



Fighting for Equality in Education: Student Activism in Post-apartheid South Africa

Since its founding in February 2008, Equal Education (EE) had pursued a simple mission: oblige the government to meet its own goals for making a decent education accessible to all South Africans. The Cape Town-based organization had started with a campaign to repair the broken windows in a single school. In 2009, EE began a nationwide campaign to ensure that every school had an adequate library. It expanded the library campaign in 2011 to incorporate every aspect of school infrastructure, from bathrooms to electricity. EE wanted to remedy the gross educational inequalities that were a crippling legacy of apartheid. Some 92 percent of the country's 24,793 public schools lacked a functioning library, 46 percent still used pit latrines and some had no electricity or running water.

By 2012, EE had become a nationally recognized activist organization. Part of its clout derived from its membership: young people, many of them high school students and few older than 25. In its short existence, EE had attracted 5,000 members, dubbed "equalisers," who were bent on making a real difference in the schools they knew all too well. Its tactics ranged from mass protests to media campaigns—but it always ensured that important decisions reflected the will of the membership that gave it power and influence.

In March 2012, EE moved to a new level with a decision to sue the minister of basic education, Angie Motshekga. The suit was to pressure her to issue binding "Norms and Standards" for school buildings as provided for by a 2007 law. It was a high-risk, high-reward gambit. Spurred in part by the government's National Development Plan, which supported EE's position, Minister Motshekga settled out-of-court on November 19, 2012, one day before a scheduled trial. She pledged to release a draft of the Norms and Standards for public comment by January 15, 2013 and publish final, binding regulations by May 15, 2013.

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But in January, Minister Motshekga produced a document so brief many EE members thought it was just a summary. It was not. Over the next two months, EE held public hearings, gathered comments from citizens and experts, and compiled a detailed response. Just six days before the May deadline to publish the Norms and Standards, Minister Motshekga told Equal Education that she'd need more time and would miss the deadline. The group's leadership was deeply frustrated. Motshekga had not respected the agreed-upon deadline, which had been won only after numerous delays. How likely would she be to come through after an extension?

The EE leadership decided to put the question of whether to grant an extension to a vote of the membership, and called for meetings of the *equalisers*. The following day, EE's legal counsel advised the group to offer a one-month extension. Refusing to offer any extension posed the risk of making Equal Education appear unreasonable, which could threaten the legal case. What could be the harm of one more month?

But on May 14, at mass meetings in Cape Town, the *equalisers* voted overwhelmingly to refuse the minister's request. The members were clearly frustrated and wanted to go to court. The next day, the EE leadership held a teleconference to decide what to do. They had to respond to the minister that day. Should they refuse to grant an extension and put everything they had worked for at risk? Or should they grant her one month, and risk alienating their membership, the lifeblood of the organization?

Unequal education: apartheid's legacy

The Europeans who colonized Africa generally viewed the natives as intellectually and morally inferior, and exploited the labor of the local populations. Thus it was no surprise that when, in the early 20th century, colonial governments instituted public education systems, the goal was to prepare young Africans to be compliant laborers. In Rhodesia (later Zimbabwe), for instance, the formal British education policy aimed to “develop a vast pool of cheap unskilled manual labor.”¹ The result was, in effect, two school systems: one appropriately subsidized, and the other chronically under-resourced.

In South Africa, the minority white population retained control of the government when the then-Union of South Africa gained full independence from the United Kingdom in 1931. At the time, the education system was segregated and unequal. As one history recounted, “While white schooling was free, compulsory and expanding, black education was sorely neglected.

¹ Dickson A. Mungazi, *Colonial education for Africans: George Stark's policy in Zimbabwe*, New York: Praeger, 1991.

Underfunding and an urban influx led to gravely insufficient schooling facilities, teachers and educational materials as well as student absenteeism or non-enrollment.”²

In 1948, 90 percent of the few black South Africans who went to school attended mission schools that were answerable to the country’s provincial governments. That year, the Afrikaner-dominated National Party won control of the white government and instituted the infamous apartheid system. Under apartheid, the government forced everyone to register her or his race and further restricted where nonwhites could live and work. It also established separate public amenities for whites and nonwhites similar to the US South during segregation. Education was a key component of apartheid, and the Bantu Education Act of 1953 centralized black South African education and brought it under the control of the national government.³ The public schools that replaced the mission schools were funded via a tax paid by black South Africans; the monies raised were inadequate to maintain the schools properly. In 1961, just 10 percent of black teachers had graduated from high school. By 1967, the student-teacher ratio had risen to 58 to 1.⁴

Soweto. In June 1976, high school students in Soweto, a black township on the southwest side of Johannesburg, organized a mass protest against unequal education. On June 16, thousands of students marched through the streets on their way to a rally at a stadium. The South African police broke up the march using dogs, batons, tear gas and, ultimately, gunfire. The police action and ensuing confrontations with the police left hundreds of students dead and more than a thousand injured.⁵ The events of the day sparked a nationwide uprising, made Soweto an emblem of the anti-apartheid movement, put the apartheid education system in the spotlight, and cemented the role of students in the nation’s political struggle.

