

EARLY CHILDHOOD DEVELOPMENT AND THE STATE'S DUTY TO PROVIDE BASIC NUTRITION TO YOUNG CHILDREN IN SOUTH AFRICA

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Executive summary

1. Sections 28(1)(c) and 29(1)(a) of the South African Constitution provide a strong legal foundation for the right of young children to nutrition.
2. Section 28(1)(c) clearly and explicitly gives every child the right to basic nutrition. In our view, it should be interpreted to mean that children from birth to school-going age must be provided with the minimum amount and type of nutrition necessary for their holistic development, as defined under section 91(1) of the Children’s Act of 2005.
3. Section 29(1)(a) gives everyone the right to basic education. Although it does not explicitly mention nutrition, it can—in light of South African jurisprudence and international law—be interpreted to include a right to the nutrition required for early learning and development.
4. The rights under sections 28 and 29 are immediately realisable and the state must take reasonable and effective steps to fulfil them. Since April 2022, the Department of Basic Education (DBE) has the primary responsibility for early childhood development (ECD) programmes. Following this function shift, and given both its direct and coordinating role under the Children’s Act, we are of the view that the state in general and the DBE in particular have a duty to take reasonable and effective steps to immediately ensure that all children receive basic nutrition in order to meet their developmental needs.
5. The means used to fulfil this duty may vary, however, depending on factors such as whether or not a child is enrolled in an ECD programme and whether that ECD programme is registered or unregistered. Further, there are other departments, such as the Department of Health, which have duties to provide nutrition support for young children, and part of the DBE’s role, following the function shift, is to exercise effective oversight over and ensure coordination of measures implemented by other government departments.
6. Currently, the main mechanism by which the state provides nutrition to young children at ECD programmes is the ECD subsidy. The DBE is now responsible for administering this subsidy. However, there are two main problems with the subsidy. First, its value is too low, at just R17 per eligible child per day. Second, its reach is too limited. Just 34% of children are enrolled at



an ECD programme, and just 33% of ECD programmes report that they receive the subsidy. In other words, it is a minority of children who are enrolled at an ECD programme and a minority of those who benefit from the ECD subsidy.

7. There is also the National School Nutrition Programme (NSNP). However, while the NSNP provides meals for children in Grade R at primary schools, it does not extend to children attending ECD programmes. This means that the NSNP does not reach millions of children in their early development phase.
8. Overall, our view is that reasonable and effective measures have not been put in place to immediately ensure that all children receive basic nutrition in order to meet their developmental needs.
9. To meet their duties in this regard, the DBE should take the following steps:
 - **In the short term**, the DBE should create an ECD nutrition programme to ensure that all children who are eligible for the Child Support Grant and who attend a registered or unregistered ECD programme are fed meals that are adequate to meet their developmental needs. It is especially important to cater for both registered and unregistered ECD programmes in the short term, given that current registration requirements are too onerous and the majority of ECD programmes are not registered.
 - The DBE should also ensure that it exercises effective oversight over other departments who deliver nutrition support to young children, including the Department of Health. This could be done through existing mechanisms, such as the national Inter-Ministerial Committee for ECD.
 - **In the longer term**, the DBE should simplify the registration process, which may reduce the need for an ECD nutrition programme to cover unregistered programmes. The DBE should also expand the availability of and access to ECD programmes, given that currently a majority of children are not enrolled in a programme (whether registered or unregistered).



10. To an extent, the existing legal and policy framework provides an enabling environment for an ECD nutrition programme. However, improvements could be made. Drawing on comparative research, we further recommend the following:

- **In the short term**, the DBE should update the NSNP policies or develop a stand-alone ECD nutrition policy to cover the roll-out of a new ECD nutrition programme.
- **In the longer term**, it would arguably be helpful if any new ECD nutrition programme in South Africa had a clear and fairly detailed foundation in primary legislation, in order to entrench the programme, ensure longevity, and provide a statutory basis for accountability. This could include a clear and explicit duty on the part of the state to provide nutrition support to children at ECD programmes.
- The laws and policies governing the nutrition programme must facilitate inclusivity. For example, in Brazil, the legislation specifically provides for children with health conditions requiring individualised nutritional care and stipulates that they must be provided with a menu tailored to their needs. South Africa may wish to consider including a similar provision.
- It may also be helpful for South Africa to have specific coordinating bodies for the delivery of an ECD nutrition programme. At the national level, South Africa could establish a body similar to the National School Meals and Nutrition Programme Inter-Ministerial Committee in Kenya or the Empowered Programme Committee in India. In both Kenya and India, there are similar coordinating bodies at each level of government. South Africa could also consider establishing such bodies at the provincial and municipal levels. These coordinating bodies should include a role for nutritionists.



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List of abbreviations

CESCR	Committee on Economic, Social and Cultural Rights (United Nations)
CNAE	National Company for School Feeding (Brazil)
Covid-19	coronavirus disease 2019
CSG	Child Support Grant
DBE	Department of Basic Education
DoH	Department of Health
DSD	Department of Social Development
ECD	early childhood development
EELC	Equal Education Law Centre
FNDE	National Fund for the Development of Education (Brazil)
ICDS	Integrated Child Development Services (India)
INP	Integrated Nutrition Programme
MEC	Member of the Executive Council
NFSA	National Food Security Act (India)
NIECDP	National Integrated Early Childhood Development Policy
NPO	non-profit organisation
NSFP	Namibian School Feeding Programme
NSNP	National School Nutrition Programme
PNAE	National School Meal Programme (Brazil)
RR4ECD	Real Reform for Early Childhood Development
UN	United Nations
WFP	World Food Programme



Early Childhood Development and the State's Duty to Provide Basic Nutrition to Young Children in South Africa

Overview

1. The Real Reform for ECD (RR4ECD) campaign sought a legal research paper on the right to nutrition for young children in South Africa. RR4ECD is an alliance supported by over 200 organisations, working towards securing and strengthening the right to early childhood development (ECD) for millions of young children in South Africa.
2. It is well established that adequate nutrition during early childhood contributes to a child's ability to thrive and survive (see Müller, Ronaasen, and Besada in the Real Reform for ECD Right to Nutrition Series).¹ The Equal Education Law Centre (EELC) was asked to consider what constitutes "basic nutrition" from a legal perspective and whether the state has a duty to provide basic nutrition to young children in South Africa. We were also asked to consider laws and policies in other jurisdictions that promote the right to nutrition for young children and to make recommendations as to the laws and policies that could be put in place in South Africa.
3. This paper is intended to inform an advocacy campaign, coordinated by RR4ECD, for the provision of basic nutrition support by the Department of Basic Education (DBE), in consultation with the Department of Health (DoH), to all attendance-based ECD programmes regardless of their registration status. As such, it forms part of the Real Reform for ECD Right to Nutrition Series. There are two other papers in the series. Whereas this paper considers basic nutrition from the viewpoint of law, the paper by Müller, Ronaasen, and Besada looks at what constitutes adequate nutrition from the

¹ See, for example, <https://nurturing-care.org/what-is-nurturing-care>



perspective of health;² while the paper by Droomer et al. focuses on potential modalities for expanding and improving nutrition support to ECD programmes.³ A synthesis of the three papers, compiled by the Equality Collective serving as the RR4ECD secretariat, presents the key messages and recommendations emerging from the research series as a whole.⁴

Do young children have a right to nutrition in South Africa?

The Constitution

4. The right of young children to nutrition can be located in a number of provisions of the South African Constitution. Most obviously, section 28(1)(c) clearly and explicitly gives every child the right to basic nutrition. Also relevant are sections 27(1)(b) and 29(1)(a). An overview of these sections is set out in the immediately following paragraphs. The content of the right and the state's duties under each section are explained more fully under separate headings.

Section 28

5. Section 28 of the Constitution states:

(1) Every child has the right—

[...]

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

² Müller, A, Ronaasen, J, Besada, D, 2023, "Adequate nutrition: A pillar of early childhood development", *Real Reform for ECD Right to Nutrition Series*, <https://www.ecdreform.org.za/#downloads>

³ Droomer, L, Cooper-Bell, T, Linderboom, S, Scholtz, K, Besada, D, 2023, "Implementation strategies for nutrition support to children in early learning programmes", *Real Reform for ECD Right to Nutrition Series*, <https://www.ecdreform.org.za/#downloads>

⁴ Equality Collective, 2023, *Providing Nutrition Support for ECD: Synthesis Report of the Real Reform for ECD Right to Nutrition Series* [Compiled by Kudrat Virk]. <https://www.ecdreform.org.za/#downloads>



(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

[...]

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section "child" means a person under the age of 18 years.

6. Section 28(1)(c) of the Constitution gives every child the right to basic nutrition, as well as shelter, basic healthcare services, and social services.
7. Under section 28(1)(c), children are the only rights-holders. For the purposes of section 28, a child means a person under the age of 18 years⁵ and there are no special rights accorded under section 28 to children in the ECD phase, often considered to be the phase from pre-birth to age eight. However, the content of the rights under section 28 will vary according to a child's age and developmental stage.⁶
8. Unlike in the case of section 27, there is no progressive realisation clause contained within section 28. This means that the right under section 28(1)(c) is immediately realisable and not subject to available resources or budgetary constraints.⁷

Section 27

9. Sections 27(1) and (2) of the Constitution state:

(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

⁵ Section 28(3) of the Constitution.

⁶ See "What is the content of this right?" in this paper.

⁷ This is further explained under the heading "What are the state's duties in respect of the right?" in this paper.



(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

10. Section 27(1)(b) gives everyone the right to have access to sufficient food and water. This right is broader than the right under section 28(1)(c) in two respects. First, the right under section 27(1)(b) is held by everyone. This includes, though is not limited to, children. Second, it is a right of access to sufficient food, while the right under section 28(1)(c) is a right to basic nutrition. The distinction between the right of access to sufficient food and the right to basic nutrition is explained further later, under the heading “What is the content of the right?”.
11. The state’s duties under section 27 are, however, more diluted than the duties under section 28. In common with many other socio-economic rights contained in the Constitution, duties are explicitly imposed on the state in respect of the rights contained in section 27, but these duties are limited by virtue of the wording of section 27(2), which requires only that the state “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.

Section 29

12. Section 29(1) of the Constitution states:

(1) Everyone has the right—

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

13. Section 29(1)(a) of the Constitution gives everyone the right to basic education. There is no explicit mention of food or nutrition in section 29. However, it is well established that the right under section 29 includes elements such as infrastructure, transport, and



nutrition, which are necessary to make education meaningful and effective.⁸ In the recent case of *Equal Education v Minister of Basic Education*,⁹ the High Court made very clear that one of the components of the right to basic education is the nutrition necessary for learning.¹⁰ At paragraph 42, the court unequivocally stated that “The Minister and MECs [Members of the Executive Council] have a constitutional and statutory duty to provide basic nutrition in terms of s29(1)(a)”. This precedent was subsequently relied on in an ECD context, with a High Court judgement requiring the payment of government subsidies to qualifying ECD providers during the national state of disaster to contain the spread of the coronavirus disease 2019 (Covid-19) pandemic.¹¹

14. It is important to note that ECD, or at least its early learning component, is increasingly considered to be part and parcel of the right to basic education.¹² There are some

⁸ For more on the development of the content of the right to education in South African jurisprudence, see Veriava, F, 2019, *Realising the Right to Basic Education: The Role of the Courts and Civil Society*, Juta & Company, Cape Town, 85–102; and Skelton, A, 2017, “Strategic litigation impacts: Equal access to quality education”, Open Society Justice Initiative, 51–55, available at <https://www.justiceinitiative.org/publications/strategic-litigation-impacts-equal-access-quality-education>

⁹ *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306; 2021 (1) SA 198 (GP). For commentary on the jurisprudential impact of the case, see Veriava, F and Ally, N, 2021, “Legal mobilisation for education in the time of Covid-19”, *South African Journal on Human Rights*, 37(2), 10–13; and Reyneke, M, 2020, “The constitutionality of suspending the South African National School Nutrition Programme during the Covid pandemic: The Equal Education case”, *International Journal for Education Law and Policy*, 16, 223–232.

¹⁰ *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306, paras 36–42.

