



National Office

The thought leader in cooperative school governance

13 June 2022

For attention: Mr Llewellyn Brown

Via email: belabill02@parliament.gov.za

Dear Sir/Madam

SUBMISSION ON THE BASIC EDUCATION AMENDMENT BILL (6 December 2021)

Please find overleaf the Governing Body Foundation's (GBF) written submission in response to the "HAVE YOUR SAY" advertisement.

We restrict our comments only to amendments to the South African Schools Act that affect public schools.

Please note, we wish to place on record that we would like to make a brief oral submission.

Yours faithfully

(DR) ANTHEA CERESETO
CHIEF EXECUTIVE OFFICER

SUBMISSION OF COMMENT ON THE BASIC EDUCATION LAWS AMENDMENT BILL (6 December 2021)

1. Introduction

- 1.1 This submission is a response to an invitation to interested individuals and organisations to submit written comments on the Basic Education Laws Amendment Bill (Bill), by 15 June 2022.
- 1.2 The Governing Body Foundation (GBF) is a Public Benefit Organisation which serves the school governing bodies of 776 public schools from all provinces in South Africa. The GBF does so by advising and supporting schools using a variety of strategies (response to telephone and email queries, website resources, workshops, seminars, webinars, podcasts, weekly information leaflets) regarding education law and policy relating, in particular, to school governance.
- 1.3 Our member schools cover the diverse range of schools in the country. We represent fee-paying schools as well as no-fee schools.
- 1.4 The GBF promotes cooperative governance. It encourages its member schools to work with the national and provincial education departments to meet the needs of learners in the education system. For this reason, the GBF supports amendments that prescribe processes for consultation between schools and the MEC or Head of Department before decisions are made.
- 1.5 The GBF restricts its comments on the Bill to amendments of the South African Schools Act (SASA) concerning public schools.
- 1.6 Schools that are members of the GBF reject amendments to SASA which unreasonably restrict their functions as assigned in SASA or processes that are deemed unnecessary or extend beyond the powers of officials as reasonably assigned in SASA.

2. The GBF takes note that some of the unacceptable amendments in the Bill tabled for comment in 2017 have been discarded.

3. What is good about the amendments made to sections in the South African Schools Act (Section references are to SASA)

- 3.1 The definition of Basic Education now includes Grade R to Grade 12.
- 3.2 The definition of “drug” has been extended and it provides for schools’ Codes of Conduct for Learners to refer to specific prohibited drugs/substances.

- 3.3 The definition of “loans” excludes operational costs that have been included in the school budget.
- 3.4 Section 3(7) is useful as it makes it an offence for any person to disrupt schooling and provides for a sanction of a fine and/or imprisonment not exceeding 12 months.
- 3.5 Provision is made in a number of sections for approval of the HOD to be deemed if the HOD fails to respond within a specified timeframe. **However, we would like this provision to be included in all sections where schools are required to apply for approval or permission from either the HOD or MEC.**
- 3.6 Section 8A makes it clear how schools must handle liquor on school premises. A long and detailed process must be followed. Schools/SGBs that do not want liquor on school property are entitled to continue holding that position.
- 3.7 Section 22 provides more protection for SGBs and their members. The process which an HOD must use to withdraw one or more functions of an SGB is prescribed in detail.
- 3.8 Sections 24 and 28 now give the power to the Minister to determine the composition of an SGB. **This will enable consistency across all provinces.**
- 3.9 Section 27(2) makes it clear that SGB members may not be remunerated in any way for attending meetings or school activities. **This will remove the belief in some schools that being elected to the SGB is a form of paid employment and that people can make money by being on the SGB.**
- 3.10 Section 32(4) makes it clear that learners may not be part of anything related to staff appointments.
- 3.11 In terms of section 36(b)(i) leases (of school facilities) not exceeding 12 months will no longer require MEC approval. This will **make it easier** for schools to allow the use of their facilities to supplement the school fund.
- 3.12 Section 59(3) makes it an offence to provide the school with false information with a sanction of a fine and/or imprisonment not exceeding 12 months.

4. Acceptable amendments

- 4.1 Section 29(2)(b) states that, if possible, only a person not employed by the school should be chairperson of the finance committee. This is a useful amendment but what is and is not possible is difficult to determine.
- 4.2 Section 12(3A) provides for an SGB to apply to be a “school with a specialised focus on talent” and specifies the process for doing this. **To be really useful this amendment should broaden the understanding of “talent” to Mathematics, Science, Engineering and other specialist fields.** This is an important section because schools with a specialised focus are allowed to do

admission tests – basically to see whether they have the “talent” to go all the way to grade 12 in the school.