Nearly two decades later, on April 27, 1994, the African National Congress (ANC) won South Africa’s first democratic election, ending apartheid and the era of white minority rule. The country’s new constitution declared that all children had the right to a basic education. But overcoming apartheid’s legacy of severe educational inequality was a monumental task. In the first years after the constitution’s adoption, formerly nonwhite schools, meaning black, colored and Indian, graduated far fewer students than formerly white schools. Formerly black schools, which remained nearly 100 percent black, had abysmal matriculation rates.

As of 2000, 10 percent of formerly black schools graduated fewer than 20 percent of their students, 35 percent graduated 20-39 percent, 32 percent graduated 40-59 percent, 16 percent

² *Bantu Education Policy*, South African History Online. See <http://www.sahistory.org.za/topic/bantu-education-policy>

³ Ibid.

⁴ Ibid.

⁵ South African History Online lists 383 names as casualties of the uprising. See: <http://www.sahistory.org.za/topic/june-16-soweto-youth-uprising?page=8>

graduated 60-79 percent, and just 7 percent graduated 80-100 percent of their students. In contrast, 2 percent of formerly white schools graduated 60-79 percent of their students, and 98 percent graduated 80-100 percent.⁶

Rediscovered activism

But there was little public outcry on education. The people of South Africa recognized that it would take years, if not decades, to undo the damage of apartheid. In fact, progressive political activism in general dissipated in the years immediately following the victory against apartheid, which for decades had defined the country's political opposition. When that system collapsed and the ANC took office, progressive opposition went into abeyance. At least until ANC policy on the HIV-AIDS epidemic ravaging Africa became clear.

AIDS policy. Compared to its neighbors, South Africa had taken practical steps against AIDS. In 1992, a broad coalition of political parties, trade unions, academics, business organizations and civic groups had created the National AIDS Coordinating Committee of South Africa (NACOSA).⁷ The committee produced a national AIDS strategy, which the ANC adopted within months of taking office.⁸ The South African health establishment was optimistic that an epidemic on the scale experienced by other African countries could be avoided.⁹ "No one could claim that the country did not know what it was facing," wrote Mary Crewe, a leading researcher on HIV/AIDS in South Africa.

We knew about AIDS—this was not some new unfolding mystery that we were the first to experience. We had a time lag of infection, the oft-repeated 'window of opportunity,' a committed government, an excellent plan and the relative wealth and advanced infrastructure to set our response apart from that of the rest of the continent.¹⁰

But the government disappointed the public health community. A government-produced AIDS awareness play was widely denounced as counterproductive. Researchers at the University of Pretoria developed an AIDS treatment that the South African Medicines Control Council

⁶ Servaas van der Berg, "Apartheid's Enduring Legacy: Inequalities in Education," *Journal of African Economies*, Volume 16, Number 5, published online August 2, 2007, pp. 849–880.

⁷ Virginia Van der Vliet, "South Africa Divided against AIDS: A Crisis of Leadership," in *AIDS and South Africa: The Social Expression of a Pandemic* (New York: Palgrave Macmillan, 2004), p.51.

⁸ Human Rights and AIDS in South Africa: From Right Margin to Left Margin, Mark Heywood and Morna Cornell, *Health and Human Rights*, Volume 2, Issue 4, 1998.

⁹ Ibid.

¹⁰ Mary Crewe, "South Africa: Touched by the vengeance of AIDS," *South African Journal of International Affairs*, Volume 7, Issue 2, 2000.

blocked because the drug, derived from antifreeze, was dangerous. Despite this, after the researchers lobbied Health Minister Nkosazana Dlamini-Zuma, she unsuccessfully pressured the Council's chair to back the drug.¹¹ In 1998, Dlamini-Zuma opposed the use of the antiretroviral drug AZT despite a study showing that a short course cut mother-to-child transmission rates by half. ANC-run provincial governments likewise rejected its use.

Opposition arose. December 10, 1998 saw the launch of the Treatment Action Campaign (TAC), dedicated to increasing access to treatment for people with HIV and reducing infection rates. TAC was led by veteran anti-apartheid activist Zackie Achmat, himself HIV-positive.¹² TAC faced an uphill battle. It had expected that international pharmaceutical companies would fight efforts to reduce drug prices. But TAC was dismayed to find the South African government also opposing its goals and initiatives. President Thabo Mbeki and his minister of health, Dr. Manto Tshabalala-Msimang, asserted in 1999 that AZT was dangerous; the administration seemed to dismiss the threat posed by AIDS.¹³ The government's 2000-2005 strategic plan against AIDS did not include a widespread antiretroviral treatment program. What critics dubbed "AIDS denialism" flourished.