¹¹ *SA Childcare (Pty) Ltd v Minister of Social Development* (unreported case number 36962/2020), at para 47. For a discussion of the case, see Ally, N, Parker, R, Peacock, T, 2022, “Litigation and social mobilisation for early childhood development during COVID-19 and beyond”, *South African Journal of Childhood Education* 12(2), 1–12.

¹² There is some debate as to whether all components of early childhood development (ECD), holistically understood, are adequately encompassed by the right to basic education. In this regard, it is important to note that early learning is only one component of the “essential package” of ECD services. Primary level maternal and child health, social services (including income support), nutritional support, and support for primary caregivers are also important components of ECD. Various articles of the United Nations (UN) Convention on the Rights of the Child also advance a holistic conception of ECD, with protection of not only the mental but also the moral, social, cultural, spiritual, personality, and talent rights of children. Some thus argue that while the right to basic education may protect one component of this holistic conception of ECD, a broader “right to development” framework is necessary when assessing the rights of children to early development. See Sloth-Neilsen, J and Philpott, S, 2015, “The intersection between Article 6 of the UN Convention on the Rights of the Child and early childhood development”, *Stellenbosch Law Review* 2, 295–317; Peleg, N, 2019, *The Child’s Right to Development*, Cambridge University Press, Cambridge; and Ally, N, Parker, R, Peacock, T, 2022, “Litigation and social mobilisation for early childhood development during COVID-19 and beyond”, *South African Journal of Childhood Education* 12(2), 1–12.



international instruments which arguably recognise that ECD is part of basic education. For example, the African Commission on Human and Peoples' Rights has, through the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, endorsed a generous approach to interpreting the right to education and has said that it "encompasses pre-school, primary, secondary, tertiary, adult education and vocational training".¹³ Though this does not explicitly include ECD, it explicitly mentions pre-school, and not just primary school.

15. Further, Fredman et al. have analysed the Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Rights of Persons with Disabilities and found strong support for a right to early childhood care and education.¹⁴ While none of these three treaties expressly refer to early childhood care and education (or to ECD), they state that education should be directed towards the full development of the child's personality, talents, and abilities and towards the preparation of the child to participate in society.¹⁵ Given that it is widely acknowledged that learning begins at birth, and given the broad acceptance of the fundamental importance of early learning, especially for disadvantaged children, Fredman et al. conclude that the right to early childhood care and education is implicit in the right to education in each of these treaties.¹⁶

¹³ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, at para 70.

¹⁴ Fredman, S, Donati, G, Richter, LM, Naicker, SN, Behrman, JR, Lu, C et al., 2022, "Recognising the right to early childhood education as a human right in international law", *Human Rights Law Review*, 2022, 22, 1–20. In their usage, the term early childhood care and education encompasses early childhood development, at 4.

¹⁵ Article 13(2), Article 29(1)(a), and Article 29(1)(d) of the Convention on the Rights of the Child; Article 13(1) of the International Covenant on Economic, Social and Cultural Rights; and Article 24 of the Convention on the Rights of Persons with Disabilities.

¹⁶ Fredman, S, Donati, G, Richter, LM, Naicker, SN, Behrman, JR, Lu, C et al., 2022, "Recognising the right to early childhood education as a human right in international law", *Human Rights Law Review*, 2022, 22, 1–20. In their usage, the term early childhood care and education encompasses early childhood development, at 7.



16. In particular, Fredman et al. point out that the Convention on the Rights of the Child Committee in General Comment No. 7 of 2005 called on state parties “to ensure that all young children receive education in the broadest sense which acknowledges a key role for parents, wider family and community, as well as the contribution of organised programmes of early childhood education provided by the State, the community or civil society institutions”.¹⁷ In addition, General Comment No. 4 of 2016 on the Right to Inclusive Education issued by the Committee on the Rights of People with Disabilities declared that state parties should “ensure access to quality early childhood development care and pre-primary education, together with the provision of support and training to parents and caregivers of young children with disabilities”.¹⁸ This provides a clear indication that the right to early childhood care and education, or at the very least its early learning component, is implicit in the right to education.
17. In this regard, it is notable too that in South Africa, there has been the migration of responsibility for ECD from the Department of Social Development (DSD) to the Department of Basic Education, which took effect on 1 April 2022. This is consistent with the idea that ECD is part and parcel of the right to basic education.
18. Since the right to basic education, interpreted in line with international law, arguably includes early learning and development, it follows, in light of South African jurisprudence, that it also includes a right to the nutrition required for early learning and development.
19. While the right to further education under section 29(1)(b) is subject to progressive realisation, the right to basic education under section 29(1)(a) is not. Hence—and as in the case of section 28(1)(c)—the right under section 29(1)(a) is immediately realisable, as

¹⁷ Fredman, S, Donati, G, Richter, LM, Naicker, SN, Behrman, JR, Lu, C et al., 2022, “Recognising the right to early childhood education as a human right in international law”, *Human Rights Law Review*, 2022, 22, 1–20. In their usage, the term early childhood care and education encompasses early childhood development, at 9.

¹⁸ Committee on the Rights of People with Disabilities, General Comment No. 4 of 2016 on the Right to Inclusive Education.



recognised by the Constitutional Court in *Juma Masjid Primary School v Essay*.¹⁹ If the right to nutrition required for early learning is a component of the right to basic education under section 29, then it too is immediately realisable.

What is the content of the right?

20. In the previous section, we set out the legal basis of young children’s right to nutrition. We now consider the content of that right.

21. While the section 27 right is framed in terms of “access to sufficient food”, the section 28 right is framed in terms of “basic nutrition”. Hence, the section 28 right is not merely a right of access to basic nutrition; it is a right to basic nutrition itself. The Constitutional Court in *Republic of South Africa v Grootboom*²⁰ considered the nature of a right of access in the context of housing. At paragraph 35, the court noted that a right of access to housing (as opposed to a right to the thing itself) “suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing”. At paragraph 36, the court explained that the nature of the right (and the nature of the state’s duty) will vary according to the individual’s economic position:

In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both

¹⁹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC), at para 37.

²⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46.



these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

22. By contrast, section 28 places no onus on children to secure basic nutrition for themselves. This is a common-sense view, given the unique and vulnerable position of children, especially young children, who cannot be expected to proactively secure their own rights. (Though, as we explain later, this does not mean that the onus is placed entirely on the state; caregivers also play a key role.)
23. The access point aside, “basic nutrition” is, in our view, distinct from “sufficient food”. Drawing on General Comment No. 12 of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), Chirwa has argued that food is broader than nutrition. While nutrition is concerned with meeting the dietary requirements of the human body, food has many other important purposes:²¹

Nutrition is a technical term in the field of health sciences that relates to issues of nourishment, food composition, dietary requirements, food nutrients and the assimilation of food nutrients by the human body. As a right, therefore, the right to nutrition must be concerned with the nutritional well-being of a person. The right to food, by contrast, is far broader than this. While one of the purposes of food is to achieve nutritional well-being, this is by no means its only function. People use food for many other important purposes, including spiritual or religious purposes, at festivities or for entertainment, for social harmony and for agricultural purposes. Thus

²¹ Chirwa, DM, 2009, “Child poverty and children’s rights of access to food and to basic nutrition in South Africa”, *ESR Review: Economic and Social Rights in South Africa*, 10(3), 4.



people do not take food only to live, but also to enjoy it and as a social and cultural good. The CESCR is therefore correct in stating that the right to food should not be interpreted in a narrow and restrictive fashion that reduces it to an entitlement to “a minimum package of calories, proteins and other specific nutrients”. To do so would clearly be equating the right to food with the right to nutrition. The right to food is concerned with all aspects of food, including its spiritual, recreational, social and agricultural aspects, in addition to issues of food security, availability, quality, safety and acceptability. For these reasons, nutrition should be regarded as forming part of the broader right to food. Because of its essence to one’s well-being or health, it is also often regarded as a vital part of the right to health.

24. In our view, the use of the word “basic” implies a minimum, or floor, below which a child’s level of nutrition cannot fall. Admittedly, and especially following *Mazibuko v City of Johannesburg*,²² the Constitutional Court may be understood as having rejected a “minimum core” approach to socio-economic rights. However, it is important to note that the court in *Mazibuko* was not dealing with an immediately realisable right such as the right to basic education or the right to basic nutrition.²³ And there is authority to suggest that rights of this kind may be treated differently by the court. In *AB v Pridwin Preparatory*

²² *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC), paras 48–67. The case followed the court’s judgments in *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46; and *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC), where the court was unwilling to adopt a minimum core content to the rights of access to housing and healthcare. The wisdom of the court’s approach has been extensively debated. See, for example, Bilchitz, D, 2003, “Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence”, *South African Journal on Human Rights*, 19(1), 1–26; Lehmann, K, 2006, “In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core”, *American University International Law Review*, 22, 163–198; Young, KG, 2008, “The minimum core of economic and social rights: A concept in search of content”, *Yale Journal of International Law*, 33, 113–176; Liebenberg, S, 2010, *Socio-economic Rights: Adjudication Under a Transformative Constitution*, Juta, 148–163 and 466–480.

²³ Indeed, the court’s rationale for rejecting minimum core content to the right of access to sufficient water (section 27(1)(b) of the Constitution) included that the right is subject to progressive realisation within the state’s available resources (paras 56–59).



School,²⁴ for example, the Constitutional Court implicitly acknowledged that the state is obliged to provide education of a certain standard. At paragraph 164, the court said:

[T]he term “basic education” refers primarily to the content of the right to education. On this understanding of the term, children attending non-subsidised independent schools are undoubtedly receiving and enjoying a basic education. The quality of the education may, at times, extend beyond what section 29(1)(a) requires from the state. But that does not mean that children stop receiving a basic education the moment they enroll at these independent schools, nor do they lose constitutional protection against unjustified interferences with their education while they remain at these schools. [Emphasis added]

25. In other words, section 29(1)(a) requires that the state provide education of a minimum standard or quality, though the actual standard of education provided at private (or indeed public) schools may go beyond this minimum.
26. Similarly, it can be argued that the use of the qualifier “basic” in relation to nutrition entails a certain minimum standard that must be met. How should this minimum level be assessed or determined? In our view, it must be assessed against what is necessary for a child’s holistic development. Under section 39(1)(b) of the Constitution, courts must consider international law when interpreting rights in the Bill of Rights, and a number of provisions of international law clearly link a child’s right to nutrition with a right to holistic development. For example, Article 14 of the African Charter on the Rights and Welfare of the Child gives every child the right to “enjoy the best attainable state of physical, mental and spiritual health” and South Africa, as a party to the charter, undertakes to pursue full implementation of this right, including by taking measures to “ensure the provision of adequate nutrition and safe drinking water”.

²⁴ *AB and Another v Pridwin Preparatory School and Others* (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).



27. Under section 91(1) of the Children’s Act of 2005,²⁵ ECD is defined as “the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school going age”. Especially in light of Article 14 of the African Charter on the Rights and Welfare of the Child, we consider that the right to nutrition under section 28 means that children from birth to school-going age must be provided with the minimum amount and type of nutrition necessary for their holistic development, as defined under section 91(1) of the Children’s Act.
28. Conceptually, the right to nutrition under section 29 of the Constitution is narrower than it is under section 28. This is because a young child’s right to nutrition under section 29 exists only so far as necessary for *early learning*, while section 28 requires children to have the nutrition necessary for their *holistic development*. However, the question of whether, and how much, the nutrition necessary for early learning diverges from the nutrition necessary for holistic development is an empirical one: It may be that there is, in fact, little if any gap between the two. Further, the two rights are mutually reinforcing. All children have a right to basic nutrition under section 28, and section 29 reinforces that right to the extent that nutrition is needed to support a child’s ability to engage in early learning activities.

What are the state’s duties in respect of the right?

29. Having set out the content of a young child’s right to basic nutrition, in this section we consider the state’s duties in respect of this right. As explained earlier, section 27 is only a right of access, and it is not immediately realisable. For these reasons, we consider that sections 28 and 29 provide a stronger foundation for the right of young children to basic nutrition, and we focus on these two sections for the remainder of the paper.

²⁵ 38 of 2005.



