FEDSAS

Nasionale Kantoor | National Office

T: 051 522 6903 F: 086 510 5386 E: office@fedsas.org.za www.fedsas.org.za

17 January 2024

Mr. E M Nchabeleng
Chairperson: SC on Education and Technology, Sports, Arts and Culture.
National Council of Provinces

CC:
Ms. Noluthando Skaka
By email: belabill@parliament.gov.za

Dear Sir

WRITTEN SUBMISSIONS BY FEDSAS ON THE BASIC EDUCATION LAWS AMENDMENT BILL

FEDSAS wishes to make submissions on the proposed amendments of the South African Schools Act, 1996 ("SASA") in terms of the Basic Education Laws Amendment Bill (BELAB).

Over and above these submissions, FEDSAS also affirms its commitment to presenting oral submissions to NCOP on behalf of our members.

Your prompt acknowledgment of receipt would be greatly appreciated.

Yours faithfully,

Dr HJ Deacon
FEDSAS CEO
jaco@fedsas.org.za

FEDSAS supplementary comments on the revised Basic Education Laws Amendment Bill [B2-2022].

We hereby make supplementary comments to our initial comments submitted on 14 June 2022. Hereto attached as Annexure A are our initial comments. Our supplementary comments must be read in conjunction with and in support of our initial comments. We urge the National Council of Provinces to take our comments into serious consideration and to engage with FEDSAS on the comments and the possible implementation of the Amendment Bill. We especially want to draw your attention to our proposed insertions to the Bill. Herewith is a summary of our proposed insertions, please refer to our full comments for a detailed description of each insertion. We are of strong opinion that these insertions will contribute to the spirit of the objectives of specifically the Schools Act as well as to the improvement of the quality of education of every child in this country.

Proposed insertions:

- **Clear Definition of "Meetings":** In response to the challenges posed by the COVID-19 pandemic, a clear definition of "meetings" is suggested to address uncertainties surrounding online gatherings.
- **Extension of Section 9 (Expulsion of Learners):** Proposed changes to Section 9 aim to address issues arising from delayed or non-responsive decisions by the Head of Department (HOD) after receiving recommendations for expulsion. The suggestion is that learners should be deemed expelled if the HOD fails to respond within the prescribed timeframe.
- **Amendment of Section 37(1) (Administration of Finances):** The proposal recommends that Section 37(1) be amended to empower the Minister, rather than the HOD, to determine the directions under which School Governing Bodies (SGBs) must establish and administer their school funds.
- **Formalizing Consultative Forums for Governing Body Organizations:** To ensure meaningful dialogue, the establishment of formal statutory structures for national and provincial governing body organizations is recommended. The

Minister would be responsible for issuing regulations governing the operation of these forums.

- **Alternative Methods for Teaching and Learning:** Recognizing the popularity of blended learning models, the proposal suggests that schools should have the flexibility to implement alternative delivery methods based on community needs. Regulations, including implementation and administration details, would be determined by the Minister.
- **Precedence of Legislation:** To avoid conflicts between national and provincial legislation, it is proposed that a provision be incorporated into the Schools Act, giving precedence to national legislation in case of conflicts and ensuring uniform application of the Act.

The National Assembly's failure to amend specific proposed changes, which could negatively impact the rights of governing bodies, even after taking stakeholders' input into account, prompts questioning the genuine intent of the Parliament and the Department to ensure meaningful public participation.

For public participation to carry significance, it is essential to acknowledge that it must be meaningful; otherwise, it becomes essentially devoid of value. Whether public participation is meaningful depends on the extent to which it can be argued that such participation affects the outcome of the process or the result.[1]

It is rather peculiar that after receiving 32 941 written comments and 1586 oral submissions on the proposed amendments and holding public hearings in all 9 provinces, that the Department only made 28 minor amendments to the initial proposed amendments. It can be argued that public participation has not been meaningful, but not due to the lack of participation.