On August 21, 2001, TAC filed suit against the minister of health in the High Court, claiming that his failure to make the drug Nevirapine (used to prevent mother-to-child HIV transmission) generally available violated the constitution. TAC won twice in court, in December 2001 and July 2002.¹⁴ When the government still refused to launch a Nevirapine treatment campaign, TAC in February 2003 organized a march on parliament and started a civil disobedience campaign a month later. TAC's combination of education, protests and litigation paid off: on August 9, 2003, the cabinet approved a universal antiretroviral treatment campaign.¹⁵

Three years later, Achmat wondered whether the lessons learned from TAC might be applied to the field of education advocacy.

¹¹ History of HIV & AIDS in South Africa, AVERT. See <http://www.avert.org/history-hiv-aids-south-africa.htm>

¹² Achmat became an activist at age 14 during the Soweto uprising and joined the ANC four years later. In 1994, he co-founded the National Coalition for Gay and Lesbian Equality, which worked to include sexual orientation in the constitution's nondiscrimination provisions.

¹³ Virginia Van der Vliet, "South Africa Divided against AIDS: A Crisis of Leadership," in *AIDS and South Africa: The Social Expression of a Pandemic* (New York: Palgrave Macmillan, 2004), 51.

¹⁴ Mark Heywood, "Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health," *South African Journal of Human Rights*, Volume 19, 2003.

¹⁵ *A History of Official Government HIV/AIDS Policy in South Africa*, South African History Online. See: <http://www.sahistory.org.za/topic/history-official-government-hivaids-policy-south-africa>. Also Mark Heywood, "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health," *Journal of Human Rights Practice*, Volume 1, Issue 1, 2009, pp. 14-36.

Educational haves and have-nots

In 2006, a PhD thesis by University of Cape Town researcher Ursula Hoadley caught Achmat's attention. It compared two middle-class schools with two located in "townships" – poor, mostly black, urban areas. The thesis described the socioeconomic inequality between the two sets of schools and how that affected student achievement.¹⁶ The government had touted education as the road to equality in post-apartheid South Africa yet, after more than a decade, the gulf between rich and poor had widened.¹⁷ Informally maintained separate and unequal educational systems survived, one for the prosperous and another for everyone else. On December 14, 2006, Achmat founded the Applied Education Research Organisation (AERO) to study inequality in education.

One of those paying attention was law student Doron Isaacs. TAC had made a strong impression on Isaacs, who had become active in student politics and social justice issues. TAC "taught people how to become citizens and how to struggle as they had in the past, but to do so within a constitutional framework, where the aim was no longer to overthrow the state, but to implement the bill of rights. How to struggle when the rule of law isn't necessarily the enemy, but a tool," he says.¹⁸

Isaacs had written a dissertation on the history of the US legal fight for integrated, equal education, including the 1954 Supreme Court decision *Brown vs Board of Education* that outlawed segregated schools. He felt South Africa could learn from the US experience. More than 12 years after the ANC came to power, little had changed in the education system, and the country had seen no significant education court cases. "In 1994 it was common to hear—and I remember hearing—it'll take a generation, because then everyone will be educated and will be equal," he recalls. "By 2007, it was very obvious that that was not happening and, in fact, education was really [perpetuating] inequality."

Through 2007, Achmat and Isaacs talked with increasing frequency about whether it might be possible to address education inequality using an approach similar to TAC's. Isaacs recruited law school classmate Yoliswa Dwane and the three began researching the problem. "That set us on a path to trying to understand how education at that time was playing a role of cementing inequality, and what would be needed to turn that around," says Isaacs. Achmat, Isaacs and Dwane, along with Wits University Dean of the Faculty of Education Mary Metcalfe and other education academics, decided to try it for themselves.

¹⁶ Ursula Hoadley, *Social class, pedagogy and the specialization of voice in four South African primary schools*. Unpublished PhD thesis. Cape Town: University of Cape Town, U.K. 2005.

¹⁷ Human Development Report 2006, United Nations Development Programme, <http://hdr.undp.org/en/reports/global/hdr2006/>

¹⁸ Author's interview with Doron Isaacs in Baltimore, Maryland, on December 11, 2013. All other quotes from Isaacs, unless otherwise attributed, are from this interview.

Equal Education. The group formed Equal Education and, on February 1, 2008, set out to understand and correct inequality in South African education through research, education and activism. Isaacs and Dwane were the first full-time employees. They noted with approval that, on December 31, 2007, President Mbeki had signed the South Africa Education Laws Amendment Act. One of the amendments was Section 5A, which empowered the minister of basic education to prescribe Minimum Norms and Standards for School Infrastructure.

Isaacs and Dwane soon hired Joey Hasson, an experienced youth organiser, Nokubonga Yawa, a TAC activist, and Lumkile Zani, who at the time was working as a cook. Thanks at least in part to Achmat's reputation and connections, Equal Education was able to attract an impressive board of directors, including Metcalfe, and Crain Soudien, acting deputy vice chancellor at the University of Cape Town and former head of the university's School of Education. "We were lucky from day one to have a number of the best people on our board, education academics and veteran activists who would feed us material all the time and be available to us," notes Isaacs.