30. Section 7(2) of the Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights, including a child’s right to basic nutrition. This entails both positive and negative obligations.
31. The state’s negative obligation not to impair access to constitutional rights was identified by the Constitutional Court in the case of *Grootboom*,²⁶ subsequently applied in *Juma Masjid*²⁷ and *Equal Education v Minister of Basic Education*.²⁸ In the context of section 28, this negative obligation was interpreted by the High Court in *Equal Education v Minister of Basic Education* to mean that the state must not obstruct or end (without suitable replacement) existing programmes that fulfil a child’s right to basic nutrition, specifically the National School Nutrition Programme (NSNP).²⁹
32. That section 7(2) also imposes positive obligations on the state was recognised in the case of *Carmichele v Minister of Safety and Security*.³⁰ The nature of these positive obligations was articulated in *Glenister v President of the Republic of South Africa*, in which the Constitutional Court held, at paragraph 189, that “[i]mplicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective”.³¹ In so holding, the Constitutional

²⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46, at para 34 (in relation to the section 26 right to housing).

²⁷ See, for example, *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC), at para 58.

²⁸ *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306; 2021 (1) SA 198 (GP), at para 44.

²⁹ *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306; 2021 (1) SA 198 (GP), at paras 57–60. Other existing programmes are listed under the heading “What existing laws and policies support the delivery of basic nutrition to young children in South Africa?” in this paper.

³⁰ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC), at para 44.

³¹ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC), at para 182.



Court set the standard against which any actions taken by the state to fulfil its positive obligations must be assessed: Are the steps taken reasonable and effective?

33. Although it concerned the section 26 right to housing, which explicitly requires the state to take “reasonable legislative and other measures” towards the progressive realisation of the right, *Grootboom*³² is somewhat instructive as to the nature of a “reasonable” measure for the purposes of section 7(2).³³ At paragraph 43, the court held that “[a] programme that excludes a significant segment of society cannot be said to be reasonable”. And then, at paragraph 43, the court reiterated:

*Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*³⁴

34. Hence, as well as general food security measures, the state must put in place reasonable and effective measures aimed specifically at providing children with the minimum amount and type of food necessary for their holistic development. Such measures will not be reasonable if they “fail to respond to the needs of those most desperate”.
35. As noted earlier, section 28 does not contain any progressive realisation clause. Hence, children’s rights under section 28 are immediately realisable and not subject to budgetary

³² *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46.

³³ On the value of a “combined model” for reasonableness review and minimum core obligations, see Yeshanew, S, 2008, “Combining the ‘minimum core’ and ‘reasonableness’ models of reviewing socio-economic rights”, *ESR Review: Economic and Social Rights in South Africa*, 9(3), 8–13.

³⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46.



constraints in the same way as other socio-economic rights. This was recognised by the High Court in *Centre for Child Law v MEC for Education Gauteng*:

*[...] What is notable about the children's rights in comparison to other socioeconomic rights, is that s 28 contains no internal limitation subjecting them to the availability of resources and legislative measures for their progressive realisation [...] **the absence of any internal limitation entrenches the rights as unqualified and immediate.***

*Insofar as polycentric issues may arise from the courts becoming involved in budgetary or distribution matters, our Constitution recognises, particularly in relation to children's rights and the right to a fair trial, that budgetary implications ought not to compromise the justiciability of the rights. Each case must be looked at on its own merits, with proper consideration of the circumstances and the potential for negative or irreconcilable resource allocations. [...]*³⁵

36. Even so, there are limits to the state's positive obligations under this section. In common with all other rights contained in the Bill of Rights, section 28 is subject to the limitations of reasonableness and proportionality set out in section 36 of the Constitution:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

³⁵ *Centre for Child Law v MEC for Education Gauteng* 2008 (1) SA 223, paras 227I–228B.



37. Further, the courts have made clear that the state is not the primary duty-bearer when it comes to the realisation of the rights under section 28. Instead, and especially in light of section 28(1)(b), parents/caregivers are the primary duty-bearers. This was established in the case of *Grootboom*,³⁶ in which the Constitutional Court considered the relationship between section 28, section 27, and section 26.³⁷ Looking at a child’s section 28 right to shelter in context, the court held that parents/caregivers have the primary obligation to fulfil this right.³⁸ According to the court, the duty under section 28 does not extend to providing shelter for children and their parents/caregivers on demand. To hold otherwise would create an incongruity with sections 26 and 27 and the limits on the state’s obligations found in those sections. This, in the court’s view, was partly because shelter—which is not qualified by the word “basic”—is not meaningfully distinct from housing.³⁹ If the state were required under section 28 to provide shelter to children and their parents on demand, this would undercut the limits on its obligation to provide access to housing under section 26 and would similarly undercut the limits found in section 27.⁴⁰
38. However, the application of this line of reasoning was limited by the later Constitutional Court judgment in *Minister of Health v Treatment Action Campaign*.⁴¹ In that case, counsel for the state sought to rely on *Grootboom* to argue that section 28(1)(c) imposes an obligation on the parents of the newborn child, and not the state, to provide the child with basic healthcare services including protection against HIV. Rejecting this argument,

³⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46.

³⁷ Section 26 gives everyone the right to have access to adequate housing. Like section 27, it contains a progressive realisation clause, with the wording of section 26(2) mirroring the wording of section 27(2).

³⁸ At paras 77 and 78.

³⁹ At para 73.

⁴⁰ At paras 71 and 74.

⁴¹ *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).



the Constitutional Court held that it was the state’s responsibility to provide single doses of nevirapine to indigent mothers and their children:⁴²

While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in Grootboom that

“[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or families.”

The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are “most urgent” and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are “most in peril” as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.

The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them.

39. Hence, the state was ordered to, amongst other things, permit and facilitate the use of nevirapine in public hospitals (and not just at selected pilot sites) for the purpose of reducing the risk of mother-to-child transmission of HIV. Although the order was framed in terms of section 27, it is clear from the judgment that the court was also persuaded by the section 28 argument.

⁴² At paras 77–79.



40. Similarly, section 28, in our view, requires the state to take reasonable and effective steps to meet a child’s basic nutritional needs when parents and primary caregivers are unable to do so. As explained earlier, basic nutrition is distinct from access to sufficient food. Further—and unlike in the case of housing—basic nutrition can be provided to children independently of their parents, without needing to remove the child from their parents’ care. It may be impracticable to house a child and not their parent, but it is much more straightforward to feed a child and not their parent, especially if this is done through ECD centres and other early learning programmes, which can provide a targeted space for the provision of nutrition support to children. The upshot is that imposing a stronger obligation on the state to provide children with basic nutrition (under section 28) does not undercut the limits on its obligation to provide everyone with access to sufficient food (under section 27).
41. This view is supported by the recent judgment of the High Court in *Equal Education v Minister of Basic Education*, applying *Treatment Action Campaign*. In line with *Treatment Action Campaign*, the *Equal Education* judgment confirms that the state is obliged to provide basic nutrition to children in circumstances when parents and caregivers are unable to do so.⁴³ This includes circumstances in which parents cannot afford such provisioning.⁴⁴ It is notable too that the judgment emphasises that schools are “the critical

⁴³ At para 49, the court stated: “[...] The applicants and the amicus curiae both acknowledge that parents have a duty to maintain and care for their children, but that the state has a duty to provide appropriate care in the absence of parental or family care as a supplementary duty. The Minister and MEC’s have done so by providing one nutritious meal a day to poor learners, i.e. to learners whose parents cannot provide sufficient nutrition to their children. Suspension of the programme left this duty unfulfilled. As a matter of fact; the relevant children have been receiving at least one nutritious meal a day during school terms, as a matter of law; the Minister has through the NSNP fulfilled this right to provide basic nutrition”.

⁴⁴ See paras 51–52: “The Constitution does not contemplate that children whose parents cannot afford to feed them should be left to starve or must be removed from their parents. The Constitution envisages that section 28 of the Constitution will protect those children. In the Grootboom-matter the Constitutional Court did find that s28(1)(c) ensures that children are properly cared for by their parents and parents cannot shirk their parental responsibilities. But what is to happen when parents cannot provide basic nutrition to a child? [...] The State remains responsible to provide families with other socio-economic rights to enable them to provide for their children. This is exactly what the State did with the NSNP [...]”.



points of contact for reaching vulnerable children, with no other state service that can connect with children on such scale and with such regularity”.⁴⁵

42. Admittedly, the issue in *Equal Education v Minister of Basic Education* was the cessation of the provision of school meals under the NSNP during the Covid-19 lockdown. The state was not, in that case, required to set up a new programme. However, the court nonetheless made clear that the state has positive duties under section 28, which the NSNP was meeting. It follows that if the NSNP had not already existed, the state would have been constitutionally required to establish this programme or an equivalent programme: equivalent in the sense of being a reasonable and effective measure to meet the basic nutritional needs of children of indigent parents.

43. This duty is underscored by section 39(1) of the Constitution. Section 39(1) states that, when interpreting provisions in the Bill of Rights, the court should “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. Accordingly, the court in *Equal Education v Minister of Basic Education* found that it was of particular importance that the Department of Basic Education must continue to roll out the NSNP to protect the human dignity of children from poor families and ensure that they do not starve:

*If there was no duty on the Department to provide nutrition when the parents cannot provide the children with basic nutrition, the children face starvation. A more undignified scenario than starvation of a child is unimaginable. The morality of a society is gauged by how it treats its children. Interpreting the Bill of Rights promoting human dignity, equality and freedom can never allow for the hunger of a child and a constitutional compliant interpretation is simply that the Department must in a secondary role roll out the NSNP, as it has been doing.*⁴⁶

⁴⁵ At para 79. For analysis of the court’s approach, see Veriava, F and Ally, N, 2021, “Legal mobilisation for education in the time of Covid-19”, *South African Journal on Human Rights*, 37(2), 10–13.

⁴⁶ At para 53.



44. The argument that hunger and starvation are an affront to human dignity, equality, and freedom carries at least as much weight in the case of young children in the ECD phase, given their exceptional vulnerability.
45. We conclude that the state has a duty under section 28 to take reasonable and effective steps to immediately ensure that young children receive the minimum amount and type of nutrition necessary for their holistic development, at least in cases where this need could not otherwise be met by their parents or primary caregivers.
46. The duty under section 29 has all the same features: The state has a positive obligation to take reasonable and effective steps to immediately ensure that a young child's nutritional needs are met, where parents are unable to do so. However, the section 29 duty is arguably narrower in that it is a duty to ensure that all young children receive the nutrition needed to meet their basic early learning needs, as opposed to the nutrition needed for their holistic development. However, as noted earlier,⁴⁷ there may, in fact, be little gap between the nutrition required for early learning and the nutrition required for a child's holistic development. Further, and in any event, the right to basic nutrition under section 28 and section 29 are mutually reinforcing.
47. The state has a choice as to the means it uses to fulfil these duties. But the means chosen must be reasonable and effective.⁴⁸ Using ECD programmes—as opposed to, say, health clinics—as a delivery point for daily meals may be particularly effective, given that ECD programmes are one of the main places where young children routinely gather. Further, it is likely that feeding children at ECD programmes will help to ensure that they are

⁴⁷ See para 28 in this paper.

⁴⁸ See *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC), at para 191.



sufficiently nourished to engage with and benefit from the early learning opportunities offered at such programmes.

48. That being said, whatever means are chosen, they must take account of *all* children and cannot be limited to children in particular institutions. Regardless of whether a child is enrolled at a public institution (such as a Grade R or Grade RR class in a public school) or a private ECD centre or no institution at all, the state is obliged to meet the child's basic nutritional needs, at least where their parents/caregivers are unable to do so.
49. Similarly, then, the state must put in place measures to cover children at both registered and unregistered ECD programmes. Under sections 80 and 95 of the Children's Act, partial care facilities and ECD programmes are obliged to register, though it is possible for exemptions to be made. But the reality is that the majority of ECD programmes are not registered. According to the 2021 ECD Census, only 41% of "early learning programmes" were either fully or conditionally registered as a partial care facility, ECD programme, or both. One likely cause is that the requirements for registration are too onerous for more providers to be able to comply, especially providers in poor communities lacking basic infrastructure. There is increasing recognition of the need for the state to offer more support to ECD programmes to allow them to register. In any case, the state retains its constitutional obligations to the child, regardless of whether the programme the child attends has met their statutory obligation to register. It may be that a programme's unregistered status has a bearing on the specific measures it is reasonable for the state to adopt in respect of children at those programmes, but it does not negate the obligation to put reasonable and effective measures in place.
50. One possible way of identifying children whose nutritional needs cannot be met by their parents or primary caregivers is by using the eligibility criteria for the Child Support Grant (CSG): Children eligible for the CSG could also be targeted to receive nutrition support at ECD programmes. We note that such children already receive some nutrition support if they attend a registered ECD programme, by way of an ECD subsidy, a portion of which is ring-fenced for nutrition. This does not currently apply, however, to children at



unregistered ECD programmes. This point is explained in further detail later (under the heading “What existing measures are in place for the delivery of basic nutrition to young children in South Africa and are they sufficient to meet the state’s duties under sections 28 and 29?”).