- 4.3 Section 38A gives more detail about what must be included in the application for SGBs to pay PED employees additional remuneration. There is a definition of “benefit in kind” but it is not an exclusive list of benefits. School fee remission is not included in the examples given. The GBF and at least one other PED have held that employees may not be exempted from paying schools fees. It is a statutory responsibility for parents to pay if they qualify to do so. This means any amount remitted above which the parent would be liable must be included as a benefit, and application made for it in terms of section 38A. All benefits are taxable. **It is, however, that the HOD responds timeously to all submitted applications.**
- 4.4 Section 60 (4)(b) requires schools to comply with section 36(2), that is, obtain MEC approval for a loan/lease/overdraft, otherwise the state would not be liable for damages or loss incurred by third parties as a result of the school’s wrongdoing.
- 4.5 Section 41(2A) might not be liked by schools trying to collect fees, but it protects parents who cannot provide details of the other parent. This section allows a parent to submit an affidavit to that effect in an exemption application. Schools will have to use other ways of tracking down these “missing” parents and not place the burden on the single parent.
- 4.6 Section 21(3A) provides for central procurement despite the right of SGBs to purchase LTSM. **However, it must be done in consultation with the SGB.**
- 4.7 Section 43(4) provides for financial investigations by the HOD on just cause. The HOD may authorise qualified persons to do investigations. Currently the MEC may request the Auditor-General to do this. This amendment makes it easier for the PED to conduct investigations into school financial management. **The GBF cautions that this section could be abused by persons who make false allegations about school personnel to satisfy their own personal agendas, including the phenomenon of “school capture”. Before the HOD initiates the investigation, there must be a reasonable suspicion of mismanagement.**

5 Amendments to be rejected in full or in part

- 5.1 The insertion of section 4A assigning responsibility to SGBs for instituting interventions relating to school non-attendance is rejected. The professional management of the school must act in terms of the National School Attendance Policy and report to the District who must then use the social services of the relevant government departments to assist them. SGB members and schools who have the capacity and skills to be part of the district’s interventions may assist but cannot be compelled to do so in terms of statute. **PEDs’ and other government departments’ responsibilities cannot be placed on schools. The GBF rejects this amendment.**
- 5.2 Section (5)(5) reduces the powers of the SGB relating to admissions. This section gives effect to the Constitutional Court rulings. The amendment describes a process which must be followed and thereby does give some protection to SGBs. What is of concern is that the policy must be approved by the HOD (sections 5(5)(b)-(e) and 5(5A)-(5D)). This is over-reach on the part of the HOD. The Constitutional Court did not rule that the HOD had the right to

approve/demand changes to the school's policy. Where the school's policy was contrary to any law, the HOD could use powers in section 22 or section 25. **The GBF rejects the requirement that school admission policies must be submitted for HOD approval.**

5.3 Section 6(5) and all sub-sections related to the approval of the language policy by the HOD are rejected for the reasons given above. The GBF supports the criteria that must be considered by schools in determining their policy. Section 6(13) provides for the HOD to direct the school to adopt more than one language of instruction. This section is of concern, but it does include a strict process (sections 6(15) - 6(20)) that must be followed by the HOD should he/she wish to use this power. **The GBF rejects the requirement that school language policies must be submitted for HOD approval.**

5.4 The insertion of 18A(4A) which requires disclosure of financial information by all SGB members annually is rejected. **It is difficult enough to find SGB members willing to serve schools for the right reasons. This section will discourage potential SGB members from standing for election to the SGB as it is an invasion of their privacy. They are volunteers, not state employees.** The administrative burden associated with gathering this information, the risk of compromising personal information, and the impossibility of verifying the information make this section unworkable and unnecessary. Section 26 already requires SGB members to recuse themselves when a matter in which they have a personal interest is being discussed or decided upon. SGBs must rather enforce section 26 strictly. **The GBF rejects this amendment. Section 26 already provides a means for addressing the problems that this amendment may be seeking to address.**

5.5 While the GBF understands the desire to involve parents in decision-making, section 38(6) which requires a 10% quorum for the budget the meeting and the meeting about a deviation from the budget, the reality is that parents do not attend, and a quorum is seldom attained. In the end the second meeting (without the quorum requirement) is attended by even fewer parents. **The GBF supports providing information to parents about the budget and about the deviation and should encourage attendance but rejects the 10% quorum amendment.**

5.6 The GBF understands that the good intention of section 59A is to have the parties sit down and talk instead of rushing to court. We are, however, concerned with the present wording. The use of the word "must" indicates that this is the only process which may be followed. This would appear to prevent a governing body from approaching a court for urgent relief. This section needs to make it clear to schools that their right to approach the courts is not removed by this amendment. **The GBF rejects this section unless "must" is changed to "may" or a sub-section is inserted stating "Nothing in this section shall preclude a party from approaching a court with jurisdiction to obtain urgent relief".**

Timeframes are given in this section but there are no consequences specified for timeframes not being adhered to. For example, the dispute could automatically go to the next step once the stipulated period lapsed.