For the first five months, the staff conducted research and reviewed academic literature. "We would spend every morning sitting in high school classrooms in townships just observing, taking notes, getting to know students, and every afternoon we'd meet for a seminar," says Isaacs. Two of the first students they met, Lwando Mzandisi and Ntuthuzo Ndzomo, began coming to meetings and soon recruited other friends. On April 24, 2008, the growing group began to meet weekly.¹⁹ "That was basically how the organization got going," says Isaacs.

But to grow, it needed a cause. EE had decided, based on the TAC example, that direct action was the most effective way to bring about change. It would try to enlist its members, the students most directly affected by inadequate education policy, in protesting current conditions. The first target was easy: broken windows.

Broken windows, missing books

Equal Education's first campaign was about broken windows at a single school, Luhlaza High School in Khayelitsha, a township of 600,000 in metropolitan Cape Town, about 30 kilometers southeast of downtown. The school, which taught 1,000 students, had 500 windows that had been broken for more than four years. Cold winter temperatures made it difficult for students to concentrate.

In June 2008, EE's Isaacs, Dwane and Hasson met with the high school's principal, teachers and student leaders as well as officials of the Western Cape Education Department (WCED). EE gathered 2,000 signatures on a petition and, when that got no reaction, held a rally in Cape Town

¹⁹ Equal Education 2008 Annual Report. See: <http://www.equaleducation.org.za/content/2013/08/14/Equal-Education-Annual-Report-2008.pdf>

on October 10 attended by 450 students from 18 high schools in Khayelitsha. Luhlaza students wrote articles for the local press and were interviewed on local radio. On November 13, Equal Education held a public meeting in Khayelitsha attended by more than 300 community members. WCED officials announced at the meeting that the windows would be fixed, and over the December/January summer break every broken window was replaced.²⁰

Isaacs liked the campaign, dubbed Fix Our Schools, because it was intuitive and the community could see tangible results. "One of the questions of strategy and tactics in any activist organization is to be, on the one hand, guided by evidence that will point you to important issues, but on the other hand, to be guided by what regular people regard as important issues and what speaks to them," he says.

But EE did not want to fight only for infrastructure improvements. It considered behaviors as well. For its second campaign, Equal Education decided to tackle tardiness, known in South Africa as latecoming. Like the broken windows campaign, the 'No to Latecoming Campaign' was chosen by the *equalisers* themselves, through discussions that aimed for consensus. On May 4, 2009, *equalisers* stood outside their schools at 7:30 a.m. and handed out leaflets detailing the damage latecoming caused both students and teachers. The demonstrations raised awareness, sparked discussion and dramatically reduced the number of latecomers. At one Khayelitsha high school, the tardy rate fell from 121 a day at the beginning of the month to one by the end.²¹

Books. The organization's third campaign was for school libraries. Only 8 percent of South Africa's public schools had functional libraries, and only about a quarter had a library at all.²² EE decided to advocate for a library and full-time librarian in every public school. On September 22, 2009, Equal Education held a march to Cape Town City Hall to launch the libraries campaign. About 3,000 students participated, and the march garnered national and international press coverage.²³ The campaign featured the slogan "one school, one library, one librarian."

Six months later, seeing little improvement, EE upped the ante. On March 21, 2010, it held first an outdoor hip-hop concert and then a march to parliament in Cape Town. The events drew 10,000 people. The marchers delivered a memorandum addressed to Minister of Basic Education Angie Motshekga that reiterated the call for libraries in every school. "During that campaign, Equal Education really built a national profile," says Brad Brockman, then-editor of the EE

²⁰ Ibid.

²¹ Equal Education 2009 Annual Report. See <http://www.equaleducation.org.za/content/2013/08/08/Equal-Education-Annual-Report-2009.pdf>

²² Ibid.

²³ Celia W. Dugger, "South African Children Push for Better Schools," *New York Times*, September 24, 2009. See: http://www.nytimes.com/2009/09/25/world/africa/25safrica.html?_r=2&hpw

publication *The Equalizer*. “We really put this issue of access to books and literacy for the very poor and working-class onto the national agenda.”²⁴

The campaign also got results. “We managed to get the national department to publish a set of guidelines for school libraries in the middle of 2010,” says Brockman. “We were also able to [impel] provincial education departments to strengthen the roll-out of school libraries.” But that still left plenty of school-related issues to address.

Campaign for school infrastructure

During Equal Education’s libraries campaign, the organization repeatedly encountered a harsh reality: many schools were in such bad shape that the lack of a library was not the most pressing need. Of the nation’s 24,793 schools, 2,611, or 11 percent, had an unreliable water supply; 2,402 (10 percent) had no water supply; 3,544 (15 percent) had no electricity; 11,450 (46 percent) had pit latrines; and 913 (4 percent) had no toilet facilities.²⁵ “Throughout that campaign, we were confronted by the argument that... in terms of the backlogs which we have inherited from apartheid, in terms of the available resources that we have, we need to focus on schools without access to water, electricity and toilets,” says Brockman.

