



The CRADLE
The Children Foundation
**Promoting Justice for Children-
the Future in our Hands**

Kenya's support to privatisation in education: the choice for segregation?

Preliminary parallel Report submitted by the Economic and Social Rights Centre (Hakijamii), the Global Initiative for Economic, Social and Cultural Rights, the East African Centre for Human Rights (EACHRights), the CRADLE, Kituo cha Sheria, and the Kenya national Union of Teachers on the occasion of the examination of the report of Kenya during the 56th session of the UN Committee on Economic, Social and Cultural Rights

Submitted September 2015

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Key issues addressed in this report

The report analyses that:

1. Despite the fact that education is now recognised in Kenya’s constitution as a basic human right, privatisation of education is rampantly growing at an alarming rate without the corresponding monitoring and regulation by the State;
2. The State has encouraged the growth of private schools through enactment of favourable policies;
3. The growth of private actors in education is leading to sharp inequalities and segregation in Kenya’s society;
4. Private schools do not offer an alternative choice for parents to ensure the education of their children in conformity with their moral or religious principles, as stipulated under human rights law, but a default low-quality and fee-charging option, due to the inability of the State to provide free quality education for all.

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I. Introduction

1. This report has been compiled by the following organizations:
 - The Economic and Social Rights Centre (Hakijamii) is a National Human Rights Organization that partners with civil society organisations and marginalised community groups to advocate for the realization of economic and social rights especially for the urban poor.¹
 - The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) is an international non-governmental human rights organization which seeks to advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens. The vision of the GI-ESCR is of a world where economic, social and cultural rights are fully respected, protected and fulfilled and on equal footing with civil and political rights, so that all people are able to live in dignity.²
2. This report has received support from the East African Centre for Human Rights (EACHRights), the CRADLE, Kituo cha Sheria, and the Kenya national Union of Teachers.
3. This report is a preliminary report to the UN Committee on Economic, Social, and Cultural Rights based on a research conducted by the above organisations about the impact of the growth of the role of private actors in education in Kenya on the realisation of the right to education. It focuses in particular on the impact in non-formal settlements on segregation and discrimination and the right to free quality education. It will be followed by an additional submission deepening these preliminary findings with empirical research and covering other impacts.

II. General legal framework on the right to education and the role of private actors applicable in Kenya

4. Basic education in Kenya is recognised as a human right in article 43 (f) of the constitution of Kenya which acknowledges that everyone has the right to education. Specifically, children's right to education is entrenched in article 53 (1) which provides that every child has the right to free and compulsory education, and is not subject to progressive realisation – contrary to article 43.
5. Article 2 (6) of the Constitution of Kenya recognises that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”. The international Convention on the Rights of the Child (ICRC), was ratified by Kenya on 30 July 1990, and is thus legally binding in domestic Kenyan law.

¹ <http://www.hakijamii.com>.

² <http://www.globalinitiative-escr.org>.

6. The Basic Education Act, 2013 repeals the previous education Act, enacted in 1980 (last revised in 2012). The Basic Education Act sought to streamline the provision of education, in institutions of basic education, in line with the constitution that was adopted in 2010.
7. Privatisation in education is a growing global phenomenon threatening the right to education in many countries. An increasing body of research is examining the impact of these developments on human rights and social justice. In 2014 Mr Kishore Singh, the UN Special Rapporteur on the right to education (SR RtE) presented a report to the UN General Assembly³ which examines State responsibility in the face of the explosive growth of private education providers, from a right to education perspective, and lays out some of the principles applicable.
8. Based on our work analysing the situation with regards to privatisation in education in seven other countries, and following extensive consultation with education civil society organisations at the domestic, regional and international level, and with human rights and education academics and experts, we have developed the following draft analysis principles, which set out how international human rights law applies to privatisation in education, drawing in particular on articles 28 and 29 of the ICRC and article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³ Report of the UN Special Rapporteur on the Right to Education, A/69/402 (24 September 2014).

Private actors in education: draft human rights analysis framework

While private providers of education are permitted, States must ensure that the involvement of private actors in the provision of education:

1. Does not lead to the creation of extreme disparities in access to quality education or discrimination of any kind, and does not lead to segregation or division in societies in general or education in particular;
2. Provides for a true alternative choice to quality free education, and does not replace the public system, as the State retains the responsibility to offer quality, free education for all;
3. Does not lead to the marketisation of education such that education is no longer directed to the full development of a child's personality, talents and mental and physical abilities, but instead only to profit-making and achieving measurable outcomes - which would be contrary to the aims of education recognised in human rights law;
4. Maintains the highest quality standards and is adequately regulated, both in law and in practice, with adequate inspection staffing, effective accountability mechanisms, and without corruption; and
5. Is the result of a participatory policy formulation process and continues to be subject to democratic scrutiny and to the human rights principles of transparency and participation.

9. This report focuses on the first two areas of this framework: segregation and discrimination and the right to free quality education. Subsequent reports will explore the other dimensions, and deepen this one with empirical data.

III. Privatisation in education in Kenya

10. Ignorance was identified at the time of independence in 1963 as one of the critical challenges facing the new nation of Kenya, alongside poverty and disease. Since then, successive governments have made deliberate efforts to encourage participation of the private sector in providing education as a means to achieving literacy levels in the country.
11. Prior to 1990, the number of private were negligible. The 1980s was however characterised by dwindling participation in formal schools, which was aggravated by the structural adjustment policies (SAPs) that were designed to be economic recovery programs. One of the visible outcomes of the SAPs in the education sector was less public expenditure on education. As a result, cost sharing in education was introduced. This resulted in many disadvantaged children, especially girls, from the rural communities, the urban poor and children with disabilities, not accessing formal education due to prohibitive costs associated with schooling. This was also an era characterised by widening social and economic disparities that evidenced increasing levels of poverty.

12. It is on this basis that the Kenyan government justified its support the growth of the private sector in provision of education.⁴ The Policy For Alternative Provision of Basic Education And Training quotes:

“in an effort to reach the spiralling numbers of non-enrolled children, the ministry of education in collaboration with development partners sought to provide broad policy frameworks to ease participation of a variety of service providers. These providers were registered under different government departments....and sought to provide school age children with education...these providers were instrumental in initiating low cost schools...they came to be categorized as non-formal schools.”

13. While the development of private schools in the 1980s-1990s was propagated by the cost sharing policy that followed the structural adjustment plans pushed by the World Bank, forcing many students out of the formal school system due to cost factors, a more tremendous growth of private schools has been observed since the introduction of the free primary education (FPE) program in 2003. This massive increase in development of private schools has been mostly attributed to the massive influx of students into public schools and resultant deterioration in quality due to overstretched facilities.⁵

14. The high escalation in number of private schools has most severely been felt in informal settlements where there is exceptionally high use of private schools. Kenya’s urban informal settlements experience severe shortage in supply of basic services. Government schools are not sufficiently available, the few available schools are found only at the periphery of these areas, making them inadequately available and inaccessible by most children. Failure by the State to provide sufficient number of public primary schools has led to tremendous growth of private low cost schools which have developed to fill in the demand gap.⁶ Since the introduction of free primary education, more children from urban informal settlements have been attending private primary schools. In urban areas such as Nairobi, Eldoret and Mombasa, more than 50% of children attend so called “low-fee” private schools.⁷

15. A research conducted in 2003 in Kibera, the largest informal settlement in Kenya, recorded a total of 76 private primary and secondary schools.⁸ These total figures should be compared to a mere total of only five government schools serving the area, and which are all located on the peripheries of the slum. A further study of the area by the researchers four years later revealed that the number of private schools had increased substantially to a total of 116 in 2007, which is an increase of 52.6% in a span of 4years.⁹ During the same period, no new public schools were built in the area by the state.