6 Amendments where there could be implementation challenges

6.1 Sections 5(1A)-(1G) are problematic because every child has a right to education, but the law requires the submission of certain required documentation. In terms of these amendments,

if a parent/learner cannot produce the documents the matter is to be referred to a National Intergovernmental Committee to be formed within 18 months of the Act coming into force. How schools will deal with this problem in the meantime is not clear. The administrative delays experienced by some parents when trying to obtain documents from Home Affairs make it impossible for them to comply with the timeframes specified in these amendments. The admission of children who have not been immunised against the specified diseases is of concern to children and staff in schools while those who do not want their children immunised claim their right to have their children educated at the school. See the detailed response relating to admission documentation below.

6.2 Some amendments require submission of new/amended school policies within 30 days of the publication of the BELA Act. We believe this is unreasonable. **At least 90 days is needed in order to review or develop policies.**

6.3 Section 9(1)(a) makes it clear that SGBs may enforce a precautionary suspension but only after the learner has been granted a reasonable opportunity to make representation. This is acceptable. However, it is not clear what PEDs will require in order to find the process procedurally fair. If the SGB is required to decide on the precautionary suspension, this potentially compromises the learner's right to a fair hearing. If members of the SGB, who have been informed of the nature of the offence and the evidence available, and as a result decided on the suspension, then are also appointed to the disciplinary committee to hear the case presented by the school, these SGB members would not be deemed neutral. It would be necessary rather to authorise the principal to make the decision with one member of the SGB who will not be eligible for appointment to the disciplinary committee that will hear the case.

6.4 Section 10(1) and 10(2) deal with corporal punishment which is defined quite broadly in the definitions. Corporal punishment is prohibited in terms of SASA. It is assault and should be dealt with in terms of normal criminal law and procedure as well as PED and SACE disciplinary processes. The sanction should not be specified in this Act. If the sanction is specified here, it could preclude a more serious sanction for an assault which caused serious bodily harm.

7. Documentation requirement concerns

7.1 Proposed insertion of the definition "required documents"

7.1.1 Care should be taken not to discriminate against learners who are unable to submit the "required documents". Sec 29(1)(a) of the Constitution affords *everyone* the right to basic education, including the right to adult basic education. This section is unqualified and unconditional. It does not only afford the right to a basic education to *"everyone who can produce the required documents"*;

7.1.2 Sec 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Neither the State nor any individual may unfairly discriminate, directly or indirectly, against anyone on one or more of the listed grounds. Even though the required documents are not contained in the listed grounds for non-discrimination in subsection 9(3) of the Constitution, the court found in the matter of *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZACGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019) (the "Phakamisa judgement") that differentiating between documented and undocumented learners, would be analogous ground of differentiation to those listed in sec 9(3) of the Constitution. Differentiating between

learners based on their documentation status, also impairs their fundamental right to dignity afforded to them in Sec 10 of the Constitution.

7.2 Requiring an unabridged birth certificate

Many children are unable to produce an unabridged birth certificate, because their births were not registered, for various reasons, including:-

- 7.2.1 the father is South African (affording the child South African citizenship), but the mother is undocumented. Undocumented mothers are prohibited from registering their child's birth, even if the father is documented. While there has been a court order in 2017, declaring Sec 10 of the Birth and Deaths Registration Act read with Regulation 12, unconstitutional and ordering the Department of Home Affairs to amend their systems, the Department of Home Affairs have yet to amend their regulations/policies to allow for fathers to attend to their children's birth registration;
- 7.2.2 some mothers (even South African citizens) are unable to produce the necessary documents for birth registration e.g. provision of "*proof of birth*", where a child was not born in a hospital or in the presence of a South Africa citizen who can attest to the birth;
- 7.2.3 some children are orphaned or abandoned, leaving them in the care of a care-giver who is unable to produce the relevant documents required for the birth registration.

7.3 Foreign children born outside of South Africa are often unable to produce a birth certificate from their country of origin because their births were never registered, the country does not have a functional birth registration system, they had to flee the country of origin under circumstances that made it impossible for them to take all of their documents with them or the documents were destroyed (during war or unrest in the country of origin).