Equal Education also found that there was nothing in the law that required schools to have an adequate physical infrastructure, let alone libraries. “Securing some type of legal requirement would be a good thing for the libraries campaign, but it seems weird to be doing it for libraries when it’s not even required for running water,” says Isaacs.

NPEP. But in 2010, Dmitri Holtzman, an Equal Education researcher and parliamentary liaison officer, came across a recently-published Ministry of Basic Education national policy document. On June 14, 2010, Minister Motshekga had issued a National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (NPEP), which stated that norms and standards for school infrastructure would be issued and adopted by March 21, 2011 (fiscal year-end). These norms and standards would establish a legal baseline for school infrastructure and stipulate how everything from water and electricity to libraries would be supplied to all schools across South Africa over a 20-year period. “This would be a set of regulations that would have the force of law, which guidelines do not,” says Brockman. “This is what the [ministry] itself was committing to.”

²⁴ Author's interview with Brad Brockman in Khayelitsha, South Africa on January 21, 2014. All further quotes from Brockman, unless otherwise attributed, are from this interview.

²⁵ NEIMS (National Education Infrastructure Management System) Reports May 2011. See <http://www.education.gov.za/LinkClick.aspx?fileticket=hHaBCAerGXc=&tabid=358&mid=180>

In response, Equal Education in January 2011 decided to broaden the library campaign to cover all aspects of school infrastructure. They labeled it the Campaign for Norms and Standards for School Infrastructure. “Our initial thought was that we were just going to hold them to their promise to adopt these norms and standards by the end of March 2011,” says Brockman. The campaign’s first step was to publicize Section 5A of the 2007 South Africa Education Laws Amendment Act that called for the ministry to develop binding norms and standards. “We hooked on to that, saying parliament is asking you to do this. Why have you never done it?,” says Isaacs. “That was the point on which our campaign struck repeatedly. Members can even quote the relevant sections of the law.”

Equal Education wrote letters to Minister Motshekga and met with her in Cape Town on February 10. The ministry repeatedly committed to drafting norms and standards, says Brockman. Nevertheless, EE was prepared for it to miss the March 31 deadline. To add pressure, EE organized a massive demonstration and, on March 21, 20,000 students marched to the national parliament building in Cape Town. March 21 was the anniversary of the Sharpeville Massacre, celebrated as Human Rights Day in South Africa. The marchers presented a memorandum about norms and standards addressed to Motshekga and President Jacob Zuma.²⁶ The memorandum, read to the crowd by Equaliser Qayisani Dlakani, was a plea to be heard:

We, the majority, sit in over-crowded classrooms, without textbooks, without laboratories and without libraries. Some have air-conditioned classrooms, and laptops on their desks, but we have broken windows, dust, and empty walls. We sit in unsafe buildings and cannot use the blocked toilets. But we know that things can get better.

Nevertheless, Minister Motshekga missed the deadline.

Summit. The March 21 demonstration was an illustration of Equal Education’s growing stature and capability. It capitalized on its increased visibility to organize a national summit, the People’s Summit for Quality Education. The meeting, held June 25-27, 2011 at the University of Cape Town and in Khayelitsha, drew 400 people representing 50 nongovernmental organizations (NGOs) and most of the country’s teachers unions.

Minister Motshekga delivered the opening address, and took the opportunity to respond to the EE norms and standards campaign. She took a combative tone, accusing Equal Education of arrogance and rudeness. She blamed the missed deadline on the requirement that she obtain “concurrence” from provincial education ministers, though the actual legal requirement was to consult, a key distinction well known to the *equalisers*. Declaring norms and standards “crucial,”

²⁶ See: [http://dl.dropboxusercontent.com/u/9750885/Education Memorandum to President Zuma %26 Minister Motshekga.pdf](http://dl.dropboxusercontent.com/u/9750885/Education%20Memorandum%20to%20President%20Zuma%20Minister%20Motshekga.pdf)

she gave credit to the ministry, not EE, for raising public awareness about the condition of the country's schools. "We are the ones who own up first," she said in her speech. "No one tells us; we are the ones who give that information."²⁷

Achmat, then Equal Education chair, gave the closing address. Drawing on a proposal made by *equalisers* at a recent youth group meeting, he announced that, beginning on July 12, EE members planned to sleep outside parliament and remain until the minister issued the school infrastructure regulations which, EE maintained, she had the authority to create unaided. As promised, about 100 Equal Education demonstrators on July 12 set up tents and spent the night outside parliament. Faced with the prospect of arrest for exceeding their one-day permit, they chose to spend only one more night after negotiating with police. The South African media widely covered the action.