4 Kenya Ministry of Education, Policy For Alternative Provision Of Basic Education And Training (May 2009), p. 11.

5 Allavida Kenya, 2012, Access to and Quality of basic education in Kibera

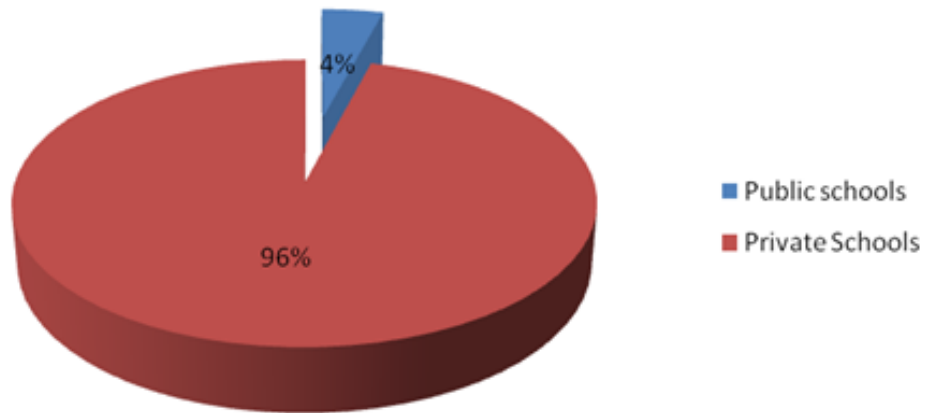
6 James Tooley et al, (2008) Impact of free primary education in kenya, a case study of private schools in kibera,

7 APHRC, Quality and Access to Education in urban informal Settlements in Kenya, October 2013, <http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>

8 James Tooley et al, (2008) Impact of free primary education in kenya, a case study of private schools in kibera,

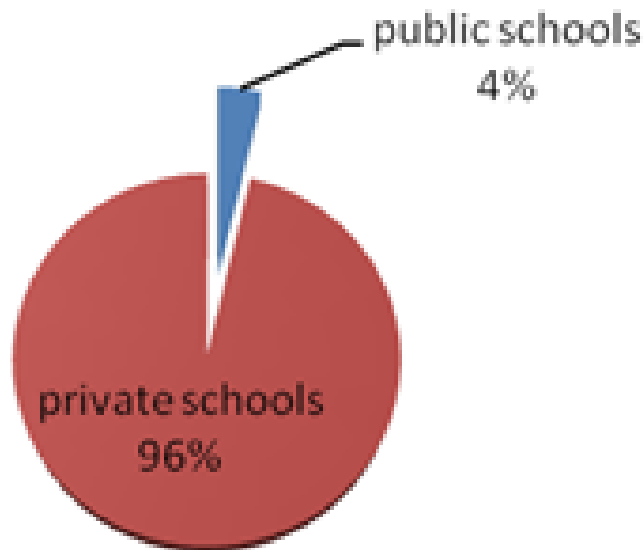
9 Dixon and Tooley; 2007, a case study of private schools in kibera.

Table 1. Proportion of schools, public and private, serving Kibera informal settlement.



16. In Mathare urban informal settlement, in Mabatini Ward, a total of 26 private primary schools serve the majority of the children population in the area, whereas only one public primary school is available.¹⁰

Table 2. Proportion of schools, public and private, serving Mathare informal settlement



17. More generally, at the national level, the number of private primary schools has grown tremendously since the 1990's; from 385 in 1998 to 1441 in 2002. After the re-introduction of the free primary education system in 2003 followed the highest recorded increase in number of private primary schools, recorded at 1624 in 2003 and later at an all-time high of 8917 in 2013. On the other hand, the increase in number of public primary schools has been

¹⁰ House Survey conducted by Mathare Community groups, 2014

minimal, from 16,971 in 1998, to 21,205 in 2013, an increase of 24.9%. In the same period, private schools increased by 2216% (see Table 3).¹¹

Table 3. Numbers, of primary school institutions, both public and private, between 1998 and 2013.¹²

Year	Number of public schools	Number of private schools	Percentage of private schools
1998	16971	385	2%
1999	17054	569	3%
2000	17381	1236	7%
2001	17544	1357	7%
2002	17683	1441	8%
2003	17697	5857	25%
2004	17804	6839	28%
2005	17807	7547	30%
2006	17964	7983	31%
2007	18063	8041	31%
2008	18130	8076	31%
2009	18543	8124	30%
2010	19059	8434	31%
2011	19848	8719	31%
2012	20307	8824	30%
2013	21205	8917	30%

18. Nevertheless, these statistics do not account for private informal schools, including in particular the “low-cost private schools”. Low-cost private schools are schools that target relatively poor households by offering education at a low cost, but also often low quality. Low-cost private schools have developed as a response to the demands of the immediate situation for a functional or compensatory education rather than as a projected deliberate educational planning. They have played an increasing role, and for instance, it is estimated that at least 52% of children in Kibera informal settlement in Nairobi attend private low-cost private schools.¹³ There could be about 2,000 non-formal schools in Kenya, with over 500,000 pupils, who are not counted in statistics. The proportion of private education is thus probably much higher than the official statistics show.¹⁴

IV. State support towards privatisation in education

19. The growth of private education in Kenya is not only the result of a spontaneous movement. It also grew thanks to the State’s direct and indirect support to private sector, especially to low-cost private schools. Support from the State may be provided in various forms ranging

¹¹ Data from Kenya economic Surveys, 2002-2015

¹² Data collected from the Kenya economic surveys, 2002-2014,,

¹³ Allavida Kenya, 2012, access to and quality of basic education in Kibera.

¹⁴ <https://mtaaniinsight.wordpress.com/2014/09/03/kenyas-education-sector-marred-by-muddles/>

from technical support through recruitment of teachers to direct financial grants to some of the registered private low cost schools.

20. Support to and institutionalisation of private education takes place in particular through the legal framework provided for non-formal schools. The Basic Education Act recognises two types of basic educational institutions: public schools, which are schools established, owned or operated by the Government; and private schools, which are those established, owned or operated by private individuals, entrepreneurs and institutions.¹⁵ All schools, whether public or private, must register with the ministry of education.
21. However, the Policy For Alternative Provision Of Basic Education And Training (APBET) creates *de facto* another type of school, the “alternative” or “non-formal” schools, which are private. The policy defines non formal schools as “*institutions that resemble formal schools in that they aim at transmitting a formalized curriculum leading to formal school examinations. They however differ in school practices, management, financing, staffing conditions, registration, operating environment and school structures.*” Under this policy, non-formal schools have less stringent requirements in terms of quality, infrastructures, teachers’ conditions, etc., than public schools, both in law, and as it is tolerated in practice. The APBET policy also creates a public private partnerships in education, as private non-formal schools registered under the ministry of education can receive funding from the government.¹⁶
22. Although the APBET policy dates from 2009, and the Basic Education Act, 2013, does not provide a framework for alternative schools, it seems to still be applicable, according to a recent presentation from the minister of education.¹⁷ Furthermore, the guidelines that have been enacted to enforce the Basic Education Act includes provisions for the “alternative provisions of basic education, training, and continuing adult education”.¹⁸ The Government also recently enacted the Registration Guidelines For Alternative Provision Of Basic Education And Training.¹⁹ Yet, it is unclear how these two set of guidelines fit within the legal framework set by the Basic Education Act – which, arguably, aimed at eliminating non-formal schools, to ensure the provision of formal, quality, public education for all.²⁰
23. While the recognition of and support to alternative private schools flows from a commendable effort by the government to include children who would otherwise not be able to attend school into the formal education system, the policy has largely been abused. In the country’s major urban informal settlements where demand for basic education is high because public schools are unavailable, private individuals who are keen on making quick

¹⁵ Section 43.