7.4 Requiring that an asylum seeker learner provides a refugee or long term study visa

- 7.4.1 A Sec 22 asylum seeker visa, affords the holder (the learner) the right to study. No additional visa is required.
- 7.4.2 It is unreasonable and unrealistic to require an asylum seeker learner to provide a refugee visa within 3 years after admission. The asylum seeker system at the Department of Home Affairs is a failed system. It is fraught with massive backlogs. The refugee appeals system has such massive backlogs, that according to the Department of Home Affairs' own calculations, an asylum seeker can wait up to 67 years for a refugee appeal hearing date. While the Department is working on a "*backlog project*" to address the long waiting periods for appeals, the results of the implementation of the "*backlog project*" is yet to be seen. The current Refugee Appeals Authority is tasked not only to deal with the historic backlog of appeals (67yrs) but also new/current appeals that is being referred to it since the re-opening of the Refugee Reception Offices in May 2022. There is this a very real possibility that an asylum seeker learner, whose status is dependent on their parents' status, will not be able to provide a refugee visa within 3 years of admission.
- 7.4.3 Expecting an asylum seeker to exit the asylum seeker system, to enter the immigration system to obtain a study visa is also unreasonable and learners will be severely prejudiced if they are required to do so. The renewal of an asylum seeker visa is much easier than renewing a study visa. The requirements for obtaining a study visa is much more financially onerous on the parents than having the learner

joined onto an asylum seeker's file at a Refugee Reception Office, and asylum seekers may not approach their country of origin to apply for a passport for themselves or their children as this will be deemed to be a ground for cessation of status (Sec (1)(a) of the Refugees Act as amended - voluntarily re-availing themselves of the protection of their country of origin).

7.5 Amendment of Section 5 by the insertion of subsections (1A)-(1G) providing for the creation of National and Provincial Intergovernmental Committee to deal with the "required documents"

While the function of these intergovernmental committees is purportedly to assist in obtaining the "required documents", which is laudable, the concern is what will these government officials do with the information of the parents who are unable or unwilling to provide these documents? What will these government officials do with the information of e.g. undocumented parents? That information cannot be disseminated to e.g. immigration officials or the SAPS to arrest, detain and deport undocumented foreign nationals. If government wishes to manage the influx of undocumented foreign nationals, then it should implement proper border control and immigration systems and not do so indirectly through the Department of Basic Education and schools.

7.6 Admissions requirement that learners be immunised

Paragraph 16 of the proposed Admissions Policy, provides that parents must provide the school with proof that a learner has been immunised against the following communicable diseases: polio, measles, tuberculosis, diphtheria, tetanus and hepatitis B. If a parent is unable to show proof of immunisation, the principal must immediately advise the parent in writing to have the learner immunised as part of the free primary health care programme. *If the parent refuses or fails, within seven days from the date of the written communication referred to above, to submit proof of immunisation, the principal must not admit the learner to the school.* While immunisation is not provided for in BELA and is not contained in the definition or list of "required documents", submission of proof of immunisation remains a requirement for admission. If parents fail and/or refuse to have the learner immunised, will that also be referred to the Intergovernmental Committee referred to in Sec 5 (1A)-(1G)? How does the Department of Basic Education and/or Intergovernmental Committee intend to deal with learners whose parents refuse to immunise the learner? How will the Department of Basic Education and/or the Intergovernmental Committee balance the rights of the parent/learner who refuse to be immunised against the rights (to health and safety) of the other learners and educators?

8 Additional amendments

The GBF would like to include the following further amendments in this round of amendments.

8.1 There is no provision currently for total online schooling (except as a form of home-schooling) or hybrid schooling. All forms of public schools at present are bound by the Policy on Learner Attendance which requires attendance at a physical school. **The GBF would like to include provision for online and hybrid forms of schooling.** The details can be expressed in regulations

8.2 The National Consultative Forum and the Provincial Consultative Forums where the departments of education consult with governing body associations are set up by way of informal agreement and thus do not have the status and powers that they should have. **We would like these forums to be statutory structures with specified rights and**

functions.

- 8.3 **In all sections** where a person is required to perform a duty, such as approving or not approving an application, a **timeframe for the response must be specified**, and **consequences stated** should a deadline not be met. It will assist schools to know what to do when there is no response after a lengthy period.

We appreciate the opportunity to comment on the Bill and we trust the legislators will give due consideration to comments from stakeholders such as ourselves and members of the public.

Handwritten signature consisting of the letters 'A' and 'C' in a cursive style.

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CEO GOVERNING BODY FOUNDATION
13 JUNE 2022