Going to court

But still there were no regulations. So on August 3, 2011, Equal Education sent a letter to Minister Motshekga threatening legal action if she didn't issue a draft for public comment of norms and standards "without further delay."²⁸ On October 10, the minister replied in a letter that she would not issue binding norms and standards but rather nonbinding guidelines. She wrote:

As you may be aware, the South African Schools Act (SASA) does not compel me to promulgate Minimum Norms and Standards for School Infrastructure... Section 5A of the SASA gives me discretion on whether or not to promulgate such Norm and Standards.²⁹ The section further gives me discretion on the manner in which to promulgate such Norms and Standards: I can do so by means of regulations, or by any other means. Section 5A does, however, compel me to consult with the Council of Education Ministers (CEM). As proof of the Department's commitment to improving education, we have compiled proposals on how to improve the

²⁷ See: http://www.equaleducation.org.za/content/2013/06/08/25-06-2011_Minister_Speech_at_Peoples_Summit_for_Quality_Education.pdf

²⁸ See: http://www.equaleducation.org.za/sites/default/files/Annexure_YD7.pdf

²⁹ Provisions 1 through 2a of Section 5A of the South African Schools Act of 1996 were: 1) The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for a) school infrastructure; b) capacity of a school in respect of the number of learners a school can admit; and c) the provision of learning and teaching support material; 2) The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following: a) In respect of school infrastructure, the availability of i) classrooms; ii) electricity; iii) water; iv) sanitation; v) a library; vi) laboratories for science, technology, mathematics and life sciences; vii) sport and recreational facilities; viii) electronic connectivity at a school; and ix) perimeter security.

provision of school infrastructure in all nine provinces... The CEM agreed to adopt the proposals as guidelines on school infrastructure.³⁰

After numerous assurances that she intended to deliver binding norms and standards, the minister had changed course. This confronted Equal Education with a decision: had the time come to file suit? “We exhausted our ability to press them to adopt the norms and standards without going to court, which was always going to be the last resort,” says Brockman. “We had marched, we had petitioned, we had met with them, we had drafted letters, we had slept outside parliament, and we had been very vocal in the media [and] social media.”

Litigation is like a weapon and sometimes the threat of using it is as important as the weapon itself, says Geoff Budlender, a prominent South African human rights senior counsel who led Equal Education’s legal team. But once you’ve used the weapon, the threat is gone. “The question really became, had the moment arrived to fire this weapon or was it better to keep it as a threat?” he says. “They felt, and I felt, that the threat had lost its potency, that there’s only a certain number of times you can threaten and not act, and they needed to show their teeth.”³¹

Equal Education’s demonstrations and informational activities had laid a solid foundation for legal action, thanks mostly to media coverage. News reports helped the public understand EE’s position, maintained political pressure on the minister, and ensured that the judge was familiar with the case. “The buildup was also important for the litigation itself, because it was important to be able to show the judge that this was not people running to court at the first opportunity without making other efforts to resolve the problem, that every other effort had been made,” says Budlender.

In combining activism with litigation, Equal Education was taking a page out of the Treatment Action Campaign’s playbook. TAC had built a strong grassroots movement supporting antiretroviral treatment for people living with HIV and AIDS. “They were also able to marshal public opinion and support behind that campaign so that by the time they went to court and demanded Nevirapine for expectant mothers, the whole country was behind them,” says Brockman. “That is what we sought to do.”

May or Must? All the EE preparations did not guarantee a legal victory, however. Minister Motshekga’s October letter went straight to the weak point of the case. Section 5A begins: “The Minister may... prescribe minimum uniform norms and standards.” That was a problem for EE. “The critical provision in the statute says that the minister ‘may’ make norms and standards. It doesn’t say she shall,” clarifies Budlender. “Usually, the use of the word ‘may’ involves

³⁰ See: http://www.equaleducation.org.za/sites/default/files/Annexure_YD53.pdf

³¹ Author’s interview with Geoff Budlender in Cape Town, South Africa on January 18, 2014. All subsequent quotes from Budlender, unless otherwise attributed, are from this interview.

discretionary power rather than an obligation. So we had to try to build a case to get around that difficulty.”

Equal Education’s approach was to place the provision in context, making it clear that the word “may” indicated an obligation. The preamble to the act said that norms and standards were necessary for effective education.³² “We said that the word ‘may’ must be read in the context of the preamble, which says ‘this is what must be done’,” says Budlender. “Sometimes ‘may’ confers a power coupled with a duty to act.” Second, EE invoked the constitutional right to basic education, which in its view included the right to a decent infrastructure. EE aimed to demonstrate, using the government’s own data, that school infrastructure was in a bad state, that infrastructure had a material impact on school performance, and that improving infrastructure would improve the quality of education. “All of that leads to an argument that improving the infrastructure is a necessary part of giving effect to the constitutional right to a basic education,” says Budlender.