¹⁶ Ministry of education science and technology, State department of education, “Registration guidelines for alternative provision of basic education and training (APBET)”, March, 2015, p. 2.

¹⁷ <http://ir-library.ku.ac.ke/bitstream/handle/123456789/12293/Education%20Reforms%20in%20Kenya....pdf?sequence=3&isAllowed=y>

¹⁸ Legal Notice N° 39, The Basic Education Act, 8th April 2015, part V.

¹⁹ Ministry of education science and technology, State department of education, “Registration guidelines for alternative provision of basic education and training (APBET)”, March, 2015.

²⁰ Interview with drafters of the Act. See also e.g. the guiding principles, on Section 4 of the Act.

money from some of the country's poorest pockets have used the policy to provide poor quality basic education in poorly structured schools in the name of "non-formal schools". The vague definition of non-formal schools and tolerance from the authorities also allow for large commercial education actors to register as non-formal schools and benefit from the lower legal requirements it offers – although it's not clear why large-scale organised companies like Bridge International Academy (see box) should not rather be registered as private schools.

24. The existence of these schools is also an incentive for government to not improve the public education system, and maintain the *status quo*. As mentioned above, in informal settlements such as Kibera and Mathare, public education has almost not been improved in the last decade, despite the fact that these areas are largely under-served. Instead, non-formal private schools, sometimes with the direct support of the government through public-private partnerships, have been providing sub-standard education to these areas. While the Government may provide temporary support to selected not for profit community-based non-formal schools, with the aim to phase them out and progressively integrate them in the formal public education system, the non-formal education policies promoted by the State Party do not provide any vision or timeline for improving and formalising alternative schools. Rather, it entrenches the existing system, although it is the source of violations of the right to education (see below part V.B).

25. Besides, the organisation of the public education system is also conducive to privatisation in education. Although the Basic Education Act indicates that education should be free in Kenya,²¹ Section 29 indicates that “*other charges may be imposed at a public school with the approval of the Cabinet Secretary in consultation with the county education Board provided that no child shall be refused to attend school because of failure to pay such charges*”. As a result, most schools charge fees ranging from a few hundreds to a few thousands Kenya Shillings per term, and these fees are generally made mandatory in practice, as children are expelled from schools if their parents cannot pay.²² These charges not only mean that free education is an illusion in Kenya, but also that they drive parents to

Bridge International Academies, World Bank funding, and its impact on access to the right to education in Kenya

Bridge International Academies (BIA), a for-profit fee-charging chain of private primary schools operating in Kenya, serving informal settlements and poor rural areas. It has recently received monetary support from the World Bank, through its private sector investment arm, the International Finance Corporation (IFC), which invested \$10 million. Bridge has also attracted more than US\$100m from international investors, including Bill Gates, Facebook founder Mark Zuckerberg, eBay founder Pierre Omidyar, education company Pearson, and the UK’s Department for International Development.

BIA uses highly standardised methods, called “school in a box”, and barely trained, unqualified, poorly paid teachers, who are given a tablet to deliver and control a totally scripted curriculum to students, written on a tablet. Teachers in Bridge schools are expected to all read aloud to the students, almost word-for-word, the content delivered on the tablet at the same time in each school every day.

The school chain claims to provide affordable education by charging ‘just’ \$6 a month, per child. However, for families in vulnerable areas where BIA operates, who earn an average \$75 or less, sending an average of three children to these schools, means sacrificing other essential survival rights such as food and water, and it is enough to entrench inequalities and create deep educational segregation.

Meanwhile, the World Bank has no active or planned investments in either Kenya’s public basic education system. The International Development Association (IDA), the arm of the World Bank that provides concessional loans and grants to the world’s poorest governments, has no active commitments to basic education in Kenya and has not financially supported Kenya’s public basic education system since 2010.

In response to the World Bank’s support to for-profit, low-cost and low-quality education models such as BIA, and its lack of support to public education, 119 civil society organisations from around the world, including 30 organisations in Kenya and Uganda, published a statement in May 2015, asking the World Bank to ensure it fulfils its mission to truly help the poor: see <http://bit.ly/WBprivatisation>

²¹ Sections 28, 29 (1), and 32.

²² Interviews in public schools and with parents.

low-fee informal schools, which may sometimes be cheaper than the public schools. In addition, they also constitute, in themselves, a form of privatisation of education in Kenya.

26. It is also important to note that public foreign donors also play a role in supporting privatisation in education in Kenya. For instance, the World Bank has developed a “private school support program” in Kenya.²³ The World Bank, through a \$10 million loan from the International Finance Corporation, also funds Bridge International Academies (see box). In May 2015, a group of 119 organisations across the world, including 18 Kenya organisations published a statement to denounce the Bank’s political and financial support to Bridge Academies, highlighting that on the other hand the World Bank currently does not provide any funding to the public education system in Kenya.²⁴ Similarly, the British Department for International Development (DFiD) also funds Bridge International Academies, thereby supporting the development of private actors in education, whereas the public education system urgently needs to be strengthened to be able to provide quality education to all without discrimination (see box above).

V. Impact of privatisation in education on segregation and discrimination in Kenya

27. This section gives a preliminary overview of the impact of the privatisation in education described previously on the right to education by focusing on the impact on segregation and discrimination. Future reports will deepen the issue, and cover impacts on other aspects of the right to education.

A. Legal framework

28. The constitution of Kenya strongly prohibits any form of discrimination. Section 10(2) which lists the national values and principles of governance which “bind all State organs, State officers, public officers and all persons” includes as one of them “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised”.
29. Section 27 of the constitution specifies what the right to “equality and freedom from discrimination” entails. It includes “the full and equal enjoyment of all rights and fundamental freedoms” (Section 27(2)), the prohibition of both direct and indirect discrimination (Sections 27(4) and (5)), on various grounds, including “social origin” (Section 27(4)). In addition, the State of Kenya is required to “take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination” (Section 27(6)).
30. The Basic Education Act reinforces the protection against discrimination in Kenya with regards to the right to education. Article 4 of the Act lays out the principle of “equitable access for the youth to basic education and equal access to education or institutions” (Article 4(b)), as well as of “protection of every child against discrimination”, by any

²³ See http://siteresources.worldbank.org/EDUCATION/Resources/278200-1126210664195/1636971-1238439091031/Kenya_Baseline_description_June09.pdf

²⁴ See <http://bit.ly/WBprivatisation>.

institution, public or private, “on any ground whatsoever” (Article 4(f)). It specifically insists on the elimination of gender discrimination (Article 4(p)) and “non-discrimination, encouragement and protection of the marginalised, persons with disabilities, and those with special needs” (Article 4(s)).

