTATIONS, GENDER IDENTITIES AND EXPRESSIONS

CLAUSE 7.12 BATHROOMS AND CHANGE-ROOM FACILITIES

27. We note and welcome the introduction of all gender bathrooms and change rooms. We would recommend the removal of the term ‘gender-neutral bathrooms’. Instead, we recommend the use of the term ‘all gender bathrooms’ because it refers to facilities where people of any gender expression or gender identity are permitted to use.

28. International research has found that almost 60 percent of transgender persons have avoided using public restrooms for fear of confrontation, saying they have been harassed and assaulted.²⁴

²⁴ See <https://www.unco.edu/gender-sexuality-resource-center/resources/all-gender-bathrooms.aspx>.

29. There are multiple learners who might need to utilise all gender spaces:
- 29.1. Learners and visitors with disabilities who might need an attendant of a different gender to accompany them to the restroom;
 - 29.2. Learners and visitors who are parents/guardians who need to accompany a child of a different gender to the restroom;
 - 29.3. Learners and visitors who identify as across the transgender spectrum who often are told they are in the “wrong bathroom.”²⁵
30. The implementation of all gender bathrooms may give effect to section 28(2) of the Constitution, which states that the best interest of the child is of paramount importance.
31. We further respect that the Draft Guidelines stipulate that binary toilets are retained, and all gender toilets would be in addition to existing toilets. In this regard, the erection of the all-gender bathrooms should not be placed far from the other bathrooms. We encourage the Draft Guidelines to ensure that there is no othering in the creation of these bathrooms.
32. Inclusivity of bathroom facilities should be included to minimise bullying and victimisation of SOGIESC learners in schools. In 2022, after the leak of the Draft Guidelines, there was a public outcry against all gender bathrooms. We note the SOGIESC community’s response that all gender bathrooms are required to protect

²⁵ Id.

queer learners. A coalition of civil society organisations also denounced the contestation as “disinformed.”²⁶ They stated, “we strongly encourage members of the public to apply their own minds to the document, and not to be misled by deliberate campaigns of disinformation, which exploit parents’ fears and manufacture panic with patently false claims about what the Guidelines are, and what they seek to achieve.”²⁷

33. One of the common objections to all gender bathrooms is that South Africa has high levels of gender-based violence. We submit that gender-based violence cannot be raised in contestation to the inclusion of all gender bathrooms.²⁸ As explained in an article published by the Daily Maverick,²⁹ gender-based violence is a pandemic and not restricted to potential risk of violence in toilets at schools.
34. Sanger provides evidence of the lack of safety of school-going transgender young people due to bullying and discrimination by learners, lack of support from teachers and administrative staff, alienation by the curriculum, exclusion from toilet use and the lack of understanding of the difference between sexual orientation and gender identity.³⁰ The violence against SOGIESC learners amounts to gender-based violence. It would therefore be disingenuous to raise

²⁶ Joint Statement of Civil Society Members Of The Basic Education Social Inclusion in Education Working Group (SIIEWG) 22 November 2022 <https://out.org.za/statement-disinformed-panic-about-unisex-toilets-in-sa-schools/> (Accessed on 25 April 2023).

²⁷ Id.

²⁸ Bheki Simelane “Gender-neutral bathrooms at schools — draft guidelines spark ‘robust’ debate” Daily Maverick 16 November 2022 <https://www.dailymaverick.co.za/article/2022-11-16-gender-neutral-bathrooms-at-schools-draft-guidelines-spark-robust-debate/> (Accessed on 25 April 2023).

²⁹ Id.

³⁰ Sanger, N. ‘Young and Transgender: Understanding the Experiences of Young Transgender Persons in Educational Institutions and the Health Sector in South Africa’ available at <https://genderdynamix.org.za/wp-content/uploads/GDXtransyouth2015-web.pdf?x91330>.

arguments of current gender-violence against girl learners to support the contestation of all gender bathrooms.

35. A Transformation and Equity Officer at Wits University explains that the inclusion of gender inclusive toilets is pivotal in the realisation of the rights of SOGIESC learners. She stated, “[i]f we gatekeep gender-neutral education from transgender learners, we are not only failing them by not accommodating them, but we are forcing a part of our community to stay in closets from which they will reflect on their days in school as a nightmare.”³¹ The all gender bathrooms would allow for learners to be comfortable to use ablution facilities where they are not interrogated and even victimised about their gender identity. In a study conducted in Australia, toilets were the main spots for bullying and victimisation against trans learners.³² Many of the learners changed their eating and drinking habits to avoid using the bathrooms. This phenomenon was also found in a study held in South Africa with trans students at universities.³³
36. We note that there are disparities of resources towards school sanitation in the country. Rural and low-fee paying schools do not have the adequate infrastructure as many suburban and former model C schools. In implementing the Draft Guidelines, we recommend that the DBE consider these disparities and

³¹ See note 29 above.