51. Regarding department-specific duties, we note that even before the function shift, the Department of Basic Education had responsibilities for certain components of early learning, as reflected in the 2015 National Integrated Early Childhood Development Policy (NIECDP). These responsibilities included developing an early learning curriculum for children from birth to four years⁴⁹ and collaborating with the Department of Social Development to develop and register ECD programmes, thereby helping to ensure “universal availability and adequate quality of, and equitable access to, inclusive learning opportunities for children aged birth to until the year before they enter formal school”.⁵⁰
52. Now, and by virtue of the function shift, the DBE has primary responsibility for ECD programmes. By presidential proclamation, and as of 1 April 2022, every time Chapter 6 (Early Childhood Development) of the Children’s Act mentions the Minister or MEC for Social Development, it will now refer to the Minister or MEC for Basic Education. For the most part, Chapter 6 is concerned with ECD programmes. As a consequence of the

⁴⁹ National Integrated Early Childhood Development Policy 2015, 77.

⁵⁰ The National Integrated Early Childhood Development Policy 2015, at page 76, states that the Department of Social Development (DSD) “is responsible for ensuring the universal availability and adequate quality of, and equitable access to, inclusive learning opportunities for children aged birth to until the year before they enter formal school through the development, delivery, regulation, registration, quality monitoring, improvement and evaluation of early childhood development programmes”. It goes on to state that the DSD “will develop and register these programmes in collaboration with the Department of Basic Education”. However, in light of the function shift, it is strongly arguable that the responsibility for ensuring access to and quality of inclusive early learning opportunities now lies solely or at least primarily with the Department of Basic Education. It should also be noted that the 2015 National Integrated Early Childhood Development Policy contains indications that some early learning opportunities for children from birth to age two are the responsibility of the Department of Health (DoH). For example, at page 76, it states that the DoH “is responsible... for opportunities for learning and play for children from birth to 2 years, through health facilities and home visits by community health workers for children at risk of poor development outcomes”.



function shift, the DBE is now directly responsible for the delivery, regulation, registration, and monitoring and evaluation of ECD programmes.⁵¹

53. In respect of other ECD services, such as healthcare, social protection, and birth registration, the DBE now has a coordinating role. This includes, in particular, a duty to create a comprehensive national strategy aimed at securing a properly resourced, coordinated, and managed ECD system, which must be determined after consultation with interested persons and other relevant government ministers.⁵²
54. Given both its direct and coordinating role in relation to ECD, we are of the view that the DBE has a duty to take reasonable and effective steps to immediately ensure that all young children receive basic nutrition in order to meet their developmental needs, at least in cases where this need could not otherwise be met by their parents or primary caregivers. This includes both direct provision of nutrition support for early learning and oversight and supervision of the provision of supplementary nutrition and nutrition support by other departments, including the Department of Health.
55. Under the next heading, we consider whether existing measures are sufficient to meet the state's duties under sections 28 and 29.

⁵¹ See sections 94–103 of the Children's Act, read with the Presidential Proclamation. Arguably, the 2015 National Integrated Early Childhood Development Policy should be re-interpreted in light of the function shift, such that the responsibility for ensuring the universal availability and adequate quality of, and equitable access to, inclusive learning opportunities for children aged birth to until the year before they enter formal school now lies primarily with the Department of Basic Education, and not with the Department of Social Development.

⁵² See section 92 of the Children's Act, read with the Presidential Proclamation.



What existing measures are in place for the delivery of basic nutrition to young children in South Africa and are they sufficient to meet the state's duties under sections 28 and 29?

56. South Africa does not have a specific department with an overall mandate on food and nutrition issues. Instead, many different departments carry out functions relating to the right of young children to basic nutrition:
- The Department of Agriculture, Land Reform, and Rural Development is primarily responsible for food safety and quality assurance and food security.
 - The Department of Health has implemented interventions such as breastfeeding support and food fortification and leads on health and safety initiatives, including in relation to food preparation and storage at ECD programmes. The DoH has also issued guidance on nutrition for young children, in the form of the Nutrition Guidelines for Early Childhood Development Programmes and the Road to Health Booklet.
 - The Department of Social Development is responsible for poverty alleviation, social security, social development, and provision of welfare services and administers the Child Support Grant, part of the purpose of which is to ensure that children's nutritional needs are met.
 - The Department of Basic Education delivers the NSNP in schools and is now responsible for ECD programmes.



57. In 2014, the National Policy on Food and Nutrition Security proposed the establishment of a National Food and Nutrition Advisory Committee to be chaired by the Deputy President.⁵³ However, no such committee has in fact been established.
58. In addition, the NIECDP envisaged that the national Inter-Ministerial Committee for ECD would have a key role in ensuring the coordinated delivery of ECD services, including nutrition. The committee was to meet at least four times per financial year. However, our understanding is that, in practice, this committee has not met regularly and is not fulfilling the functions envisaged in the NIECDP. In recognition of this, the DBE is including in its 10-year sector plan for ECD an activity of strengthening institutional mechanisms, including the Inter-Ministerial Committee for ECD.
59. In the absence of such coordinating mechanisms, there have, to date, been a number of different (and uncoordinated) measures in place for the delivery of basic nutrition to young children in South Africa, led by different government departments.

ECD subsidy

60. Currently, the main mechanism by which the state provides nutrition support to young children at ECD programmes is through the ECD subsidy. In the 2021/2022 financial year, the Department of Social Development was allocated a conditional grant of R1.235 billion for ECD. The conditional grant has two components: an infrastructure component and a subsidy component. Following the function shift, this conditional grant was moved and allocated to the Department of Basic Education in the amount of R1.193 billion for the 2022/2023 financial year. Provinces also allocate budget to the ECD subsidy from their equitable share.

⁵³ National Policy on Food and Nutrition Security in GN 637 GG 37915 of 22 August 2014, available at https://www.gov.za/sites/default/files/gcis_document/201409/37915gon637.pdf



61. The value of the ECD subsidy varies between different types of ECD programmes. *ECD centres* are provided with a means-tested subsidy of R17 per child per day for a maximum of 264 days in a year and the subsidy is available in respect of children from households below set income thresholds. Currently, 40% of the subsidy, or R6.80 per child per day, is allocated for nutrition. *Non-centre-based ECD programmes* are provided with a means-tested subsidy of R6 per child per day for every day on which the programme is conducted during the year.
62. While the ECD subsidy goes some way towards meeting the nutritional needs of young children, it falls short of being a reasonable and effective measure. Nearly 60% of young children live below the upper-bound poverty line and 33% live below the food poverty line (a more extreme form of poverty with insufficient income to meet a child's nutritional needs). Yet the 2021 ECD Census found that only 33% of early learning programmes (whether registered or unregistered) stated that they received the ECD subsidy: 25% of fully or conditionally registered early learning programmes claimed not to receive a subsidy, while 5% of unregistered programmes claimed to receive a subsidy.⁵⁴ These figures are particularly stark given that, according to the census, only 1.6 million children are enrolled at an ECD programme and only 1.5 million are in regular attendance.⁵⁵ Enrolment rates range from 40% in Gauteng to 26% in the Eastern Cape, with an average of just 34% across provinces.⁵⁶ In short, it is a minority of children who are enrolled at an ECD programme and a minority of those who benefit from the ECD subsidy.
63. It should be noted that there have been some steps taken to widen access to the subsidy. In a media release on 26 January 2023, the DBE confirmed that ECD programmes will not

⁵⁴ Department of Basic Education, 2022, *ECD Census 2021: Report*, 33, available at <https://datadrive2030.co.za/wp-content/uploads/2022/09/ecdc-2021-report.pdf>

⁵⁵ Department of Basic Education, 2022, *ECD Census 2021: Report*, 39, available at <https://datadrive2030.co.za/wp-content/uploads/2022/09/ecdc-2021-report.pdf>

⁵⁶ Department of Basic Education, 2022, *ECD Census 2021: Report*, 39, available at <https://datadrive2030.co.za/wp-content/uploads/2022/09/ecdc-2021-report.pdf>



be required to register as non-profit organisations (NPOs) in order to be eligible to receive the ECD subsidy. All registered or conditionally registered programmes are eligible. Further, the ECD subsidy will be available in respect of all children who are attending a registered ECD programme and are in receipt of a Child Support Grant, or who are eligible for the Child Support Grant based on the CSG means test gazetted in a particular year.

64. That said, allocation of the subsidy is also contingent on sufficient funds being available, which allows the government to deny children access to the subsidy, even if they are eligible.
65. Further, it remains the case that unregistered programmes are generally unable to access the subsidy: Officially, only registered and conditionally registered programmes are eligible. Yet unregistered programmes and the children who attend them will typically be in greater need of the subsidy. This is because many of the barriers that prevent a programme from registering—such as poor infrastructure—stem from socio-economic disadvantage that also puts children at greater risk of food poverty. Partly for this reason, the 2020 Child Gauge found that the way the subsidy is administered and its eligibility requirements “prejudices programmes serving poor and rural communities” and “reinforces inequalities in children’s early childhood education, care and nutrition”.⁵⁷
66. Even for children who benefit from the subsidy, this does not necessarily mean that they are provided with the minimum amount and type of food necessary for their holistic development, or even to meet their basic early learning needs. The first problem is that while there are Nutrition Guidelines for Early Childhood Development Programmes,

⁵⁷ May J, Witten C, Lake L (eds), 2020, *South African Child Gauge 2020*, Children’s Institute, University of Cape Town, available at https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/ChildGauge_2020_lowres_18_02.pdf



issued by the Department of Health,⁵⁸ that provide ECD practitioners with guidance on planning, preparing, and serving appropriate, nutritious, adequate, and safe foods to children in their care, it is not clear that the value of the subsidy (R17 per child per day, R6.80 of which is for food) is sufficient to allow practitioners to meet the guidelines. (See Müller, Ronaasen, and Besada in this research series, for more on the implementation challenges of the Nutrition Guidelines.) This is because, according to the Pietermaritzburg Economic Justice and Dignity Group’s Household Affordability Index, the cost of feeding a nutritious diet to a child aged three to nine years is, as of January 2023, R748.47 per month or R24.61 per day (which, assuming the amount is divided equally between three meals in one day, would work out at R8.20 per meal).⁵⁹ Moreover, an “ideal menu”—one which would comply with the aforementioned DoH guidelines—has been costed, and it comes to R10.70 per child per day (at wholesale prices) in 2022 terms (see Droomer et al. in this research series). The second problem is that the subsidy is only provided for a maximum of 264 days in a year. In other words, it covers only weekdays and not weekends.

National School Nutrition Programme

67. Another mechanism by which the state meets the nutritional needs of some young children is the National School Nutrition Programme.
68. As mentioned earlier, the NSNP is a government programme that provides one meal per day to all learners in poorer primary and secondary schools, currently being implemented

⁵⁸ Department of Health, 2016, *Guidelines on Nutrition for Early Childhood Development Centres*, available at https://ilifalabantwana.co.za/wp-content/uploads/2016/12/Nutrition-guidelines-for-ECD-centres_Draft-2_30-September-2016.pdf

⁵⁹ Pietermaritzburg Economic Justice and Dignity Group, Household Affordability Index, January 2023, available at https://pmbejd.org.za/wp-content/uploads/2023/01/January-2023-Household-Affordability-Index-PMBEJD_25012023.pdf



by the DBE. Priority is given to learners in quintile 1–3 schools. The objective is to provide nutritious meals to learners to improve their ability to learn.⁶⁰

69. In 2020/2021, the NSNP was delivered in 21,189 schools.⁶¹
70. However, while the NSNP provides meals for children in Grade R at primary schools, it does not extend to children attending ECD programmes. In other words, the NSNP does not reach millions of children in their early development phase.