31. Equality and non-discrimination are immediate and crosscutting obligations in the ICRC (and the ICESCR),²⁵ which require States parties to respect and ensure the rights set out in the ICRC without discrimination. International human rights bodies have stressed the importance of non-discrimination.

32. The States Parties’ obligations with respect to non-discrimination under both the ICRC and the ICESCR are immediate (as opposed to being subject to progressive realisation) and require States to pay particular attention to vulnerable or marginalised groups. Non-discrimination also applies to the distribution of government funds and resources for education.

33. In General Comment 5 the CRC elaborated:

This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes.²⁶

34. Following its General Day of Discussion on private actors and the ICRC, the CRC adopted the following recommendation relating to non-discrimination:

Likewise, the general principle of non-discrimination as enshrined in article 2, assume[s] particular importance in the context of the current debate, with the State party equally being obliged to create standards consistent and in conformity with the Convention. For instance, privatization measures may have a particular impact on the right to health (art. 24), and the right to education (arts. 28 and 29), and States parties have the obligation to ensure that privatization does not threaten accessibility to services on the basis of criteria prohibited, especially under the principle of non-discrimination. Such obligations of the State party are also applicable in the context of article 4.²⁷

35. The CRC also addressed this issue in its General Comment 16 (on the ICRC and private actors) where it stated that States must ensure that the provision of essential services by private actors ‘does not threaten children’s access to services on the basis of discriminatory criteria.’²⁸

²⁵ Article 2 ICRC; article 2(1) ICESCR.

²⁶ CRC General Comment 5, UN Doc CRC/GC/2003/5, para 12.

²⁷ Committee on the Rights of the Child, Report on the Thirty-First session, CRC/C/121, 11 December 2002, para 4

²⁸ Committee on the Rights of the Child, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, UN Doc CRC/C/GC/16, para. 34.

36. General Comment 20 of the Committee on Economic, Social and Cultural Rights (CESCR) also specifies that any kind of discrimination, whether direct or indirect, formal or substantive is prohibited. Applying the obligation not to discriminate, as well as the principles of equal opportunity and effective participation in society for all, the CESCR emphasised in its General Comment 13 that the State has an obligation to ensure that privatised education *‘does not lead to extreme disparities of educational opportunity for some groups in society.’*²⁹
37. The issue has also been addressed by the CRC in its general observations. Most recently, in the case of Morocco, the CRC expressed concern that the fast development of private education *‘has led to the reinforcement of inequalities in the enjoyment of the right to education.’*³⁰ It has also recommended that Lebanon place stronger emphasis on public education so as to *‘prevent any risk of discrimination.’*³¹
38. Socio-economic segregation is directly linked to discrimination. In a recent list of issues, the CRC explicitly expressed its worry about segregation on a socio-economic basis. It requested Chile to explain the impact of privatization in education and its measures *“to put an end to segregation in the education system and guarantee the right to equality and non-discrimination in terms of access to education and within schools”.*³²
39. As stated by the SR RtE, *‘[p]rivatization in education cripples the universality of the right to education as well as the fundamental principles of human rights law by aggravating marginalization and exclusion in education and creating inequities in society’*, and it *‘favours access to education by the privileged’*. High levels of privatisation in education have been shown to affect particularly marginalised and vulnerable groups, such as girls, as shown in a recent submission made to the CEDAW.³³

B. Situation in Kenya

40. The growth of private schools in Kenya creates or deepens inequalities. Children from high income families attend expensive high quality schools which are known to perform well, while children from the poorest and most vulnerable families are relegated to public and low cost private schools which are grossly under resourced. This in turn increases inequality in accessing education and also deepens cycles of poverty and exclusion by entrenching social classes through segregation.
41. Schools fees, even when relatively low, cannot be afforded by part of the population. As a result, the introduction of fee-charging private schools results in a stratification of the children, whereby the relatively richer go in different schools from the poorest. There are,

²⁹ CESCR, General Comment 13, para. 30.

³⁰ CRC, Concluding Observations: Morocco, CRC/C/MAR/CO/3-4 (2009), para. 60.

³¹ CRC, Concluding Observations: Lebanon, CRC/C/15/Add.169 (2002), para. 33.

³² CRC, CRC/C/CHL/Q/4-5, para. 14.

³³ Global Initiative for Economic, Social and Cultural Rights, ‘Privatisation and its Impact on the right to education of Women and Girls’, *Submission to the Half-Day General Discussion on Education of the UN Committee on the Elimination of Discrimination Against Women*, June 2014, accessible here:

<http://globalinitiative-escr.org/wp-content/uploads/2014/07/140627-Right-to-Education-Submission-to-CEDAW-Final-with-logos.pdf>

schematically, three types of schools in Kenya, whose distinction is the source of segregation.

- Formal private schools, including “elite, proprietor-owned schools, charging high fees and providing in return high-quality education to pupils from middle-income and upper-income families.” They “recruit their intakes from much wider geographic catchment areas than most public schools – but from much narrower socioeconomic catchments”, and “achieve outstanding results” in national examination.³⁴
- Low-cost private schools, which provide sub-standard education, charge moderate fees, and take children from relatively poor and lower-middle class households.
- Public schools, which charge low or no fees, whose quality varies, and which accept all children, often the poorest.

42. Beyond the obvious stratification that happens between medium/high-fees formal private schools, low-fee private schools, and public schools, even small changes in fees lead to micro-segregation, amongst the poor. This is particularly visible in informal settlements in Kenya.
43. In May 2015, 119 organisations, including 17 Kenyan organisations, presented a statement where they denounced World Bank funding to the chain of low-fee private schools Bridge International Academies.³⁵ The statement demonstrates that even if private schools such as Bridge Academies charged \$6, such schools are not accessible by at least 50% of the population.
44. Indeed, according to the most recent Demographic and Health Survey in Kenya released in 2015, women from poor families record higher birth-rates compared to their counterparts from wealthier families.³⁶ The poorest families in Kenya today have three times as many children as a wealthy one. Nationally, women from the poorest families were found to have an average of 6.4 children although those aged 19 to 49 had an exceptionally higher fertility rate at an average of 9.4 children each.
45. Data from the latest 2012/2013 household survey in Kenya show that half of the households in Kenya earn KES 7,000 (\$75) or less.³⁷ Thus, for half of Kenyan households, even assuming a cost of \$6 a month, sending 3 children of primary school age to a private school chain such as Bridge International Academies would cost **at least 24% of their monthly income**. Taking into account more realistic monthly cost for such chains of about \$17 that include school meals, sending their children to these schools would cost half Kenyan households **at least 68% of their monthly income**. Private schools costing \$6 or above are

³⁴ Moses Oketch and Anthony Somerset, “Free Primary Education and After in Kenya: Enrolment impact, quality effects, and the transition to secondary school” Create Pathways to Access Research Monograph No. 37 (May 2010), available on http://www.create-rpc.org/pdf_documents/PTA37.pdf.

³⁵ Available on <http://bit.ly/statementWBprivatisation>

³⁶ Kenya Demographic and Health Survey (KDHS) report released on 2/4/15 conducted by the Kenya National Bureau of Statistics (KNBS),

³⁷ http://www.knbs.or.ke/index.php?option=com_phocadownload&view=category&download=710:housing-survey-report-2012-2013&id=123:kenya-national-housing-survey&Itemid=599.

therefore not accessible by the poorest, who put their children in cheaper private schools, or public schools, creating a stratification in the education system.