³²Jacinta Francis, Pratihtha Sachan, Zoe Waters, Gina Trapp, Natasha Pearce, Sharyn Burns, Ashleigh Lin and Donna Cross “Gender-Neutral Toilets: A Qualitative Exploration of Inclusive School Environments for Sexuality and Gender Diverse Youth in Western Australia” *International Journal of Environmental Research and Public Health* 2022, Vol 19, 10089. <https://doi.org/10.3390/ijerph191610089>.

³³ Brown, A., Maseko, N., & Sedibe, M. (2020). “I only relieve myself when I get home in the afternoons”: Microaggressions in (queered) bathroom spaces at a South African university, *Agenda*, 34(2), 32-40 <https://doi.org/10.1080/10130950.2019.1706983>.

recommend that adequate sanitation infrastructure be installed to ensure the safety of all learners.

37. The lack of adequate sanitation in schools is a national issue facing learners. The case of *Komape and Others v Minister of Basic Education and Others*³⁴ is indicative of the ongoing challenges facing the Limpopo Department of Education. SECTION27 in collaboration with CCL have been involved in the litigation and post-litigation monitoring of the eradication of pit latrine toilets in the Limpopo province.
38. The challenges concerning the roll out of adequate sanitation, nationally, should continue to be prioritised. We recommend that adequate separate funding is appropriated by DBE for the implementation of the Draft Guidelines. The budget therefore requires an incorporation of a special allocation towards the implementation of all gender bathrooms.
39. It is against this backdrop that we recommend the following:
 - 39.1 Under-resourced schools – The DBE must ensure that all schools are built to enhance a safe and secure learning environment for all learners;
 - 39.2 Well-resourced schools –

³⁴ *Komape and Others v Minister of Basic Education and Others*, High Court of Limpopo, Polokwane (Case Number 1416/2019) (17 September 2021).

39.2.1 the DBE must ensure that in schools where there is no infrastructure to build additional toilets, they should configure existing toilets for all gender bathrooms; or

39.2.2 where they can build additional bathrooms, all gender bathrooms should be built in spaces, which in close proximity to other bathrooms.

CLAUSE 7.14 GENDER AFFIRMING HEALTH CARE AND GENDER AFFIRMING PRACTICES (OR SOCIAL TRANSITIONING)

40. We welcome the inclusion of the provision of gender-affirming health care, which places an obligation on schools to create a supportive and accommodating environment for learners undergoing medical treatment, dealing with gender dysphoria or may be in the process of transitioning – whether socially or medically.

41. Clause 7.14 mentions that the school’s affirming and supportive policy and practices would apply to support learners who are undergoing medical treatment. It is unclear to us how many schools have or do not have such policy and practices, but on a national level, the *Integrated School Health Policy*³⁵ (ISHP) is applicable to all schools. One of the strategic objectives of this joint initiative by the Departments of Basic Education and Health is to increase access and knowledge

³⁵ Available at <https://serve.mg.co.za/content/documents/2017/06/14/integratedschoolhealthpolicydbeanddoh.pdf>.

about sexual and reproductive health rights, as well as the *promotion of gender equity* in line with broader policy of the Primary Health Care Strategy and in terms of legislation such as the Schools Act.

42. The ISHP is not without its challenges, especially in relation to implementation. The barriers to the successful implementation of comprehensive school health programmes include the culture of operating in silos by government departments, which results in:
- lack of prioritisation of the progressive realisation of school health services in all schools (particularly those in rural areas);
 - the unrealistic nurse-learner ratios in schools; and
 - the lack of support, capacity and knowledge of the Health-promoting Schools Initiative of senior management responsible for overseeing the implementation of the ISHP.
43. Despite the systemic barriers to the implementation of the ISHP (which ought to be addressed with immediate effect), we recommend that it be explicitly included in the Guidelines to outline the roles and responsibilities of all the stakeholders, including all schools and the Department of Health. Alternatively, the roles and responsibility of the relevant stakeholders can be further elucidated in relation to gender-affirming health care and linking the obligations to existing policy (i.e. ISHP).
44. Clause 7.14 makes reference to circumstances where the school may communicate with the parent/caregiver in relation to the support and accommodations required. The protective measures relating to the health of children in terms of the Children's Act must be borne in mind. Section 129(2), in particular, sets out age 12 as the age

of consent of a child to their own medical treatment, with or without the knowledge of the parent/caregiver. We recommend that it be explicitly included that any communication to parents/caregivers concerning the medical treatment, should be with the consent of the learner if they are above the age of 12.

