Submission to the Committee on Economic, Social and Cultural Rights
(72 Pre-sessional Working Group)

Access to public services essential for the enjoyment of economic, social and cultural rights in Kenya, especially education and health

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The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), People's Health Movement (PHM) Kenya, Centre for Education Policy and Climate Justice, and East African Centre for Human Rights (EACHRights) welcome the opportunity to contribute with inputs to the Committee on Economic, Social and Cultural Rights (CESCR) during its 72 Pre-sessional Working Group (6 Mar 2023 – 10 Mar 2023) for the drafting of the list of issues regarding the sixth periodic report of Kenya (E/C.12/KEN/6).

This submission refers to the "Access to public services essential for the enjoyment of economic, social and cultural rights in Kenya, especially education and health".

Introduction

Kenya's Constitution has entrenched economic, social, and cultural rights since 2010. This has led to significant progress in access to education and healthcare. However, significant gaps in availability, access, acceptability, and quality of public services for education and healthcare are fuelled by the privatisation and commercialisation of these services, which hinders the full enjoyment of these rights, especially for those living in urban poverty.

Right to education

In the 2015 Concluding Observations on Kenya's combined second to fifth periodic reports, the CESCR highlighted the adverse human rights impact of the commercialisation of education in Kenya. In particular, the CESCR was concerned that insufficient financial and human resources were allocated to public education and that the inadequacies of the public school system led to the increasing privatisation of education.[1] The CESCR also flagged that the proliferation of so-called low-cost private schools led to segregation and discriminatory access to education, especially for children living in informal settlements and semi-arid areas.[2]

The CESCR recommended that Kenya strengthen its public education sector by increasing the budgetary allocation to primary education and improving access to and quality of primary education for all without hidden costs, particularly for children living in informal

[1] Committee on Economic, Social and Cultural Rights (CESCR), Concluding observations on the combined second to fifth periodic reports of Kenya, E/C.12/KEN/CO/2-5 (April 2016) para 57.
[2] Ibid.

settlements.[3] The Committee also recommended that Kenya align the Registration Guidelines for Alternative Provision of Basic Education and Training with international human rights law requirements and ensure that all public, private, formal or non-formal schools are registered and comply with the guidelines.[4]

The State report confirms that in 2015 the State adopted the Registration Guidelines for Alternative Provision of Basic Education and Training (APBET) to facilitate the registration of APBET institutions, including low-cost private schools.[5] However, these guidelines still need to be implemented and most APBET schools still need to be registered. According to a 2020 mapping of APBET schools in Nairobi by the National Council for Nomadic Education in Kenya (NACONEK), a department with the Ministry of Education, only 12.7% of the schools were registered with the Ministry of Education.[6]

Lack of access to quality public education remains a challenge in informal settlements. A study on the impact of the COVID-19 pandemic on education in informal settlements demonstrated that the 'majority of families in [urban informal] settlements send their children to private schools because there are no government schools available near them, not necessarily because they prefer private schools to government schools.'[7]

The research further found that in response to the decrease in household incomes caused by the measures taken to contain the spread of the pandemic, about 13.4% of learners in informal urban settlements transferred from private schools to public schools.[8] Concurrently, some low-cost private schools could not reopen because of the loss of income during school closures, and learners had to find other schools, while some learners (about 1%) remained out of school; 47.4 per cent of school dropouts came from the poorest wealth tertile.[9] This demonstrates the precarious nature of education systems that over-rely on private education provision, and the critical importance of free, quality, inclusive public education, especially for impoverished families.

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[3] Ibid, para 58.
[4] Ibid.
[5] Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, E/C.12/KEN/6 (September 2022) para 215.
[6] Ministry of Education, State Department of Early Learning and Basic Education, National Council for Nomadic Education in Kenya (NACONEK), *Mapping of Basic Learning Institutions Operating in the Informal Settlements of Nairobi County Report* (July 2020) 39.
[7] Olivier Habimana, Francis Kiroro, John Muchira, Aisha Ali, Catherine Asego, Rita Perakis, Moses Ngware "Exploring the Effects of the COVID-19 Pandemic on Low-Cost Private Schools in Nairobi, Kenya." [Abstract] CGD Working Paper 623. Washington, DC: Center for Global Development (October 2022). Retrieved from https://www.cgdev.org/publication/exploring-effects-covid-19-pandemic-low-cost-private-schools-nairobi-kenya (last accessed 9 February 2023).
[8] Ibid, p 11.
[9] Ibid, p 11 – 12.