Interventions under the Integrated Nutrition Programme

71. The Department of Health, alongside the Department of Social Development and Department of Agriculture, Land Reform, and Rural Development, implements a number of other nutrition interventions for young children, such as breastfeeding support, targeted supplementary feeding, and food fortification in the form of vitamin A programmes. These are delivered under the auspices of the Integrated Nutrition Programme (INP), established in 1994 with the aim of improving nutrition in children and adults through inter-sectoral collaboration between departments.
72. Although these programmes relate to the right of young children to nutrition, they do not—taken together or separately—constitute reasonable and effective measures to provide young children with the minimum amount and type of food necessary for their holistic development. In an evaluation in 2014, the INP was found to have resulted in “little improvement between 1999 and 2012 in reducing underweight of children under 5”. This was attributed to a lack of effective coordination, with the INP being characterised “mainly as an approach rather than a formalised programme”, where “[e]ach

⁶⁰ Department of Basic Education, *Annual Report 2020/2021*, 211, available at https://www.gov.za/sites/default/files/gcis_document/202110/dbe-annual-report-202021.pdf

⁶¹ Department of Basic Education, *Annual Report 2020/2021*, 234, available at https://www.gov.za/sites/default/files/gcis_document/202110/dbe-annual-report-202021.pdf



department's interventions that contribute to [the] INP are not formally coordinated". In addition, there was no centralised monitoring and evaluation framework or platform for tracking nutritional outcomes.⁶²

Child Support Grant

73. The aforementioned nutrition programmes exist alongside other more general social assistance and poverty alleviation programmes for young children, including the Child Support Grant. The CSG is mandated by section 6 of the Social Assistance Act of 2004 and is administered by the South African Social Security Agency, which sits within the Department of Social Development. As of December 2022, it was accessed by over 13 million poor children. It is intended to cover the cost of food and other essentials.⁶³
74. The CSG is not designed exclusively to meet a child's nutritional needs, but to support their development and well-being more generally. It is notable in this regard that the DBE initiated and continues to implement the NSNP, notwithstanding the existence of the CSG.
75. The available research on the actual use of the CSG shows that some caregivers use it solely to meet their child's needs, while others use it to meet the needs of the household more generally or see it as a source of personal income. Uses of the grant include food, transport, healthcare, clothes (including school uniforms), and education and ECD services.⁶⁴

⁶² *Diagnostic/Implementation Evaluation of Nutrition Interventions for Children from Conception to Age 5: Summary Evaluation Report*, 31 March 2014, available at <https://knowledgehub.health.gov.za/system/files/elibdownloads/2019-07/Summary%20evaluation%20of%20nutritional%20interventions%20for%20children%20from%20conception%20to%20age%205%202014.pdf>

⁶³ See South African Social Security Agency, *Social Assistance Statistical Report December 2022*, available at <https://www.sassa.gov.za/statistical-reports/Documents/December%202022%20%20social%20assistance%20%20report.pdf>

⁶⁴ See Khosa, P and Kaseke, E, 2017, "The utilisation of the child support grant by caregivers: The case of Ba-Phalaborwa municipality in Limpopo Province", *Social Work*, 53(3), 356–367, available at http://www.scielo.org.za/scielo.php?script=sci_abstract&pid=S0037-80542017000300006. See also Mazikwana, TJ, 2020,



76. Yet the current value of the CSG is not adequate to meet a child’s nutritional needs, let alone their wider needs. As of April 2022, the value of the CSG was set at R480 per month, compared to R460 the previous year.⁶⁵ This is substantially below the food poverty line which, in 2022, was R663.⁶⁶ This means that—despite being intended to cover clothing, toiletries, transport, and other essentials, as well as food—the CSG is not enough even for basic nutrition. Under the 2023 budget, the amount of the CSG rose to R500 in April 2023 and is set to rise to R510 in October 2023 (in other words, its average value in 2023/2024 will be R505).⁶⁷ This is an average increase of 5.2%. Yet food inflation in January 2023 was at 13.4%.⁶⁸

Are the existing measures reasonable and effective?

77. The inadequacy of existing measures—both the Child Support Grant and nutrition-specific programmes—is apparent from the evidence presented in the 2020 Child Gauge, which focused specifically on nutrition. For example, it notes that stunting still affects more than one in four children:

Stunting is a sign of chronic malnutrition and rates have remained unacceptably high for the past 20 years, affecting one in four young children (27%). Stunting not only affects children’s physical growth, but it also impairs their cognitive development and

“Caregivers’ perceptions about the purposes, uses and adequacies of the Child Support Grant in Mfuleni, Western Cape, South Africa: Implications for social policy”, mini thesis, University of the Western Cape, available at <http://etd.uwc.ac.za/xmlui/handle/11394/7821>

⁶⁵ Increase in Respect of Social Grants in GN 1947 GG 46144 of 31 March 2022.

⁶⁶ See National Poverty Lines 2022, available at <https://www.statssa.gov.za/publications/P03101/P031012022.pdf>. See also Pietermaritzburg Economic Justice and Dignity Group, Household Affordability Index, December 2022, available at https://pmbejd.org.za/wp-content/uploads/2023/01/December-2022-Household-Affordability-Index-PMBEJD_28122022.pdf

⁶⁷ Budget Review 2023, available at <https://www.treasury.gov.za/documents/National%20Budget/2023/review/FullBR.pdf>

⁶⁸ Consumer Price Index January 2023, available at <https://www.statssa.gov.za/publications/P0141/P0141January2023.pdf>



ability to learn, with long term consequences. Stunting rates rise from 8 months old and peak at 40% amongst children 18–27 months old.⁶⁹

78. In addition, the 2020 Child Gauge notes the prevalence of “hidden hunger”, whereby deficiencies in micronutrients impair immunity and cognitive development. More specifically, it notes that 44% of children under five are deficient in vitamin A, while 45% of children aged one to nine are deficient in zinc, 15% are deficient in iodine, and 10% are deficient in iron.⁷⁰
79. In light of the persistence of childhood stunting (amongst other factors), the 2019 Early Childhood Review rated the existing delivery of nutritional support as *poor* (where other possible ratings were *fair* or *good*).⁷¹
80. The 2015 National Integrated Early Childhood Development Policy concluded its situational analysis by noting that a number of ECD services, including food and nutritional support, “are not universally available and are not accessed by especially vulnerable children”. It further noted:

Poor child nutrition outcomes in South Africa are attributable to poor implementation of available programmes as well as programmatic gaps. Notably, currently programmes do not make adequate provision of food for children with growth failure, for effective prevention of malnutrition through targeted prevention interventions

⁶⁹ May J, Witten C, Lake L (eds), 2020, *South African Child Gauge 2020*, Children’s Institute, University of Cape Town, 98, available at https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/ChildGauge_2020_lowres_18_02.pdf

⁷⁰ May J, Witten C, Lake L (eds), 2020, *South African Child Gauge 2020*, Children’s Institute, University of Cape Town, available at https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/ChildGauge_2020_lowres_18_02.pdf

⁷¹ Ilifa Labantwana, *South African Early Childhood Review 2019*, available at https://ilifalabantwana.co.za/wp-content/uploads/2019/09/SA-ECR_2019_12_09_2019_online_pages.pdf



*aimed at pregnant women and infants, or for broader public prevention communication.*⁷²

Unfortunately, it appears that programmatic gaps still exist today.

81. Overall, our view is that the state in general and the DBE in particular have not put in place reasonable and effective measures to immediately ensure that all young children receive basic nutrition adequate to meet their developmental needs.

What existing laws and policies mandate and support an ECD nutrition programme in South Africa?

82. In the previous section, we explained why existing measures are not sufficient to meet the state's duties under sections 28 and 29 of the Constitution. In this section, we consider whether the legal and policy framework provides an adequate enabling environment for more robust measures to be taken.

2015 National Integrated Early Childhood Development Policy

83. As explained earlier, the Constitution contains a number of rights mandating nutrition programmes for young children in South Africa: most obviously, section 28, but also section 29. A child's constitutional right to nutrition under sections 28 and 29 finds expression in the 2015 National Integrated Early Childhood Development Policy.
84. The policy defines the essential package of ECD services and includes nutrition as one of its five key priorities. More specifically, at paragraph 5.3.2, it sets an objective that:
- A national multi-sectoral comprehensive food and nutrition strategy for children younger than 5 years is reviewed and strengthened to ensure delivery of a*

⁷² National Integrated Early Childhood Development Policy 2015, 45.



comprehensive package of food and nutrition support and services both in the home and at community level, backed up by environmental health, health and social services that improve the nutritional health and well-being of infants and young children.

85. Amongst other things, this strategy should ensure “delivery and oversight of the essential nutrition services”, detailed at paragraph 5.2.1. Paragraph 5.2.1 sets out various “preventative and curative mental and physical health care” measures for mothers, infants, and children, as well as “nutrition promotion services from pre-conception until the child reaches the age of 5 years”. These include
- promotion and support of exclusive breastfeeding for the first six months after birth;
 - counselling to support appropriate and responsive complementary feeding or alternatives to breastfeeding where this is not possible, including the prevention of obesity;
 - home-, community-, and facility-based growth monitoring, early identification of growth faltering (growth and developmental lags) and referral for investigation and follow-up for all children aged birth to two years;
 - micronutrient supplementation (folic acid and iron for pregnant women, and vitamin A supplementation of infants and young children) and food supplementation for underweight pregnant women and children who fail to thrive for reasons of poverty and associated social problems; and
 - provision of food and nutritional support to pregnant women and young children by community outreach workers.
86. Hence, the strategy envisioned by the NIECDP should ensure the delivery and oversight of essential nutrition services, including food and nutrition support for young children. In principle, then, the policy could provide the foundation for a nutrition programme for young children attending (or eligible for) ECD programmes. However, the envisioned strategy has not yet been established.



87. Further, the NIECDP is now eight years old and long predates the function shift, which took effect in April 2022 and which made the Department of Basic Education primarily responsible for ECD, rather than the Department of Social Development. The NIECDP does not, therefore, reflect this new distribution of responsibilities.

Nutrition Guidelines for Early Childhood Development Programmes

88. As mentioned earlier, there are also national-level Nutrition Guidelines for Early Childhood Development Programmes, dated 2019.⁷³ These guidelines have been issued by the Department of Health. The guidelines encourage exclusive breastfeeding up to six months and then include a “standard operating procedure” for feeding children aged six months to six years. The guidance is broken down according to three age groups: six to eight months; nine to eleven months; and twelve months to six years. It gives guidance as to amounts and types of food and drink, as well as methods of feeding. (See Müller, Ronaasen, and Besada in this research series, for more on the Nutrition Guidelines.)

Road to Health Booklet

89. The Road to Health Booklet⁷⁴ is part of the Department of Health’s “side-by-side” campaign and it is issued to district health departments to give to parents/caregivers for all new births. The latest version was issued in 2018.
90. Pages four to seven cover good nutrition for children from birth up to five years. As in the case of the Nutrition Guidelines for Early Childhood Development Programmes, exclusive breastfeeding is encouraged for children up to six months. For children between six months and five years, the booklet offers guidance on appropriate types and amounts of

⁷³ Department of Health, 2019, *Nutrition Guidelines for Early Childhood Development Programmes*.

⁷⁴ Department of Health, 2018, *Road to Health Booklet*, available at https://www.westerncape.gov.za/assets/departments/health/rthb_booklet.pdf



foods. This guidance is broadly consistent with that contained in the Nutrition Guidelines. (See Müller, Ronaasen, and Besada in this research series, for more on the Road to Health Booklet.)

91. However, it is important to note that neither of these documents are legally binding and they could potentially be developed into norms and standards, in order to give them more force.