CLAUSE 7.17 SPORT

45. We disagree with the position taken on the issue of sports. Schools are not best placed to make decisions about participation in sporting activities.
46. The Constitution provides that there shall be no unfair discrimination on the basis of gender or sex. Placing restrictions on participation in sports is unfair discrimination.
47. Athletes come in all shapes and sizes. These differences may be advantageous based on the scenario. Transgender and intersex athletes are no exception. The assumption that transgender people have categorical, overwhelming physical advantages compared to cisgender people is overly broad and not supported by evidence. The overbroad assumption fosters discrimination against already marginalised, particularly transgender and intersex learners, who face some of the highest rates of discrimination and violence.

THE ADDITION OF CLAUSE 7.3

48. It is imperative for the DBE to clearly state its obligations in ensuring that all parties involved comply with the prescribed duties and responsibilities. It is also crucial for the DBE to outline its plans for providing appropriate training and

workshops to promote a thorough understanding of these Draft Guidelines by all stakeholders, including educators and other personnel who are bound by DBE's policies.

49. We therefore recommend the addition of the following clause:

49.1. 7.3 Protocols and procedures

The Department's Protocol for the Management and Reporting of Sexual Abuse and Harassment in Schools³⁶ provides clear guidelines for stakeholders involved in protecting learners, including those who are facing sexual harassment and bullying due to their SOGIESC. However, it is necessary to go beyond these guidelines and establish effective protocols that specifically address instances where educators are involved in discriminating against SOGIESC learners. This would ensure that all learners are able to learn and grow in a safe and inclusive environment.

50. The *South African Council for Educators (SACE)* has a crucial role to play in ensuring that educators adhere to its Code of Professional Conduct,³⁷ which includes provisions on non-discrimination and respect for diversity. In cases where educators are found to have engaged in discriminatory behaviour towards learners

³⁶ Available at [https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20\(1\).pdf?ver=2019-03-13-093606-697#:~:text=The%20purpose%20of%20the%20Protocol,abuse%20and%20harassment%20perpetrated%20against](https://www.education.gov.za/Portals/0/DoE%20Showcase/Launch%20of%20protocol/Sexual%20Abuse%20and%20Harassment%20in%20Schools%20march%202019%20%20(1).pdf?ver=2019-03-13-093606-697#:~:text=The%20purpose%20of%20the%20Protocol,abuse%20and%20harassment%20perpetrated%20against) (Accessed on 18 April 2023).

³⁷ Available at <https://www.sace.org.za/pages/the-code-of-professional-ethics> (Accessed on 18 April 2023).

based on their SOGIESC, the SACE has the power to investigate and discipline offending educators. The recent *Centre for Child Law and Others v South African Council for Educators and Others*³⁸ judgment further emphasised the importance of the SACE's role in protecting learners from discrimination and harassment in schools. The High Court found that SACE's disciplinary process was inadequate and did not effectively protect the interests of learners.³⁹ The Court further ordered SACE to revise its disciplinary process to ensure that it is effective in protecting the interests of learners and that it considers the gravity of the misconduct committed by educators.⁴⁰ Although the case was not specifically related to SOGIESC learners, the findings highlight the importance of having effective disciplinary processes in place to protect the interests of learners who are victims of misconduct by educators.

GENDER-RESPONSIVE BUDGETING

51. While progressive policy and legislation are powerful tools towards advancing more inclusive and diverse education spaces for learners in the country, without funding allocations to support these interventions, they risk ineffective implementation, entrenching the inequities faced by learners.

52. South Africa's budget has faced [criticism](#) for its failure to allocate funding in a manner that reflects the diverse experiences of people of different social identities, thereby entrenching the inequalities that we as a country aspire to overcome.

³⁸ *Centre for Child Law and Others v South African Council for Educators and Others* (61630/2020) [2022] ZAGPPHC 787 (13 October 2022).

³⁹ Id at para 56.

⁴⁰ Id at para 58.

Grants that are meant to support marginalised learners like the grant for learners with severe to profound intellectual disabilities have experienced real terms cuts to their allocations. This means that provinces have fewer resources to enact these progressive interventions and end up entrenching [the hardships](#) that these learners face.