In light of the above and regarding the right to education, we propose the following questions to be considered by the CESCR in the list of issues of Kenya:

1. Please provide information on measures taken to improve availability, accessibility (including physical and economic access), acceptability and quality of public education for impoverished people.
2. Please provide information on the plans to address the proliferation of low-cost private schools, which result in discrimination in access to quality education and create a segregated society.
3. Please provide additional information on the right to education in relation to the privatisation of public institutions offering higher education in line with the requirement that higher education shall be equally accessible to all, based on capacity, by every appropriate means, and in particular by the progressive introduction of free education.

The right to health

In the 2015 Concluding Observations, the Committee had raised concerns regarding the 'inadequate budgetary allocation to the health sector, very limited coverage of the National Health Insurance Fund and the significant share of out-of-pocket payments in health expenditure, which limit access to health for disadvantaged and marginalized persons.'[10] The Committee recommended that Kenya 'take concrete measures to enhance access to health services, particularly for disadvantaged and marginalized individuals and groups, including through increasing budgetary allocation to the health sector and expanding the coverage of the National Health Insurance Fund.'[11]

In the State report submitted in September 2022, Kenya stated that there has been a 43% increase in government investments in healthcare since 2013 and an increase of public health facilities from a stock of 4,429 facilities in 2013 to 6,342 in 2022.[12] Kenya also stated that in the same period, the intensive care unit capacity has increased by 502%; total hospital bed capacity has also increased by 47%; and over the past 10 years the total number of health workers in the public and private sectors increased by 41% to address the human resource shortage.[13]

However, realisation of the right to health has been constrained by privatisation and commercialisation of healthcare. Policies such as the Kenya Health Policy 2014-2030 includes strengthening the role of the private sector as both a financier and a provider of

[10] CESCR, Concluding observations on the combined second to fifth periodic reports of Kenya, E/C.12/KEN/CO/2-5 (April 2016) para 51.
[11] Ibid, para 52.
[12] Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, E/C.12/KEN/6 (September 2022) para 174.
[13] Ibid, paras 176 and 178.

healthcare services as one of its core objectives.[14] As a result, between 2013 - 2021, the share of health establishments that are for-profit in Kenya grew from 33% to 43% in less than 10 years.[15] This development has had a negative impact on the right to health, especially for the most marginalised populations. Research conducted in 2021 on the impact of commercialisation of healthcare services on people living in urban poverty, in the context of the COVID-19 pandemic found that:[16]

a) Decades of healthcare commercialisation have resulted in insufficient public healthcare services, leaving Kenya remarkably short on medical resources that are vital to respond to the COVID-19 pandemic.[17] While we acknowledge the increase in national and county government spending on healthcare, healthcare services are still starved of resources: domestic spending on health was as low as 9% of the national budget in 2020,[18] far below the target of 15% to which the African Union States committed in the Abuja Declaration.[19] Likewise, Kenya's general government spending on health in 2018 accounted for only 2.17% of its gross domestic product (GDP).[20]

b) The commercialisation of the healthcare system has exacerbated inequalities in access to healthcare services. High-end, expensive private health facilities are largely inaccessible to low-income individuals, who instead rely on the limited available public medical facilities or low-cost private health services, some of which are offering substandard medical services. The COVID-19 pandemic has worsened these inequalities, with marginalised individuals facing geographical, information