46. This stratification phenomenon clearly appears in informal settlements. In these areas, as discussed previously, generally a majority of people attend non-State schools. A recent study from the Africa Population and Health Centre (APHC) in six informal settlements in Kenya found that households income in informal settlements varies greatly, from 2,371 KES (\$25) to 25,081 KES (\$267) a month.³⁸ In addition, households level of education also differ widely, with, in average, 53% of the households heads who have not completed more than primary education, although the situation can change from a settlement to another (see Table 4). Overall, therefore, most households are poor and have a low level of education, but within this broader category or poor uneducated households, there are significant differences between households. Said differently, some people living in slums are extremely poor and uneducated, while others are just poor and have limited education.

Table 4. Distribution of household heads in six informal settlements by level of education³⁹

Town of the settlement	No Education	Primary	Secondary	Higher	Unknown
Mombasa	9	42.4	37	9.2	2.4
Nairobi (combining 2 settlements)	7.4	51.9	35.7	2.6	2.4
Nyeri	8	63.2	25.3	1.6	1.9
Nakuru	6.7	54.5	32.2	3.7	3
Eldoret	4.5	46	40.5	6.3	2.7
Kisumu	2.3	30.2	50.1	16.4	1
TOTAL	6.1	47	38.4	6.4	2.2

47. At the same time, school charges (including fees, levies, meals) also vary enormously, from 467 KES (\$4.5) per year in some government schools to 20,900 KES (\$210) per year in some private schools (see Table 5).

³⁸ APHRC, Quality and Access to Education in urban informal Settlements in Kenya (October 2013), available on

<http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>.

³⁹ Adapted from APHRC, Quality and Access to Education in urban informal Settlements in Kenya (October 2013), available on

<http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>, p. 17.

Table 5. Average school charges in grade 3 in six informal settlements, by type of school (in KES)⁴⁰

Town of the settlement	Government	Formal private schools	Low-cost schools
Mombasa	467	10,349	-
Nairobi (combining 2 settlements)	603	6,892	3,245
Nyeri	1,276	14,333	-
Nakuru	2,931	20,900	-
Eldoret	2,493	7,032	-
Kisumu	616	8,783	-

48. The result of this situation is that the wide disparities in income and education are directly reflected in the schools parents put their children in. The APHRC's study shows that in the six informal settlements they studied, children from relatively richer households were more likely to go to formal private schools, in a statistically significant manner, than children whose parents were poorer: in the settlements studied, nearly 40% of children of the top 20% wealthiest households went to formal private schools, whereas only 52% went to public schools. Conversely, the bottom 40% poorest households overwhelmingly put their children in public schools (71%), and only 14% put their children in formal private schools (see Table 6). Similarly, children who have one parent who has been to secondary schools are more likely to go to a formal private school than children whose parents' education is below secondary.

⁴⁰ Adapted from APHRC, Quality and Access to Education in urban informal Settlements in Kenya (October 2013), available on <http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>, p. 15.

Table 6. Segregation in informal settlements
Association between background characteristics and school type attended in six informal settlements, with over-representations circled in red (in %)⁴¹

Background	School Type		
	Public	Formal Private	Low-cost
Sex of Child:			
Boy	62.2	22.2	15.6
Girl	63.9	19.4	16.8
Orphan status			
Both parents	74.6	10.4	
Single parent	71.2	14.3	14.5
None orphan	61.3	22.2	16.5
Sex of HH head			
Male	59.6	23.3	17.1
Female	71.9	14.3	13.8
HH head education			
Below secondary	64.2	16.5	19.3
Secondary or above	61.5	26.3	12.2
HH size			
1-3	57.4	24.6	18.0
4-6	63.2	21.0	15.9
7+	69.5	15.4	15.1
HH wealth status			
Bottom 40%	70.5	14.2	15.3
Middle 40%	57.9	21.0	21.2
Top 20%	52.5	39.5	8.0

⁴¹ Adapted from APHRC, Quality and Access to Education in urban informal Settlements in Kenya (October 2013), available on <http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>, p. 23.

49. Thus, the poorest and least educated parents tend to put their children in public schools, relatively wealthier and more educated parents are relatively more likely to put their children in low-cost or formal private schools, and the top 20% wealthiest and the most educated households living in these settlements are much more likely than the others to put their children in formal private schools. This is how a **sorting between children on the basis of their socio-economic status is taking place, a micro-segregation between the poor themselves**, whereby the poorest are put together in public schools, and the poor that can afford it put their children in different, private, schools, according to how much they can afford.
50. The situation is similar in rural areas. Although the proportion of private schools is relatively lower in rural Kenya, a study has found a similar segregation dynamic taking place between public and private schools. This phenomenon has also be found to be increasing between 2004 and 2007 (see Table 7).⁴²

Table 7. Type of school attended according to level of wealth (assets)
with striking figures in red⁴³

Type of school	Level of wealth (measured according to asses)				
	All	1 (Poorest)	2	3	4 (Least poor)
<i>2004</i>					
Not enrolled	8.2	10.2	10.0	6.1	6.4
Public	87.0	88.3	89.7	86.3	83.9
Private	4.8	1.5	0.3	7.3	9.7
<i>2007</i>					
Not enrolled	7.7	11.1	7.7	7.4	4.6
Public	80.3	85.6	85.6	82.7	70.0
Private	12.0	6.3	6.7	9.9	25.4

51. Other studies have shown a similar dynamic at the scale of the country. Some researchers note that following the introduction of Free Primary Education in 2003, “enrollment of less educated households (primary education or less) in the public sector increased significantly,

⁴² Mikiko Nishimura and Takashi Yamano, “Emerging Private Education in Africa: Determinants of School Choice in Rural Kenya”, *World Development* Vol. 43, pp. 266–275, 2013.

⁴³ Adapted from *Ibid.*, p. 271.

whereas more educated households left the public sector” (see Table 8).⁴⁴ Thus from 2003, although access was broadened, this has contributed, according to analysts, “to increased segregation between public and private primary schools”.⁴⁵

Table 8. Segregation of education in Kenya after the 2003 Free Primary Education (FPE) Policy

Gross (GER) & net (NER) enrollment rates in public and private schools, before & after FPE, by education of household head, with major changes cycled in red⁴⁶

	NER		GER	
	1997 (1)	2006 (2)	1997 (3)	2006 (4)
Gov't schools:				
All	71.2	71.6	99.9	103.5
No education	62.1	65.4	95.8	97.6
Some primary	74.6	77.2	104.3	120.3
Completed prim.	67.4	72.6	100.7	95.4
Some sec.	77.0	71.7	98.7	97.7
Some tert.	63.1	47.2	79.2	54.6
Private schools:]				
All	3.8	8.9	4.4	11.2
No education	1.9	2.7	2.6	3.2
Some primary	2.6	5.1	3.0	6.3
Completed prim.	2.7	8.8	2.8	9.4
Some sec.	6.4	16.4	8.0	21.8
Some tert.	20.9	42.2	17.9	56.2

52. In addition, segregation may take place on other grounds. Generally, private schools, in particular for-profit commercial schools, have little interest to enrol marginalised groups who require extra-teaching support, or, unless they are required to do so through adequately enforced regulation. Though evidence is scant, a study has shown for instance that in Kibera, children with disabilities constituted 11% of the school population in a primary school, while they constituted less than 1% of the children enrolled in non-formal schools in the area.⁴⁷

53. While such segregation is itself a major human rights concern, and constitutes a human rights violation by Kenya to the extent that the authorities have not responded adequately to this phenomenon, it also leads to additional issues. Firstly, such segregation can affect the already fragile **social cohesion in society**. As researchers have noted, a key reason why relatively richer households are moving their children out of public schools towards

⁴⁴ Bold T., Kimenyi M., Mwabu G., Sandefur J. 2011b. Why Did Abolishing Fees Not Increase Net Enrollment in Kenyan Public Schools? Center for Global Development, Working Paper No. 271. Washington, D.C.: Center for Global Development, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972336, p. 7.