53. When considering inclusive budgeting and budget allocations in the context of all gender bathrooms, it is crucial to not only consider the quantum of spend but the quality of spending as well. School infrastructure spending through the Education Infrastructure Grant has shown a welcomed trend of above inflation investment over the years, outside of a COVID-19 cut of 10,5%, which was subsequently restored to 24,2% the following year (2021/22). Many provinces are completely reliant on the EIG for the construction, upgrading, repair and rehabilitation of public school infrastructure including toilets. In 2021/22, education departments in the Eastern Cape and Mpumalanga forfeited more than R400-million of funding that was meant for school infrastructure projects. The funding was reallocated to other provinces that had demonstrated better capacity to spend the money. In 2021/22, underspending of the EIG led to R200 million being moved to Kwa-Zulu Natal (KZN) from the Eastern Cape. While this may mean that KZN learners benefit from better quality infrastructure, especially in a context of increasing frequency of floods damaging schools, learners in the Eastern Cape (also subject to destructive floods) are disadvantaged as they continue to attend schools with mud classrooms and dangerous pit toilets.
54. As these dangerous toilets have been reported as sites of gender-based violence in schools, not utilising the funding allocated to eradicate them perpetuates gender-based violence that learners experience. The budget can be a powerful tool in

redressing gender inequalities in the country, not only in allocation but also in effectively using this funding.

55. Thus, we recommend the prioritisation of training and capacity building initiatives to build local and provincial governments' ability to efficiently plan and procure for these bathrooms. Moreover, it is crucial that the reliance on implementing agents - who are subsequently not held accountable for failure to complete school infrastructure projects - is explored. To ensure that the right to basic education is realised for all learners in every province, we call for effective consequence management for these implementing agents. We also recommend improved budget transparency through making available all reports of spending trends in the provinces as frequently as possible, to strengthen budget oversight, and to protect the funds that support this policy's implementation from corruption and under spending.
56. The Department of Women, Youth and People with Disabilities (DWYPWD) has highlighted weaknesses in gender mainstreaming across government departments. Gender sensitive funding allocations have ripple effects that extend beyond gender equality. National Treasury along with the International Monetary Fund (IMF) recognised last year that effective gender responsive budgeting may result in other vulnerable groups being prioritised in the country, bolstering learnings from effective gender responsive budgeting towards budgets that are sensitive to people with disabilities and youth, moving the country closer to achieving the NDP.
57. In 2019, Cabinet approved the Gender Responsive Planning, Budgeting, Monitoring, Evaluation and Auditing Framework (GRPBMEAF), which gave the National Treasury the mandate to lead in this area. Treasury has committed to workshopping gender responsive budgeting in several government departments

that are yet to be confirmed. It would be worth considering piloting gender responsive budgeting for the SOGIESC policy to resource schools to implement it effectively. In this way, the National Budget can be utilised as a tool to redress gender inequality by protecting the human rights of the most vulnerable learners in South Africa and ensuring that these learners are able to attain education in a safe and inclusive space.

IMPLEMENTATION OF THE DRAFT GUIDELINE

58. We note that the DBE has many progressive policies, but we are concerned with its implementation. In a study held within 5 countries in the Southern Africa region, the study concluded that there is not much evidence collated on safety of trans learners. It held that although the South African Constitution is explicit to protect persons on the basis of their sexual orientation, and the DBE has progressive policies, there is a lack in implementation of these policies.⁴¹
59. We recommend and implore the DBE and Provincial Departments of Education to ensure that the Draft Guidelines be implemented at all schools.

⁴¹ Dennis A. Francis, Finn Reygan, Anthony Brown, Bethusile Dlamini, John McAllister, Lineo Nogela, Sethunya T. Mosime, Marguerite Muller & Glodean T. Q. Thani (2018): A Five Country Study of Gender and Sexuality Diversity and Schooling in Southern Africa, *Africa Education Review*, DOI: 10.1080/18146627.2017.1359637.

RECOMMENDATIONS

60. We recommend the following:

60.1 The Draft Guidelines must be revised into Regulations. We recommend that the aims of the Regulations should be the following:

60.1.1 To foster a school environment that is inclusive, safe and free from harassment and discrimination for all members of the school community, learners and adults, regardless of sex, sexual orientation, gender identity, gender expression and/or sex characteristics.

60.1.2 To promote the learning of human diversity that is inclusive of queer learners, thus promoting social awareness, acceptance and respect.

60.1.3 To ensure a school climate that is physically, emotionally and intellectually safe for all learners to further their successful learning development and well-being.

60.2 We recommend that the Regulations cover behaviour that takes place in the school, on school property, at school sponsored functions and activities. It also applies to usage of electronic technology and electronic communication that occurs in the school property, at school sponsored functions, on school computers, networks, fora and mailing lists.

60.3 We recommend the use of Inclusive Language. This means that educators and people at school that avoid terms that include pathologising language such as ‘disorders of sex development’.

CONCLUSION

61. We support the direction that the DBE would like to take. We ask that the DBE take our comments into account in the development of Regulations that will ensure that SOGIESC children are protected and are also able to realise their constitutional right to education. A right that is immediately realisable.

SECTION 27

CENTRE FOR APPLIED LEGAL STUDIES

CENTRE FOR CHILD LAW

28 APRIL 2023