[14] Ministry of Health, 'Kenya Health Policy 2014-2030' (2014). Retrieved from http://publications.universalhealth2030.org/uploads/kenya_health_policy_2014_to_2030.pdf (last accessed 9 February 2023).
[15] Data from 2013 are from the following official report: Ministry of Health, Kenya Service Availability Readiness Assessment Mapping (SARAM) Report (2013) p 12. Retrieved from http://guidelines.health.go.ke:8000/media/Kenya_Saram_Report.pdf (last accessed 9 February 2023).
[16] Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), Patients or customers? The impact of commercialised healthcare on the right to health in Kenya during the COVID-19 pandemic (2021). DOI: 10.53110/RPCN4627.
[17] Economic and Social Rights Centre – Hakijami and the Centre for Human Rights and Global Justice, 'Wrong Prescriptions: The Impact of Privatising Healthcare in Kenya' (November 2021). Retrieved from https://chrgj.org/wp-content/uploads/2021/11/Report_Wrong-Prescription_Eng_.pdf (last accessed 9 February 2023).
[18] Health Policy Plus, 'Is Kenya allocating enough funds for healthcare' (February 2021). Retrieved from http://www.healthpolicyplus.com/ns/pubs/18441-18879_KenyaNCBABrief.pdf (last accessed 9 February 2023).
[19] WHO, The Abuja Declaration: Ten Years On (2011). Retrieved from https://www.who.int/healthsystems/publications/abuja_report_aug_2011.pdf?ua=1 (last accessed 9 February 2023).
[20] WHO, Global Health Expenditure Database (2022). Retrieved from https://data.worldbank.org/indicator/SH.XPD.GHED.GD.ZS?locations=NG-KE-ZACI-ZG (last accessed 9 February 2023).

and financial barriers in accessing COVID-19 testing and treatment, with collateral impacts on access to other medical services. The financial barriers are exacerbated by the low insurance coverage. Despite State efforts to increase insurance coverage, according to the State report, only about '25% of Kenyans are covered by public, private or community-based health insurance schemes.'[21]

c) The public policies that have encouraged higher private sector engagement in healthcare over the last few decades have not been accompanied by sufficient regulation and monitoring of private healthcare actors, which has contributed to a proliferation of ramshackle private clinics, nursing homes and laboratories. Several private health facilities in marginalised areas are unsafe and offer substandard medical services. These facilities, often unlicensed, tend to employ unqualified doctors and the chemists were reported to sell expired drugs, resulting in episodes of misdiagnosis, unnecessary treatments.

In light of the above and regarding the right to health we propose the following questions for the CESCR to be considered in the list of issues of Kenya:

1. Please provide information on the measures taken to effectively monitor and regulate the provision of health services by private actors, particularly in informal urban settlements.
2. Please provide information on measures taken to improve availability, accessibility (including physical and economic access), acceptability and quality of public healthcare services for people living in poverty.
3. Please provide information on measures taken to more rapidly ensure universal access to public health insurance for persons living in poverty.
4. Please provide additional information on measures taken to ensure water (in relation to health and sanitation) is generally available in acceptable and quality quantities for the most disadvantaged and in a manner that protects the most vulnerable from the adverse impacts of climate change.

For more information, please consult the following publications:

- Global Initiative for Economic, Social and Cultural Rights, 'Patients or Customers? The impact of Commercialised Healthcare on the Right to Health in Kenya during the COVID-19 pandemic' (April 2022)
- Economic and Social Rights Centre – Hakijamii and the Centre for Human Rights and Global Justice, 'Wrong Prescriptions: The Impact of Privatising Healthcare in Kenya' (November 2021).

[21] Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant (September 2022) 30.

- Global Initiative for Economic, Social and Cultural Rights, 'States' Human Rights Obligations regarding public services essential for the enjoyment of Economic, Social and Cultural Rights – The regional perspective' (September 2022).
- Global Initiative for Economic, Social and Cultural Rights, 'Compendium of United Nations Human Rights Treaty Bodies' Statements on Private Actors in Healthcare' (June 2021).
- Global Initiative for Economic, Social and Cultural Rights, 'Human Rights Bodies Statements on Private Actors in Education' (January 2023).
- Global Initiative for Economic, Social and Cultural Rights, 'Ensuring Public Services for Indigenous Peoples: Human Rights Standards' (December 2022).

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