Finally, EE planned to invoke racial inequality. It would argue that the school system was perpetuating and deepening inequality, and that the inequality was principally racial in character. Racial inequality was prohibited by the constitution, and EE held that there was an equality right to decent school infrastructure in order to get a decent education. “That won’t happen unless there are binding obligations on government,” says Budlender. Equal Education’s leadership, nervous about taking legal action, brought in retired Constitutional Court judges for advice. “We knew that ultimately the case might come down to this legal technicality [how to interpret ‘may’], but we wanted to put the government on trial with overwhelming evidence,” says Isaacs.

In the final months of 2011 and early 2012, Equal Education prepared the court case. It gathered dozens of affidavits from students, teachers, principals and parents, and marshaled academic evidence on the connection between school conditions and educational outcomes. “We wanted to drown the court in true stories of what it actually means for these schools that have no infrastructure,” says Isaacs. He explains:

It’s often difficult to convince people to make a sworn statement, because then their name is involved and they can be targeted. People are worried about losing their jobs. There were about 40 who did [provide statements]. Just unbelievable stories. Not only stories of the situation in school, but also all of the efforts over all of the years to try to change things.

On March 2, 2012, Equal Education filed suit in the Eastern Cape High Court to compel Minister Motshekga to issue binding norms and standards for school infrastructure. A trial was

³² WHEREAS **it is necessary** [emphasis added] to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa etc.

scheduled for late November. On March 21, the organization staged protests around the country, including a march in Khayelitsha.

Re-org. Equal Education was still growing and, from July 8-11, held its first National Congress. Delegates from every branch in the country gathered in the Johannesburg-area township of Tembisa and at the University of Johannesburg. The leadership had decided to reorganize. EE eliminated its board of directors and instead elected a national council. The time had come for final authority to rest with people elected by and from the membership, says Isaacs. Members elected Brockman as the organization's general secretary, Dwane as chair and Isaacs as deputy general secretary. "One of the things that we agreed upon in the Congress... was to involve our members in each and every decision that this movement is taking," says Bayanda Mazwi, a high school student who was elected deputy chair representing students.³³

EE didn't forget its campaign, however. On July 12, it held a protest march for norms and standards in Tembisa.

Settlement and a draft

On August 15, 2012, the government's National Planning Commission released a National Development Plan-2030, which stated that guidelines for public school infrastructure "should be legislated to ensure that they are adhered to." Over the next several months, the auditor general, the Human Rights Commission and the Fiscal and Finance Commission also took positions that aligned with Equal Education's, which gave more weight to the organization's norms and standards campaign.

Equal Education, meanwhile, planned a mass demonstration in the city of Bhisho outside the Eastern Cape High Court to coincide with the trial at the end of November. "We put together one of our most ambitious stunts ever," says Isaacs. He explains:

We were going to camp on this field, in this rural area outside the High Court, for three or four days. We had water trucks and tents and power. We were basing it on stuff we had read about the [US civil rights] march from Selma to Montgomery.

Then on November 17, three days before the case was scheduled to be heard, Minister Motshekga called Equal Education and offered to settle. EE's legal team flew to Johannesburg to meet with the minister and her staff. An offer to settle generally poses a difficult choice, says Budlender. "You might do better in court," he says.

³³ Author's interview with Bayanda Mazwi in Khayelitsha, South Africa on January 20, 2014. All further quotes from Mazwi, unless otherwise attributed, are from this interview.

The litigation, the court process itself can help to mobilize and organize and it becomes a public spectacle rather than a closed, quiet, behind-doors process. But you run the risk, of course, of the court saying you have already had a reasonable offer made to you and you are being unreasonable. That can be demobilizing.

On November 19, one day before the court date, Minister Motshekga and Equal Education entered into an out-of-court settlement. She agreed to publish draft norms and standards for public comment by January 15, 2013, and final regulations by May 15. "They completely capitulated," says Isaacs. "They agreed to a deadline to create the regulations. It was an anti-climactic victory. The one thing which we compromised on was not making it an order of the court. It's an agreement between the parties."

Weak draft. On January 9, 2013, Minister Motshekga published a draft of Norms and Standards for School Infrastructure. The draft was so short and insubstantial that some EE members thought it was a summary. "The Minister published a very poor set of draft norms and standards, which took us by surprise by just how empty and bad they were," says Brockman. "That angered us, and we criticized those norms and standards vocally."

From January 9 to March 31, Equal Education held public hearings, gathered comments from citizens and experts, and submitted a detailed response to the minister. It also prepared the next salvo in its public relations campaign. From April 23-26, EE escorted Archbishop Thabo Makgoba, South African Human Rights Commissioner Lindiwe Mokate, and seven prominent writers, activists and academics around schools in the Eastern Cape. The visit was filmed and Equal Education produced a video.³⁴ "That trip took the campaign for norms and standards back onto the front pages of newspapers, back onto television sets, back onto radios throughout the country," says Brockman. He adds:

It put the situation in the Eastern Cape and the need for norms and standards and the very poor draft that had been submitted by the minister in January back on the public agenda in a very, very big way. In fact, the president made a statement, after the first or the second day, about poor school infrastructure in the Eastern Cape.