⁴⁵ Ibid.

⁴⁶ Adapted from *ibid.*, p. 6.

⁴⁷ Allavida Kenya, *Access to and quality of basic education in Kibera, Nairobi: Study and synthesis report* (September 2012), available on , p. ix.

private schools is the “peer-effect”: better-off households have exited public schools as a result of poor children entering such schools, following the introduction of the FPE policy in 2003, while private schools “increasingly became a preserve of the affluent”.⁴⁸

54. Secondly, another impact of this education system is that it maintains or deepens inequality, and thus is a source of discrimination. It keeps the poorest students, who have the most challenging socio-economic environment to learn, together, and without proper support, further reinforcing the initial inequality, rather than remedying it.
55. Thirdly, Segregation lowers the general quality of education. It also affects privileged children, who miss on an important part of a quality education. As the Kothari Education Commission in India put it, such segregation in education

*is bad not only for the children of the poor but also for the children of the rich and the privileged groups [...] By segregating their children, such privileged parents prevent them from sharing the life and experiences of the children of the poor and coming into contact with the realities of life [...] [and also] render the education of their own children anaemic and incomplete.*⁴⁹

56. As shown by the Organisation for Economic Cooperation and Development (OECD) through its studies in a number of countries, segregation also has a negative impact on the overall quality of an education system. The highest performing education systems across OECD countries are those that combine quality with equity.⁵⁰
57. Thus, calling for low-cost schools to stand as an alternative advances the legality of dual education systems that stratify society according to socio-economic canons. In other words, it is a promotion of a system that legitimizes inequality.

VI. Impact on the right to free quality education

A. Normative framework

58. According to the Committee on Economic, Social and Cultural Rights (CESCR), interpreting article 13 of the ICESCR:

*First, it is clear that article 13 regards States as having **principal responsibility for the direct provision of education in most circumstances**; States parties recognize, for example, that the “development of a system of schools at all levels shall be actively pursued” (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfill (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, **States parties have an enhanced obligation to fulfill (provide) regarding the***

⁴⁸ Bold T., Kimenyi M., Mwabu G., Sandefur J. 2011b. Why Did Abolishing Fees Not Increase Net Enrollment in Kenyan Public Schools? Center for Global Development, Working Paper No. 271. Washington, D.C.: Center for Global Development, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1972336, p. 20.

⁴⁹ India Education Commission, “Education and national development: Report of the education commission, 1964-66 – Volume I”, India ministry of education, National Council of Educational Research and Training (1966), para. 1.37.

⁵⁰ OECD, *Equity and Quality in Education: Supporting Disadvantaged Students and Schools*, OECD Publishing (2012).

right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States parties.⁵¹

59. It should also be noted that Article 13 (3) of the ICESCR protects the liberty of parents and legal guardians to choose for their children schools ‘*other than those established by the public authorities*’, thereby assuming that there is a system of public schools available, which private schools provide an alternative too in order to ensure parents can offer ‘*the religious and moral education of their children in conformity with their own convictions*’. The SR RtE made it explicitly clear by emphasising that:

*education must be safeguarded as a public good. Drawing upon the adverse impact of privatization in education and the consequent growing disparities in education, **Governments should ensure that private providers only supplement public education, the provision of which is the Government’s responsibility, rather than supplant it.** [...] It is important to ensure that States do not disinvest in public education by relying on private providers.*

60. Article 28 of the ICRC require States parties to ‘*make primary education compulsory and available free to all*’ and to progressively introduce free secondary education.

61. The Committee on the Rights of the Child has also provided guidance on the implementation of the ICRC in the context of privatisation in General Comment No. 5:

The Committee emphasizes that enabling the private sector to provide services, run institutions and so on does not in any way lessen the State’s obligation to ensure for all children within its jurisdiction the full recognition and realization of all rights in the Convention (arts. 2 (1) and 3 (2)).⁵²

62. The CRC additionally addressed the issue of privatisation during its Day of Discussion on ‘The private sector as service provider and its role in implementing child rights’ in 2002. The Committee made a number of recommendations including:

The Committee further recommends that, in order to ensure economic accessibility, policies on services, in particular health care and education services, be so formulated as to reduce the financial burden on low-income groups, particularly the poor, for example by reducing and eliminating user fees for those groups that cannot afford them, especially the poor.⁵³

63. UN treaty bodies, including the CRC, have made a number of observations on the impact of privatisation and fees on the realisation right to education, with a direct link between the right to free education and the right to non-discrimination. For instance, with regards to Colombia, the Committee noted that the legislative provision that allows costs to be levied by schools upon those who can afford to pay ‘*has created a discriminatory educational system marked by arbitrary fees and social exclusion.*’⁵⁴

⁵¹ CESCR, General Comment 13, para. 48 – emphasis added.

⁵² Committee on the Rights of the Child, General Comment 5, CRC/GC/2003/5, para 44.

⁵³ *Op. cit.* paragraph 23.

⁵⁴ CRC, Concluding Observations: Colombia, CRC/C/COL/CO/3 (2009), para. 33. See also CRC, Concluding Observations: Sri Lanka, E CRC/C/LKA/CO/3-4 (2010), para. 62.

64. Building on these principles, the SR RtE cautioned in his last annual report that privatisation *'throws overboard the fundamental principle of equality of opportunity in education, which is common to almost all international human rights treaties'*.⁵⁵ Access to education based upon the capacity to pay fees, which is a consequence of privatisation, *'flies in the face of prohibited grounds of discrimination'*.⁵⁶
65. Similarly the CESCR's concluding observations have highlighted the negative and discriminatory impact of tuition fees. Despite the existence of scholarships and bursaries in Canada, the Committee expressed *'concern about the discriminatory impact of tuition fee increases on low-income persons'*.⁵⁷ It connected the importance of free education with the realisation of the right to non-discrimination, including discrimination on socio-economic grounds. In the case of Nepal, the CESCR was concerned that *'in practice primary education is not completely free due to various fees charged to parents, such as for school supplies and uniforms'*.⁵⁸
66. Further, in its review of the Republic of Korea, the CESCR clearly highlighted that access to education should not be based on financial capacity or, in the case of higher education, solely based on ability. It expressed its concerns with the *'high associated costs of education required to be paid by parents,' 'the deepening inequality in education,' and 'the fact that the chances of entering a high-level university for students are often determined by their parents' ability to afford after-school tutoring or private education.'* The CESCR recommended that the Republic of Korea *'ensure that education is equally accessible to all and without discrimination, on the basis of ability, not financial capacity.'*⁵⁹
67. In relation to primary education, the CESCR in General Comment 13 says that the State's obligation to fulfil the right to education amounts to an obligation to *directly provide* education in most circumstances and suggests that its obligations in relation to primary education may be of a higher order and entails more immediate obligations.⁶⁰ General Comment 13 states:
- "First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13 (2) (e))."*⁶¹
68. While the CRC permits (as does the ICESCR⁶²) the provision of education (to unspecified levels) by non-State providers, as provided in Article 29(2), the liberty to establish educational institutions is constructed negatively, as something that should not be affected by the fulfilment of the right to education. The responsibility is thus on the State to fulfil the right to education. The UNESCO Convention against Discrimination in Education takes a

⁵⁵ Report of the Special Rapporteur on the right to education, A/69/402 (24 September 2014), para. 48.