Division of Revenue Acts and conditional grant frameworks

92. Currently, both the ECD subsidy and the NSNP are funded by way of conditional grants. These conditional grants are managed by the DBE and transferred to provinces in terms of the annual Division of Revenue Acts.
93. As well as the annual Division of Revenue Acts, other relevant laws and policies for the NSNP include the South African Schools Act of 1996, National School Nutrition Programme: A Guide for Secondary Schools (2009), Food Specifications—For Products Marketed to the National School Nutrition Programme (2015), and the NSNP Safety Directory (2014). Other relevant laws and policies for the ECD subsidy include the Children’s Act.

South African Schools Act

94. Arguably, the NSNP (or a similar nutrition programme) is mandated by sections 12(1) and 34(1) of the South African Schools Act. Section 12(1) provides that
The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.
95. Section 34(1) provides that



The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.

96. However, these provisions do not clearly and explicitly mandate the NSNP. Further, the provisions relate to public schools, not to ECD programmes. Hence, even if they do, or could, form part of the legislative basis for the NSNP, it would be very difficult to argue that they can be interpreted in such a way as to mandate an ECD nutrition programme.

National School Nutrition Programme: A Guide for Secondary Schools

97. The Guide for Secondary Schools explains the importance of the programme, which learners get meals, what should be included in the meal, when to feed learners, the management structure of the programme, and how the programme should be implemented.
98. It also sets out guidelines for communication and reporting by schools to provincial education departments and the DBE.

Food Specifications—For Products Marketed to the National School Nutrition Programme

99. This document outlines the laws applying to those who procure, provide, and cook meals for learners, including laws relating to tenders and procurement, agricultural production standards, marketing, and quality management.
100. It further sets out definitions and general, nutritional, physical, microbiological, packaging, labelling, delivery, storage, and shelf-life requirements for different categories of food.



NSNP Safety Directory

101. The NSNP Safety Directory provides guidance on how to ensure that school meals are prepared in a hygienic manner, on safe premises, and result in reduced waste that does not negatively impact the environment.
102. This document is not only used for guidance but also for monitoring by provincial education departments, districts, schools, and food handlers.
103. It deals with the following topics:
- Safe food transportation
 - Personal hygiene
 - Kitchen hygiene
 - Kitchen safety
 - Food handling
 - Food storage
 - Waste management

Children’s Act

104. Under section 93 of the Children’s Act, the MEC for Basic Education may, from money appropriated by the relevant provincial legislature, provide and fund ECD programmes.⁷⁵ This could, in light of the arguments set out earlier (under the heading “Do young children have a right to nutrition in South Africa?”), be interpreted to include the provision and funding of nutrition for children in ECD programmes.

⁷⁵ Section 93 of the Children’s Act refers to the MEC for Social Development. However, in light of the function shift, this must be read as the MEC for Basic Education.



105. However, it is important to note that section 93 contains a *power*, not a *duty*. This stands in contrast to the provision and funding of, for example, child protection services. Under section 105(1) of the Children’s Act, the MEC for Social Development *must*, from money appropriated by the relevant provincial legislature, provide and fund designated child protection services for that province.

National Health Act

106. Section 4(3) of the National Health Act stipulates that the state and clinics and community health centres funded by the state must provide free health services for pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes. The definitions section of the National Health Act makes clear that these health services include basic nutrition, as contemplated in section 28(1)(c) of the Constitution.

107. On a literal reading, this duty applies to the state as a whole. However, when the provision is read in context, it is not clear that it places an obligation on the DBE to provide nutrition to children at ECD programmes: The provision is contained within the National Health Act, and explicitly lists clinics and community health centres as duty-bearers.

108. Overall, the existing regulatory framework contains some provisions that could potentially be leveraged for the purposes of an ECD nutrition programme. However, laws and policies that clearly and explicitly speak to an ECD nutrition programme are currently lacking.

Drawing on comparative jurisdictions, what laws and policies could be put in place to support a nutrition programme for young children in South Africa?

109. In this section, we look at nutrition programmes in other jurisdictions and the laws and policies that support them. Drawing on this comparative research, we make recommendations as to what laws and policies could be put in place in South Africa to



ensure an enabling regulatory environment for adequate nutritional support for young children.

Kenya

110. Kenya's Home Grown School Meals Programme is well established, having launched in 2009. Over the years, it has steadily extended its reach. In 2018, it supported 1.6 million children and had a budget of \$24 million.
111. The Home Grown School Meals Programme uses a direct transfers model: Cash stipends are transferred directly into the accounts of participating institutions. If South Africa were to implement a direct transfers model, the laws and policies to support the Home Grown School Meals Programme could serve as a guide to creating an enabling regulatory framework for this delivery model. (See Droomer et al. in this research series, for more on direct transfers as a potential implementation model in South Africa.)

Brief history of the programme

112. In 1980, the World Food Programme (WFP) launched Kenya's school feeding programme, reaching 240,000 children in that year.
113. In 2009, the Home Grown School Meals Programme was launched. At that time, the WFP began handing over responsibility to the Kenyan government. In June 2018, the handover from the WFP to the Kenyan government was completed and the Home Grown School Meals Programme came wholly under national control.
114. In 2017, the Kenyan government launched a National School Meals and Nutrition Strategy (2017–2022), which envisaged the creation of a National School Meals and Nutrition Programme as the successor to the Home Grown School Meals Programme. The National School Meals and Nutrition Programme was to use a variety of delivery models, including but not limited to direct transfers. However, we have not been able to determine whether this new programme has been rolled out yet.



What are the key components of the programme?

115. According to the National School Meals and Nutrition Strategy, the Home Grown School Meals Programme “aims to link school meals and local smallholder farmers, embedding school meal planning with health and nutrition education, and ensuring that school meals are both nutrition sensitive and culturally sensitive, thus respecting dietary habits while providing adequate intake of macronutrients and micronutrients for all school children”.⁷⁶
116. The Home Grown School Meals Programme does this through a decentralised, direct transfers model, whereby funds are transferred from the national level to school committees, which are responsible for purchasing, preparing, and serving hot school meals.

Who does the programme serve?

117. The focus of the Home Grown School Meals Programme is pre-primary and primary schoolchildren.
118. In 2018, it provided school meals to 1.6 million children in arid and semi-arid counties.

Who is responsible for delivering the programme?

119. The Kenyan Ministry of Education has within it a School Health, Nutrition, and Meals Coordination Unit, which convenes and promotes inter-ministerial and inter-agency dialogue, including information sharing, discussions, sectoral planning, and budgetary

⁷⁶ National School Meals and Nutrition Strategy (2017–2022), 22.



processes as well as the monitoring of progress towards agreed objectives outlined in the National School Meals and Nutrition Strategy.⁷⁷

120. This is done via a National School Meals and Nutrition Programme Inter-Ministerial Committee. This committee is chaired by the Ministry of Education and co-chaired by the Ministry of Health; Ministry of Agriculture, Livestock, and Fisheries; Ministry of East African Community, Labour, and Social Protection; and the Treasury. The responsibilities of the national committee include policy formulation and guidelines; budget preparation and funds disbursement; coordination, collaboration, and linkages; support and guidance at regional and local levels; capacity-building; resource mobilisation; planning, monitoring, and evaluation; and promotion and support to smallholder farmers.⁷⁸
121. There are similar committees at the county and sub-county levels.⁷⁹
122. There are also school meals and nutrition programme sub-committees within school boards of management. These school committees are responsible for implementing the programme at school level. In the case of the Home Grown School Meals Programme, this involves receiving funds from the national level to purchase, prepare, and serve school meals. They are also responsible for record-keeping and reporting; receiving, inspecting, and managing food supplies; mobilising and involving parents; monitoring food consumption; and accounting to government, community, and development partners.⁸⁰

⁷⁷ National School Meals and Nutrition Strategy (2017–2022), 34.

⁷⁸ National School Meals and Nutrition Strategy (2017–2022), 33 and 36.

⁷⁹ National School Meals and Nutrition Strategy (2017–2022), 36.

⁸⁰ National School Meals and Nutrition Strategy (2017–2022), 36.



What laws and policies regulate the delivery of Kenya's ECD nutrition programme?

123. The mandate for the Home Grown School Meals Programme is found in the Kenyan Constitution. Article 53(1)(b) of the Kenyan Constitution provides that every child has the right to free and compulsory basic education and Article 53(1)(c) provides that every child has the right to basic nutrition, shelter, and healthcare. In addition, Article 43(1)(c) states that everyone has the right to be free from hunger and to have adequate food of acceptable quality.
124. Following the handover from the WFP to the Kenyan government, the Ministries of Education, Health, and Agriculture, Livestock, and Fisheries published the National School Meals and Nutrition Strategy (2017–2022). This became the primary policy regulating the implementation of the Home Grown School Meals Programme. It should be noted that the National School Meals and Nutrition Strategy makes specific reference to the aforementioned provisions of the Kenyan Constitution and the government takes the view that these provisions provide part of the legal and policy framework for the Home Grown School Meals Programme, as well as its envisioned successor, the National School Meals and Nutrition Programme.
125. The National School Meals and Nutrition Strategy is structured as follows:
- Chapter 1 introduces the strategy, setting out the background, situation analysis, and legal and policy framework.
 - Chapter 2 sets out the vision, mission, strategic objectives, principles, and rationale.
 - Chapter 3 sets out plans for programme implementation, including modalities of implementation, food procurement, aggregation, storage, and distribution of food commodities; nutritional considerations; complementary interventions and partnerships; sustainable resource mobilisation; and a resource mobilisation strategy.
 - Chapter 4 sets out the governance and institutional framework.



- Chapter 5 deals with monitoring, evaluation, and next steps.

126. Annex II sets out strategic objectives, composed of activities, indicators, and expected outcomes. One of these activities is that Home Grown School Meals Programme implementation guidelines should be distributed to government officers and schools. These guidelines are to include nutrition standards, specifications for school meal composition and balanced menus, and guidelines for micronutrient supplementation and food safety.

127. Annex III includes examples of nutritionally balanced meals. These examples vary according to the type of school. For example, in a half-day pre-primary school, one possible meal would include rice, pulses, and vegetables with super cereal porridge. The ration would be 100g rice, 20g pulses, 5g fortified vegetable oil, 3g iodised salt, and 40g super cereal. This would amount to 623 calories (or 38% of a child's daily requirements).

Brazil

128. In Brazil, nutrition programmes aimed at children form part of the country's Zero Hunger (*Fome Zero*) strategy. This strategy includes four coordinated programmes:

- the National School Meal Programme (PNAE);
- Auxilio Brasil, which replaced the Bolsa Familia family allowance system;
- the Public Food Acquisition Programme; and
- the National Programme for Strengthening Family Farming.

129. In what follows, we focus on the PNAE, which provides school meals and food and nutrition education to children in all stages of public basic education, including childhood education.

Brief history of the programme

130. The PNAE was preceded by the National Company for School Feeding (CNAE), established in 1955. The CNAE was a federal programme established by the National Commission for



Food, though it received almost all of its funding from international aid. In 1976, it was reorganised and became the Second Food and Nutrition National Programme. In 1979, it was reorganised again and was given its current name: PNAE.

131. The Zero Hunger strategy was launched in 2003 and integrated the PNAE into a multipronged approach, aimed at achieving zero hunger by prioritising healthier school children and promoting family farming. At this time, food and nutrition security became a political priority and the government established a Ministry of Social Development and the Fight Against Hunger to coordinate the delivery of the Zero Hunger strategy. This coordination is considered to have been critical to the strategy's success: In 2009, it was estimated that 20 million Brazilians climbed out of poverty following the implementation of this strategy, meaning that Brazil achieved its Millennium Development Goal of halving poverty (from 27.8% in 1999 to 15.4% in 2009).⁸¹

What are the key components of the programme?

132. The broad aim of the PNAE, as part of the Zero Hunger strategy, is to eliminate hunger and poverty in Brazil. More specifically, the PNAE aims to promote healthy eating in public schools through the provision of free meals, sustainably sourced. The programme is funded so as to facilitate the provision of school meals for 200 days each year.
133. As the system is decentralised, different cities and municipalities adopt different menus. However, the primary legislation makes certain stipulations about the school menus, including that they must be prepared by a nutritionist and must respect local and cultural eating needs and habits.