Rushing into a quandary

Still, EE hoped that the final regulations, due by mutual agreement on May 15, would be complete. However, on Thursday, May 9, 2013, Minister Motshekga wrote a letter informing Equal

³⁴

See: <http://www.equaleducation.org.za/video/2013-06-04-fixourschools-norms-standards-for-school-infrastructure-now>

Education that she would not make the deadline. She asked for more time, but didn't specify how much. In a quasi-admission of its inadequacy, she did admit that she would have to substantially rewrite the January draft. Nonetheless, Equal Education saw the letter as a delaying tactic. "We were angry," says Brockman. He explains:

She had left it until less than a week before the 15th of May to write the letter. She had committed herself to finalizing these norms and standards by the 15th of May and she had reneged on that promise. We felt insulted that she wasn't taking us seriously, and we also felt a degree of regret that we hadn't insisted that the agreement be a court order, because then she would be in contempt of court.

Equal Education had to decide, grant the minister an extension or go back to court? Equal Education felt strongly that it needed to maintain the moral high ground. It wanted to be perceived as the aggrieved party, the one "getting messed around," says Isaacs. At the same time, it didn't want to appear weak. It also had to be strategic about the legal case itself. There was little time for deliberation. It was less than a week until the deadline, and Equal Education knew that every newspaper in South Africa was going to call for comment. "The events that took place then were very much influenced by the shortness of time," says Isaacs.

Grassroots. The next day, May 10, Brockman, Dwane and Isaacs decided to bring the membership into the decision-making process. The members were already scheduled to meet on Tuesday, May 14 at their schools. The leadership decided to convert the regular meetings to mass meetings at fewer locations where *equalisers* could gather in larger numbers to discuss what to do. They also decided to schedule a vote on whether to grant the minister an extension. "There was disagreement amongst the staff as to whether an extension should be granted," says Isaacs. He explains:

Yoliswa and I had doubled down into the no-extension position. We probably wanted there to be a vote so that there would a mandate from the membership .

Legal. On Saturday, May 11, the leadership had an e-mail exchange with the legal team. Budlender laid out the likely scenario if EE said no to an extension and went back to court. The court was unlikely to sanction the minister. Even in a case of noncompliance, the most likely consequence would be a further extension. When a government minister explains that an action will take a certain amount of time, courts are unlikely to second-guess them. "The court doesn't really have that knowledge and the courts will be very reluctant to get too involved," says Budlender. He amplifies:

They will think that they are exceeding their mandate. Separation of power issues start to be raised at a certain point. Who really can decide

how long it's going to take the government to make decent norms and standards?

On the other hand, granting the minister a short extension had benefits. If Equal Education took the minister back to court and the judge granted her an extension anyway, the consequences could be serious. "It will be reported on as that she's won and we've lost," says Isaacs. "They'll... portray us as having been unreasonable. And this little procedural issue will come to overshadow the substantive issues. And none of that appealed to us." The legal team recommended granting a one-month extension. As Isaacs recalls:

They basically said, 'Look, a one month extension is not really an extension. I mean, what's a month? But it lets you keep the moral high ground. What do you really lose by giving them a month? She hasn't asked for a specific time. So, you get to write back and say, yes you can have an extension. You can have one month. Here is your new deadline. Why would you not do that?' It was very compelling.

The vote. On Monday, Brockman briefed the Youth Organizers, young adults who mentored and organized students at the local level, on how to run the mass meetings where the *equalisers* were to vote on an extension. "I had explained to the Youth Organizers that in the meetings they should explain to the *equalisers* that this was not a vote the result of which would determine our course of action, but that it was to give the National Council, which is the body entrusted with making this decision, a clear sense of how the *equalisers* felt about this particular issue," he says.

On Tuesday, May 14, the Equal Education Youth Groups met to vote on the extension. As expected, the *equalisers* and Youth Organizers voted overwhelmingly to deny the request. "The *equalisers* wanted to go to court," says Luyolo Mazwembe, an Equal Education community leader. "They were ready for court."³⁵

Deadline. On Wednesday—deadline day—the National Council, which included *equalisers*, held a teleconference to decide what to do. The council members respected the advice from the legal team to grant a one-month extension. At the same time, they shared the membership's anger at the minister. The idea of giving her any extension went against the grain after several years of struggle and the frustration of watching the settlement victory fizzle into business as usual. Should EE take its lawyers' advice? An extension seemed to offer a good chance of winning in the long run.

³⁵ Author's interview with Luyolo Mazwembe in Khayelitsha, South Africa on January 20, 2014. All further quotes from Mazwembe, unless otherwise attributed, are from this interview.

Or should they honor the vote? Ignoring it could alienate core members. Equal Education was a grassroots movement, after all. Was the risk of a disaffected membership greater than the risk of losing the case? If they said no to the minister and lost the case in court, would the *equalisers* lose faith in the leadership anyway? Was holding a hard line with the minister the right thing to do regardless of the outcome of the case?

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