⁵⁶ Ibid., para. 45.

⁵⁷ CESCR, Concluding Observations: Canada, E/C.12/CAN/CO/4 E/C.12/CAN/CO/5 (2006), para. 31.

⁵⁸ CESCR, Concluding Observations: Nepal, E/C.12/1/ADD.66 (2001), para. 57.

⁵⁹ CESCR, Concluding Observations: Republic of Korea, E/C.12/KOR/CO/3 (2009), para. 76.

⁶⁰ CESCR, General Comment 13, paragraphs 48, 51 and 52.

⁶¹ *Emphasis added.* CESCR, General Comment 13, paragraph 48.

⁶² See also ICESCR, Article 13(4) and CESCR General Comment 13, paragraph 59.

similar approach in its Article 2 which provides that the establishment or maintenance of private educational institutions does not constitute discrimination when it is to provide educational facilities *in addition to those* provided by the public authorities.⁶³ It should also be noted that in its indicators on the right to education, the OHCHR suggests measuring child enrolments in *public* education institutions as an indicator of compliance with human rights standards.⁶⁴

69. A former Special Rapporteur on the Right to Education, the late Katarina Tomaševski, emphasised that:

“[i]nternational human rights law defines free and compulsory education as a government obligation, thus implying that it should be a free public service, while permitting private education for those parents who desire and can afford it, bearing in mind most private schools charge for their services.”⁶⁵

70. Thus, it is permissible, and even required, to allow the development of private education, but the State retains the positive obligation to fulfil the right to education, and the obligation to provide primary education for all is an immediate duty of States.⁶⁶

71. Finally, States have an obligation to ensure that the maximum available resources are devoted to achieving education outcomes, and thus have the burden of demonstrating that any State resources diverted to private providers of education cannot be better utilized by allocating them to the direct provision of public education.

72. The rights protected under article 43 of the constitution are subject to progressive realisation. However, according to article 20, “it is the responsibility of the State to show that the resources are not available, and “in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals”. The constitution also asserts that “the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation” of the rights guaranteed under Article 43.

73. Furthermore, article 53, which concerns children’s rights is not subject to progressive realisation. Therefore, according to its own regulations, the right to free and compulsory basic education is not limited by the State party’s resources. The State has an immediate duty to ensure that every child in Kenya has access to free and compulsory basic education.

⁶³ UNESCO Convention against Discrimination in Education, 1960. It can also be noted that in Africa, the African Commission on Human and Peoples’ Right also considers the African Charter on Human and People’s Rights to requires States ‘to respect the liberty of parents and guardians to establish and choose for their children schools, *other than those established by the public authorities*’, clearly emphasizing the primacy of public schools.⁶³

⁶⁴ OHCHR, Human Rights Indicators: A Guide to Measurement and Implementation (2012).

⁶⁵ Katarina Tomaševski, *Manual on rights-based education*, UNESCO (2004), p. 55.

⁶⁶ CESCR, General Comment 13, para. 51.

B. Situation in Kenya

74. A growing preference and inclination towards private schools in Kenya has been propagated by an apparent failure by the public system to meet the needs of parents at all income levels.⁶⁷
75. In 2003, the public education sector experienced a massive explosion of student enrolment in primary schools as the government introduced the Free Primary Education (FPE) program. Enrolment increased from 6.0 million in 2002 to 7.2 million pupils in 2003. Latest statistics show that as at 2013, enrolment had risen to roughly about 10.2 million pupils.⁶⁸
76. Although enrolment has increased, evidence also exists that government allocation of per-capita grants to schools has declined. The government currently allocates a capitation grant of 1500 Kenya Shillings per child under the Free Primary Education program implemented in 2003, representing a decline from the 2774 Kenya Shillings the government had spent on each primary school child in 1997 (EYC, 2004).⁶⁹
77. Despite this great milestone that was achieved in the education. The available facilities have to date had to cater for all the students who continue to enrol since 2003, with very minimal growth in infrastructure, as detailed in the tables below.

Table 9. Number primary education facilities 2004-2008 ⁷⁰

CATEGORY	2004	2005	2006	2007	2008
Schools					
<i>Pre-primary</i>	32,879	34,043	36,121	37,263	37,954
<i>Primary</i>					
Public	17,804	17,807	17,946	18,063	18,130
Private	6,839	7,546	7,983	8,041	8,076
Totals	24,643	25,353	25,929	26,104	26,206

⁶⁷ Heyneman, S.P., Stern, J.M.B., Low cost private schools for the poor: What public policy is appropriate? Int. J. Educ. Dev. (2013), p 12.

⁶⁸ Kenya National Bureau of Statistics, 2013, "Kenya Facts and Figures 2014", pg 12

⁶⁹ Omwami, E.M., Omwami, R.K., Public investment and the goal of providing universal access to primary education by 2015 in Kenya. Int. J. Educ. Dev. (2009),

⁷⁰ Source: National Education Support Strategy, UNESCO, 2010.

Table 10. Number of primary school teachers by qualification and sex 2006-08⁷¹

	2006			2007			2008		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
TRAINED									
Graduate	584	436	1,020	608	470	1,078	658	490	1,148
Approved	22,302	18,572	40,874	23,033	20,135	43,168	22,003	21,010	43,013
S1/Diploma	6,786	7,001	13,787	7,060	7,527	14,587	7,054	7,456	14,510
P1	52,616	40,659	93,275	54,741	44,250	98,991	55,241	44,160	99,401
P2	6,541	4,877	11,418	6,805	5,213	12,018	6,802	5,185	11,987
P3	778	920	1,698	809	992	1,801	-	-	-
TOTAL	89,607	72,465	162,072	93,056	78,587	171,643	91,758	78,301	170,059
UNTRAINED									
K.C.E./K.C.S.E.	338	115	453	568	120	688	-	-	-
K.J.S.E	42	21	63	84	29	113	-	-	-
C.P.E./Others	254	151	405	556	157	713	-	-	-
TOTAL	634	287	921	1,208	306	1,514	-	-	-
GRAND TOTAL	90,241	72,752	162,993	94,264	78,893	173,157	91,758	78,301	170,059

78. The influx of students to public primary schools and overstretched facilities in these schools resulted in a high number of student transfers to private schools. This trend has especially informed parents' perception of poor quality in public schools due to the infrastructural constraints they face. This perception has also contributed to the rise and increased enrolment in private schools.
79. The worst case scenario has been experienced in the densely populated urban informal settlements. The perceived need by parents to transfer children from public schools in search of 'better quality' education has over the years created a much ready market for low cost education. Public schools and basic services are either inadequate to cater for the huge populations or are completely unavailable. Research shows that because there are too few government schools in urban slums to accommodate all of the children in their areas, and also because quality is perceived to be better in private schools, the gap in supply and quality has led to the proliferation of low cost non-government schools whose direct fee-charges are generally higher than those of government schools. In large urban informal settlements such as those in Nairobi, Mombasa and Eldoret, more than 50% of the children attend low fee non-government schools⁷² which have mushroomed tremendously to cater to a growing demand among those seeking 'quality' education, and which the State has not provided.