⁸¹ See, for example, Raffray, M, 2012, "Brazil's 'Zero Hunger' Strategy", *Inter-reseaux Briefing*, September, available at [Note FaimZe'ro Sept2012_EN_vp \(inter-reseaux.org\)](#)



134. Resolutions of the National Fund for the Development of Education (FNDE) provide further details. For example, FNDE Resolution No. 6 of 8 May 2020 provides that, for entities offering part-time school meals, menus must offer at least 280g of fresh fruits, vegetables, and greens per student per week. Specifically, fresh fruit must be offered at least two days a week and vegetables at least three days a week. For entities offering full-time school meals, menus must offer at least 520g of fresh fruits, vegetables, and greens per student per week. Specifically, fresh fruit must be offered at least four days a week and vegetables at least five days a week.

Who does the programme serve?

135. The PNAE serves students enrolled in basic education in federal, state, district, and municipal public networks, in accordance with Brazil's School Census. It covers all phases of basic education, including childhood education, elementary school, high school, and youth and adult education.
136. Basic education entities that wish to be assisted by the PNAE must make a declaration of interest in the School Census. Those that do not wish to be assisted by the PNAE must make a request to disassociate from it, which is then approved by way of an official letter from the FNDE.
137. In 2014, 44.2 million students were supported by the PNAE.

Who is responsible for delivering the programme?

138. The FNDE is responsible for overseeing and coordinating the PNAE.
139. It is the schools themselves that provide the meals to the students. However, school feeding councils oversee meal composition and supply and ensure transfer of federal funds to the municipalities.



140. Importantly, the PNAE also employs a large number of nutritionists who bear significant responsibilities in respect of the programme, its roll-out, and its impact on schoolchildren.

What laws and policies regulate the delivery of Brazil’s ECD nutrition programme?

141. The mandate for the PNAE, including its funding, is found in Brazil’s Constitution. Title II, Chapter II of the Brazilian Constitution provides for social rights. Article 6 states that “[e]ducation, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights”.

142. Title VIII, Chapter 3, section I covers education. Article 208 stipulates that the state’s duties in respect of education shall be fulfilled by ensuring “mandatory basic education, free of charge, for every individual from the age of 4 (four) through the age of 17 (seventeen), including the assurance of its free offer to all those who did not have access to it at the proper age”,⁸² “infant education to children of up to 5 (five) years of age in day-care centers and pre-schools”,⁸³ and “assistance to students in all grades of basic education, by means of supplementary programmes providing school materials, transportation, food, and health care”.⁸⁴ Article 212 provides for the funding of these supplementary food and health assistance programmes, stating that they shall be financed “with funds derived from social contributions and other budgetary funds”.

143. The PNAE also finds specific mandate in Law No. 11947 of 16 June 2009, otherwise known as the School Feeding Law.

⁸² Article 208(I).

⁸³ Article 208(IV).

⁸⁴ Article 208(VII).



144. Article 2 of the School Feeding Law provides “guidelines” for school feeding. These are set out in the form of guiding principles. They include

- the use of healthy and adequate eating, including the use of varied, safe foods that respect healthy culture, traditions, and eating habits, contributing to the growth and development of students and to the improvement of school performance, in accordance with their age group and health status, including those in need of specific attention.
- the inclusion of food and nutrition education in the teaching and learning process, which permeates the school curriculum, addressing the theme of food and nutrition and the development of healthy practices of life, from the perspective of food and nutritional security.
- the universality of care to students enrolled in the public primary education network.
- the participation of the community in social control and in the monitoring of actions carried out by the states, the federal district, and municipalities to ensure the provision of healthy and adequate school meals.
- support for sustainable development, with incentives for the acquisition of diversified foodstuffs, produced at the local level and preferably by family farming and rural family entrepreneurs, prioritising traditional indigenous communities and quilombos remnants.
- the right to school feeding, which aims to ensure the food and nutritional security of students, with equal access, while respecting the biological differences between ages and health conditions of students who need specific attention and those who are socially vulnerable.

145. Article 3 provides that “[s]chool feeding is the right of students of public basic education and [a] state duty and will be promoted and encouraged with a view to meeting the guidelines established in this Law”.

146. Other key provisions include



- Article 12, which concerns the content of school meals. Specifically, Article 12 stipulates that school meals should be prepared by a nutritionist. The nutritionist should prepare the school meal using “basic foodstuffs”,⁸⁵ should respect the “eating habits, culture and the food tradition of the locality” and “the sustainability and agricultural diversification of the region”, and should respect the principle of “healthy and adequate eating”. Article 12 also provides for students who have health conditions requiring individualised nutritional care. For such students, “a special menu will be prepared based on medical and nutritional recommendations, nutritional assessment and differentiated nutritional demands”.
- Article 14, which provides that 30% of the total financial resources allocated to the PNAE should be used to acquire foodstuffs directly from family farming and rural family entrepreneurs, prioritising agrarian reform settlements, traditional indigenous communities, and quilombola communities.⁸⁶
- Article 15, which provides that the Ministry of Education is responsible for the education component of the PNAE, namely “educational actions that permeate the school curriculum, addressing the theme of food and nutrition and the development of healthy practices of life, from the perspective of food and nutritional security”.
- Article 16, which provides that the FNDE is responsible for the coordination of the PNAE. Specifically, the FNDE is responsible for establishing the general rules of planning, execution, control, and monitoring and evaluation of the PNAE; transferring financial resources aimed at the execution of the PNAE in the states,

⁸⁵ Under Article 12, basic foodstuffs are defined as “those indispensable to the promotion of a healthy diet, in compliance with the applicable regulations”.

⁸⁶ Quilombola communities are remote mountain communities established by African people who escaped slavery.



federal district, municipalities,⁸⁷ and federal schools; promoting the “interinstitutional articulation” between federal entities directly or indirectly involved in the implementation of the PNAE; promoting the adoption of international guidelines and goals, with a view to improving the quality of life of students in public primary education; providing general technical guidance to states, federal district, and municipalities for the good performance of the PNAE; cooperating in the process of training personnel involved in delivering the PNAE; and promoting the carrying out of studies and research to evaluate the PNAE.

- Article 17, which sets out the responsibilities of the states, federal district, and municipalities.
- Article 18, which provides for the establishment of school feeding councils at the state, federal district, and municipal levels.

147. The School Feeding Law also provides for accountability mechanisms in respect of use and misuse of funds and compliance with the school feeding guidelines.

India

148. India is a useful comparator for three reasons. First, both India and South Africa have a decentralised system of government, necessitating cooperation between the different layers. Second, India faces similar development challenges to South Africa: widespread poverty and inequality. Third, and finally, India’s Integrated Child Development Services (ICDS) is the largest early childhood development programme in the world and this programme has, since its inception in 1975, had nutrition as one of its core components.

⁸⁷ Brazil is divided into 27 federative units, together forming the Federative Republic of Brazil. There are 26 states and one federal district. The states are divided into municipalities, while the federal district assumes the competences of both a state and a municipality.



Other components include medicine and early learning, all of which are incorporated under this one state programme.

Brief history of the nutrition programme

149. Currently, the main state programme for delivering nutrition to young children in India is Saksham Anganwadi and Poshan 2.0 (hereinafter Poshan 2.0). The latest iteration in a long line of similar programmes, Poshan 2.0 is the successor to the Prime Minister's Overarching Scheme for Holistic Nutrition or Poshan Abhiyaan, which itself was the successor to an older initiative called the National Nutrition Mission. Poshan 2.0 integrates several formerly separate initiatives relating to nutrition, medicine, and education under one state programme.
150. The Poshan Abhiyaan was established by the Indian government in 2018. It was intended as the new flagship programme to improve nutritional outcomes for children, pregnant women, and lactating mothers. Unfortunately, the Covid-19 pandemic exacerbated India's nutrition challenges. Economically disadvantaged people became more vulnerable to malnutrition and food insecurities during lockdown, reversing some of the progress made by government schemes in the pre-pandemic phases of the Poshan Abhiyaan. In response, the Ministry of Women and Child Development launched Poshan 2.0 in September 2021. Poshan 2.0 is an integrated nutrition support programme, which aligns three pre-existing nutrition programmes: the Poshan Abhiyaan; the Supplementary Nutrition Programme under the Anganwadi Services Scheme; and the Scheme for Adolescent Girls.

What are the key components of the programme?

151. The overall objectives of Poshan 2.0 are
- to contribute to the human capital development of the country;
 - to address challenges of malnutrition;
 - to promote nutrition awareness and good eating habits for sustainable health and well-being; and
 - to address nutrition-related deficiencies through key strategies.



152. Poshan 2.0 has four focus areas:
- maternal nutrition;
 - infant and young child feeding norms;
 - treatment of moderately and severely acute malnourished children; and
 - wellness through Ayurveda, Unani, Siddha, and Homeopathy.
153. The programme is delivered via a network of Anganwadi centres, which were themselves set up as part of India's ICDS. The word *anganwadi* means "courtyard shelter". Traditionally, courtyard shelters are one of the centres of village life, where community members gather to socialise and prepare meals. Modern Anganwadis are spread throughout poor and rural communities and provide supplementary nutrition, pre-school non-formal education, nutrition and health education, immunisation, health check-ups, and referral services. The latter three services are delivered by the Ministry of Health and Family Welfare, while supplementary nutrition, pre-school non-formal education, and nutrition and health education are delivered by the Ministry of Women and Child Development.
154. As well as providing health services for young children, such as iron syrup and deworming tablets, the Poshan 2.0 programme provides food in the form of fresh produce, fortified grains, and nuts; a take-home ration (which must be cooked / not raw); and hot, cooked meals on-site at Anganwadis.

Who does the programme serve?

155. The programme is designed to provide all children aged six months to six years with an age-appropriate meal, free of charge.
156. It is notable that there are no eligibility criteria, except that exclusive breastfeeding is promoted for children aged less than six months and children need to be registered at an Anganwadi in order to access their entitlements.



Who is responsible for delivering the programme?

157. At the national level, multiple government departments are responsible for delivering the programme, including the Ministry of Women and Child Development, Ministry of Health and Family Welfare, Ministry of Rural Development, Ministry of Drinking Water Supply and Sanitation, and others. Representatives of each of these departments sit on the Empowered Programme Committee, which is the highest technical authority responsible for planning, supervising, and monitoring the effective implementation of the Anganwadi Services Scheme.
158. There is also a State Level Steering Committee, through which the Chief Secretary of the States and Union Territories coordinates the activities of various departments within India's 28 states and eight union territories.
159. The states and union territories are further subdivided into districts. Within each district, there is a District Nutrition Committee, composed of certified nutrition experts and chaired, monitored, and supervised by the District Magistrate.
160. Under the supervision of the District Magistrate, the Child Development Project Officer is responsible for the overall administration and coordination of the nutrition programme in the district. The specific responsibilities of the Child Development Project Officer include coordinating and evaluating deliveries in the district as a key performance indicator for the nutritional improvement of beneficiaries, especially moderately and severely acute malnourished children; conducting periodic monitoring, including surprise spot checks and collection of samples for quality testing of the supplementary nutrition provided; and monitoring the distribution of necessary stocks for delivery of key services.

What laws and policies regulate the delivery of India's ECD nutrition programme?

161. India's Constitution does not contain as clear and robust protection for children's rights as the South African Constitution. It does not give children an explicit right to basic



nutrition. Nonetheless, certain provisions of the Indian Constitution provide a foundation for Poshan 2.0. Part IV sets out Directive Principles of State Policy. These include

- section 45, which stipulates that the state “shall endeavour to provide early childhood care and education for all children until they complete the age of six years”; and
- section 47, which stipulates that the state “shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties”.

162. The delivery of Poshan 2.0 is governed by the Mission Saksham Anganwadi and Poshan 2.0 Scheme Guidelines (hereinafter Poshan 2.0 Guidelines). The Poshan 2.0 Guidelines are rooted in the National Food Security Act (NFSA) of 2013 and were issued pursuant to sections 4(a), 5(1)(a), 6, and 7:

- Section 4(a) of the NFSA stipulates that “[s]ubject to such schemes as may be framed by the Central Government, every pregnant woman and lactating mother shall be entitled to [...] [a] meal, free of charge, during pregnancy and six months after the child birth, through the local *anganwadi*, so as to meet the nutritional standards specified in Schedule II”.
- Section 5(1)(a) of the NFSA gives every child up to the age of 14 years certain entitlements for meeting their nutritional needs. Children aged six months to six years are entitled to an “age appropriate meal, free of charge, through the local *anganwadi* so as to meet the nutritional standards specified in Schedule II”.
- Section 6 of the NFSA stipulates that “[t]he State Government shall, through the local *anganwadi*, identify and provide meals, free of charge, to children who suffer from malnutrition, so as to meet the nutritional standards specified in Schedule II”.
- Section 7 of the NFSA stipulates that “[t]he State Governments shall implement schemes covering entitlements under sections 4, 5 and section 6 in accordance with the guidelines, including cost sharing, between the Central Government and the State Governments in such manner as may be prescribed by the Central Government”.



163. The Nutritional Standards set out in Schedule II stipulate that children aged three months to three years are entitled to a “take-home ration” containing 500 calories and 12–15g of protein, while children aged three to six years are entitled to a morning snack and hot cooked meal, also containing 500 calories and 12–15g of protein. The Nutritional Standards do not cover children below six months.
164. The Poshan 2.0 Guidelines give more detail. They contain
- the vision, objectives, and main components of the programme (in the introduction).
 - an outline of the institutional framework for delivering the programme, including the roles and responsibilities at different levels of government; digital infrastructure; funding; social audit; and evaluation.
 - a detailed chapter each on the Poshan Abhiyaan; Anganwadi Services Scheme; and Scheme for Adolescent Girls.
 - a chapter on training for Anganwadi functionaries.
165. The chapter on the Anganwadi Services Scheme sets out operational details including the place and time of distribution (nutrition is to be provided at the Anganwadis during working hours); the number of days on which nutrition is to be provided (a minimum of 300 days per calendar year); nutritional norms (giving the number of calories and amount of protein required for different cohorts) and cost norms (giving the amount to be spent per day per beneficiary); and the need for dietary diversity. The chapter also contains requirements relating to procurement and quality testing.

Namibia

166. Namibia has been selected as a comparator due to its historical connections with South Africa and its shared socio-economic characteristics, particularly its high levels of inequality and poverty. Overall, Namibia is much less densely populated than South Africa. However, most of its population is concentrated in the north.



167. Like South Africa, Namibia has a school feeding programme. However, unlike South Africa, Namibia has primary legislation clearly and explicitly mandating a feeding programme at ECD centres. Though we have not been able to determine whether an ECD feeding programme has been established yet, Namibia is nonetheless a useful comparator, given that its regulatory framework specifically provides for this possibility.

Brief history of the programme

168. The Namibian School Feeding Programme (NSFP) was established in 1991 as a pilot programme in which the World Food Programme distributed surplus rations from the UN Transition Assistance Group in the wake of Namibian independence. This pilot programme included five schools and 400–500 children. After its initial success, it was expanded into a four-year operation, still run and funded by the WFP. In 1996, it was taken over by the Namibian government, which has run it ever since (albeit with technical assistance from the WFP).

What are the key components of the programme?

169. The NSFP aims to provide school feeding to contribute towards increased enrolment, regular attendance, improved retention and progression through the grades, and improved general health and concentration levels. More broadly, the aim is to improve equitable access, learning, and education for all children in Namibia.

170. To further these goals, there are three specific objectives:

- enhancing access and learning through access to diverse and nutritious foods;
- enhancing learners' health and nutrition through provision of meals; and
- supporting smallholder producers by linking them to the NSFP. This last objective reflects an attempt to commit the NSFP to sustainable practices through linking the programme to locally produced foods, thus increasing the diversity of school meals and generating income for smallholder producers.



171. As of 2012, the NSFP has provided nutrition in the form of a fortified maize porridge, served as a standard mid-morning meal. This is delivered as a maize blend and prepared for the learners at the participating schools. However, with the new focus on sustainability and support for local smallholders, coupled with greater decentralisation, it is unclear whether this uniform porridge will continue to be the main source of nutrition provided by the programme.

Who does the programme serve?

172. In its early stages, the programme targeted vulnerable children in food-insecure regions. However, it has since been expanded to include schools across the country. According to government statistics, as of May 2016, there were over 330,000 learners participating, with 80% of the children in need being covered by the programme. As of 2021, the programme had 1,423 participating schools.

173. The following groups are eligible for school feeding:

- All learners enrolled for basic education (Grades 0–12) in public schools, regardless of age, gender, and socio-economic status.
- All pre-primary and primary learners registered with the government of Namibia.

Students at private schools may also be eligible; however, this is decided by the Ministry of Education, Arts, and Culture on a case-by-case basis.

174. In its 2019 School Feeding Policy, the Namibian government also committed to introducing “a suitably adapted age sensitive feeding programme to cater for the ECD centres”, in recognition of the fact that state-supported ECD services were expanding.

175. Eligible schools must meet minimum requirements relating to adequate hygiene, adequate water and sanitation facilities, adequate kitchen and storage facilities, and community commitment. However, schools that do not meet these criteria are not disqualified. Instead, they are “supported” by the ministry to meet the requisite standards.



176. It should be noted that despite its broad eligibility criteria, the programme is still targeted, with preference given to learners from food-insecure households.

Who is responsible for delivering the programme?

177. The Ministry of Education, Arts, and Culture is responsible for the management of the programme from the national to the school levels and is also responsible for the coordination of other stakeholders. Within the ministry, there is a specific sub-division of school feeding, which oversees the implementation of the NSFP and coordinates the other ministries involved in the programme.
178. Other ministries responsible for delivering the programme include the Ministry of Health and Social Services; Ministry of Agriculture, Water, and Forestry; Ministry of Fisheries and Marine Resources; Ministry of Environment and Tourism; Ministry of Poverty Eradication and Social Welfare; Ministry of Urban and Rural Development; Ministry of Works and Transport; Ministry of Gender Equality and Child Welfare; and Ministry of Finance, as well as the National Planning Commission. The specific responsibilities of these other ministries are linked to their roles in the state. For example, the Ministry of Health and Social Services is charged with, amongst other things, regulating consumer health relating to food safety, including regulations and standards on school meals and feeding facilities.

What laws and policies regulate the delivery of Namibia's ECD nutrition programme?

179. Like the Indian Constitution, the Namibian Constitution does not contain provisions guaranteeing children the right to basic nutrition (though there is such a right contained in other primary legislation, as noted below). The only constitutional support for the NSFP is found in Article 95, which stipulates that the state “shall actively promote and maintain the welfare of the people” by adopting policies that, amongst other things, are aimed at “consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health”.



180. The NSFP is specifically mandated by the Basic Education Act (Act No. 3 of 2020). The relevant provisions are section 12, which relates to learners with disabilities and special needs, and section 14, which relates to integrated early childhood development:
- Section 12(2)(g) stipulates that in order to give effect to the policy of inclusive education, school boards and governing bodies of private schools must ensure that “learners with disabilities, special needs in education and those from disadvantaged socio-economic backgrounds, vulnerable families and orphans are provided with, at least, one nutritious meal per day through the school feeding programme”.
 - Section 12(3)(h) stipulates that the Minister of Basic Education may establish “a school feeding programme at both primary and secondary school levels to provide meals, especially to learners with disabilities, disadvantaged socio-economic backgrounds, vulnerable families and orphans, to contribute to keeping all learners in school and to enhance their cognitive and psycho-social development”.
 - Section 14(1) stipulates that the Minister of Basic Education, in developing the national policy framework for basic education, must include a policy on integrated early childhood development that is aimed at, amongst other things, “recognising the importance of the first 1000 days of a child in terms of health and safety, protection, nutrition and stimulation”.
 - Section 14(4)(e) stipulates that the Minister of Basic Education may prescribe “guidelines for establishing a feeding programme at early childhood development centres”.
181. Given the permissive language of sections 12(3)(h) and 14(4)(e), it appears that the Minister of Basic Education is empowered but not required to establish a school feeding programme and/or guidelines for an ECD feeding programme.
182. Additionally, the NSFP finds support in the Child Care and Protection Act (Act No. 3 of 2015). Section 3(1) gives paramountcy to the best interests of the child in matters concerning the child. Importantly, section 6(1) sets out the child’s right to basic conditions of living, including the right to adequate food. Under section 6(2), the obligation to meet



these needs is assigned exclusively to the child's parents or caregivers. However, especially given that the duty is subject to the parents' "abilities and financial capacities", it could be argued that there is an implicit duty on the part of the state to meet the child's needs where their parents are unable to do so.

183. The 2019 Namibia School Feeding Policy provides a framework and guidelines for the management of the NSFP. The policy consists of five parts: introduction; policy strategy; implementation framework; implementation, monitoring, and evaluation; and conclusion. The objectives of the policy are sub-divided into 13 strategies, through which the primary aims are to be achieved.
184. This policy is supplemented by the Namibia School Feeding Policy Implementation Action Plan, which guides the execution of the policy over a five-year period (2019–2024), following which it is to be reviewed alongside the policy. The action plan takes the 13 strategies identified in the policy and sets out corresponding activities, timelines, and targets, as well as details the bodies responsible for instituting the strategies and the corresponding budgets. For example, under the second objective of enhancing nutrition and health through balanced and fortified meals, the policy adopts the strategy of exploring the diversification of school meals. The action plan identifies promoting the establishment of school gardens as one way of implementing the strategy, setting a goal of 80% of schools having functioning school gardens by 2023/2024. This work is to be led by the Ministry of Agriculture, Water, and Forestry, with support from the Ministry of Education, Arts, and Culture as well as the Food and Agriculture Organisation and the World Food Programme. In much the same manner, the action plan lists activities through which the strategic aims are to be achieved.

Recommendations

185. Overall, in the case of South Africa, our view is that the state in general and the Department of Basic Education in particular have not put in place reasonable and effective measures to immediately ensure that all young children receive basic nutrition adequate



to meet their developmental needs. To meet its duties, the DBE should, in our view, take the following steps:

- **In the short term**, the DBE should create an ECD nutrition programme to ensure that all children who are eligible for the Child Support Grant and who attend a registered or unregistered ECD programme are fed meals that are adequate to meet their developmental needs. It is especially important to cater for both registered and unregistered ECD programmes in the short term, given that current registration requirements are too onerous and the majority of ECD programmes are not registered.
- The DBE should also ensure that it exercises effective oversight over other departments that deliver nutrition support to young children, including the Department of Health. At least in the short term, this could be done through existing mechanisms, such as the national Inter-Ministerial Committee for ECD.
- **In the longer term**, the DBE should simplify the registration process, which may reduce the need for an ECD nutrition programme to cover unregistered programmes. The DBE should also expand the availability of and access to ECD programmes, given that currently only 34% of children are enrolled in a programme (whether registered or unregistered).
- It may also be helpful for South Africa to establish specific coordinating bodies for the delivery of an ECD nutrition programme. At the national level, South Africa could establish a body similar to the National School Meals and Nutrition Programme Inter-Ministerial Committee in Kenya or the Empowered Programme Committee in India. In both Kenya and India, there are similar coordinating bodies at each level of government. South Africa could also consider establishing such bodies at the provincial and municipal levels. The coordinating bodies should include a role for nutritionists.

186. To an extent, the existing legal and policy framework provides an enabling environment for an ECD nutrition programme. However, improvements could be made. Drawing on the comparative research set out in this paper, we conclude by further recommending the following:



- **In the short term**, the Department of Basic Education should update the NSNP policies or develop a stand-alone ECD nutrition policy to cover the roll-out of a new ECD nutrition programme.
- **In the longer term**, it would arguably be helpful if any new ECD nutrition programme in South Africa had a clear and fairly detailed foundation in primary legislation, in order to entrench the programme, ensure longevity, and provide a statutory basis for accountability. This could include a clear and explicit duty on the part of the state to provide nutrition support to children in ECD programmes. It could also involve creating a legislative foundation for the Nutrition Guidelines for Early Childhood Development Programmes, including accountability mechanisms to help ensure compliance.
- This longer-term legislative reform must facilitate inclusivity. For example, in Brazil, the legislation specifically provides for children with health conditions requiring individualised nutritional care and stipulates that they must be provided with a menu tailored to their needs. South Africa may wish to consider including a similar provision.




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