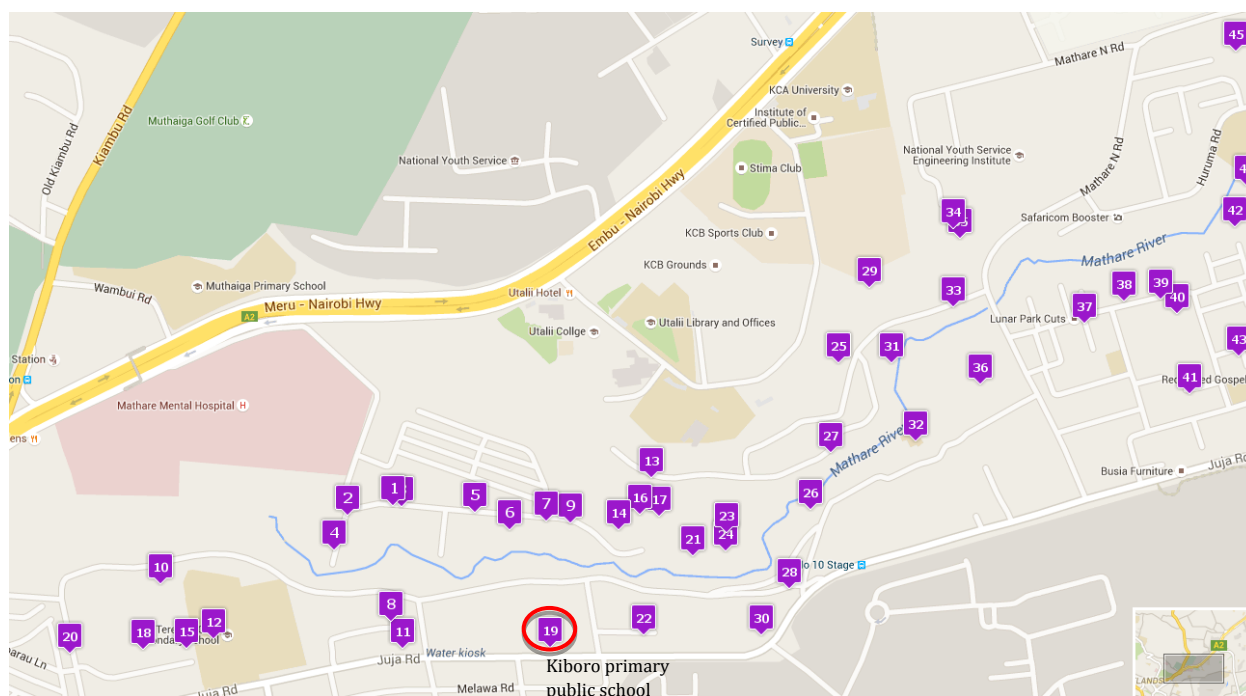
⁷¹ Source: National Education Support Strategy, UNESCO, 2010.

⁷² Adapted from APHRC, Quality and Access to Education in urban informal Settlements in Kenya (October 2013), available on <http://aphrc.org/publications/quality-and-access-to-education-in-urban-informal-settlements-in-kenya>

80. The situation of the Mathare Valley informal settlement, in Nairobi, illustrates this situation. The population in Mathare is unknown, and has been estimated between 600,000 and 800,000,⁷³ although the population of the informal settlement alone may be around 180,000.⁷⁴ In any case, the slum itself only has only one government school available (see map below), Kiboro primary school, which was originally a community school started by residents, and later upgraded and taken over by the authorities. All other 40+ schools in the area are private schools. As a result, residents, in particular those living in the north and east of the area have no choice but to send their children to a private school. Contrary to arguments sometimes put forward, private schools in slums like Mathare Valley therefore often do not serve to fulfil the freedom element of the right to education by providing an alternative able to ‘ensure [parents] the religious and moral education of their children in conformity with their own convictions’. Parents putting their children into these schools is not a choice of parents that expresses a preference for private providers, it is rather a default option reflecting on the failure of the Kenyan State to fulfil one of its core obligations with regards to the right to education.

Figure 1. Map of Mathare Slum Valley⁷⁵

Schools in purple points, the only public school, Kiboro primary school, circled in red



⁷³ Dan Darkey and Angela Kariuki, “A Study on Quality of Life in Mathare, Nairobi, Kenya” J Hum Ecol, 41(3): 207-219 (2013), available on [http://www.krepublishers.com/02-Journals/JHE/JHE-41-0-000-13-Web/JHE-41-3-000-13-Abst-PDF/JHE-41-3-207-13-2400-Darkey-D/JHE-41-3-207-13-2400-Darkey-D-Tx\[4\].pmd.pdf](http://www.krepublishers.com/02-Journals/JHE/JHE-41-0-000-13-Web/JHE-41-3-000-13-Abst-PDF/JHE-41-3-207-13-2400-Darkey-D/JHE-41-3-207-13-2400-Darkey-D-Tx[4].pmd.pdf)

⁷⁴ <https://en.wikipedia.org/wiki/Mathare>. See also http://www.mathareroots.org/index.php?option=com_content&view=article&id=103&Itemid=27 (estimating 500,000), <http://www.matharevalley.org/mvalley.html> (estimating 600,000), <http://cmetrust.org/mathare/> (estimating more than 600,000).

⁷⁵ Map from Geonames, http://www.geonames.org/maps/google_-1.266_36.854.html

81. Further, the trend towards preference for private schools is also advised by the existing trends of transition of students from primary school to secondary schools. Due to a variety of factors, available data reveal that students from private primary schools are 10 times more likely to secure places in prestigious national secondary schools as their public school counterparts,⁷⁶ although the government has put in place a system of quota and incentives to give higher chances to pupils from primary schools to be accepted in secondary schools. This shows a trend whereby students from private schools tend to pre-empt spaces in top performing national public secondary schools. The risk then is that students from private schools increasingly dominate the high end national public secondary schools.⁷⁷ This leads to a situation where parents do not enjoy a real choice when choosing to take their children to private schools, their decisions also being affected by their chance to reach secondary schools.

VII. Recommendations for list of issues

82. Given the analysis above, we recommend that the CESCR ask the following question to the State Party:
- a. **Why are private school chains, such as Bridge International Academies, registered as non-formal schools, whereas they appear to offer formal education?**
 - b. **How does the state supervise, monitor and evaluate the implementation of basic education by private non formal schools to ensure it complies with the Convention on the rights of the child? Is the ministry of education well equipped in terms of data and technical capacity to carry out this function?**
 - c. **If the Government intends to progressively replace non-formal education by formal quality free education, why does it continuously support non-formal schools without a plan to lead to formalisation? Otherwise, what are the plans from the Government to phase out non-formal education, and how is this intention materialised in laws and policies?**
 - d. **What steps are being taken to ensure that public primary education is strengthened to reach out to marginalised groups, such as in non-formal settlements, and to ensure that public education is free and of good quality to avoid forcing parents having to resort to private schools? Specifically, does the government have plans to allocate resources to improve the public education access and quality in informal settlements?**

⁷⁶http://www.create-rpc.org/pdf_documents/PTA37.pdf

⁷⁷ p. 29 http://www.create-rpc.org/pdf_documents/PTA37.pdf