Various sections of the Constitution deal with the obligations of the State and its functionaries to ensure public participation or involvement. The very first section determines that the Republic of South Africa is one, sovereign, democratic state founded on universal adult suffrage, a national common voters roll, regular elections

[1] Henrico. TSAR 2020 3. 496.

and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. Reiterating these values, section 41 states: "All spheres of government and all organs of state within each sphere must … provide effective, transparent, accountable and coherent government for the Republic as a whole …". A government can only be open, transparent and accountable if the public is made aware of and is involved in state decisions that may affect them. The value of responsiveness implies that the government must display some form of response to the needs of the public. Section 195 also states that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that people's needs must be responded to and the public must be encouraged to participate in policy-making, that public administration must be accountable, and that transparency must be fostered by providing the public with timely, accessible and accurate information. We are of the opinion that these minor amendments made to the initial amendments are not an adequate form of response to the public's participation in the process or the public's needs as emerged from their participation.

In the matter of *Doctors for Life International v Speaker of the National Assembly and Others*[2] Sachs J said "*in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense*", thus, where the legislature makes a decision, and such decision does not correctly reflect what was deduced during the public participation process, the legitimacy of legislation which flows from such a decision will be tainted. In Doctors for Life the Court also implied that when legislation is passed legitimately, the general public would be more accepting of such legislation.[3] The legitimacy of the South African Schools Act is being compromised at the moment by the Department's response to public participation.

Considering the above, we request the Department to hold a meeting or an expert briefing where the Department invites stakeholders to question experts from the

[2] (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).
[3] Nyati, L --- "Public Participation: What has the Constitutional Court given the public?" [2008] Law, Democracy & Development Law Journal. 15

Department on the inclusion of and rationale behind certain proposed amendments to the Schools Act to ensure that the Department upholds its Constitutional duties.

Furthermore, certain proposed amendments will be placing an additional administrative load on provincial education departments. We are seriously concerned that provincial education departments do not have the capacity with regards to human and/or financial resources to manage and execute these additional duties that the amendments will place on them. These additional duties include:

- Making grade R compulsory. FEDSAS does support this proposal, but we are concerned about the additional educator posts and other resources that must be provided to ensure the successful implementation thereof. Recognizing the financial implications of proposed amendments, we earnestly request a thorough costing analysis focusing on the affordability and viability of implementing the BELAB changes within each province. Key aspects of this analysis should include funding for introducing Grade R as compulsory education, auditing available space and infrastructure for Grade R learners, and evaluating the availability of qualified educators for Grade R classes. We also request that this analysis be made accessible to the public. A thorough analysis will enable informed decision-making aligned with these differences. By assessing the economic feasibility of the proposed amendments in each province, we can better ensure that the enhancements to the Basic Education Laws are not only well-intentioned but also realistic and implementable across our diverse educational landscape.
- The approval of admission and language policies by the Head of Department. Apart from the fact that we do not support these proposed amendments at all for reasons discussed in our initial comments, these proposed amendments will place a huge administrative burden on the provincial departments, especially HODs. FEDSAS is regularly inundated with complaints from members where no response is received from Heads of Departments to correspondence, requests, applications, and submissions to them. In our own experience, it is rare to receive any response at all from officials to even such serious matters as recommendations for expulsion. The enormity of this exercise has not been

considered. In KZN alone, almost 11,600[4] policies will need to be submitted and considered by the Head of Department at least every three years.

- The submission of quarterly reports on all incomes and expenditures. Has the department received additional allocations of financial, administrative personnel, or other resources to support the command? We once again doubt whether the provincial departments have the capacity to manage the implementation of this proposed amendment. With regards to this proposed amendment (clause 34 – amendment to section 43) we suggest the alternative that if the Department rejects our initial request to reject the proposed amendment, the clause is amended to the effect that only schools that did not submit their audited financial statements the previous two years or schools that did not receive qualified audits two years in a row, are required to report quarterly for a period determined by the Minister in a Regulation.
- Centralized procurement of LTSM. We once again refer to our initial comments on this proposed amendment. We object to this addition, and we also find it challenging to see how provincial departments will possess the essential capacity to effectively procure on behalf of all public schools within their province. Within our current educational environment, disadvantaged schools continue to grapple with issues related to textbooks. In the case of Minister of Basic Education v Basic Education for All in 2016, it was highlighted that those adversely affected by the state's failure to provide textbooks were primarily from "poor communities and predominantly, if not exclusively, black learners." Fast forward to 2022, FEDSAS lodged a complaint with the Human Rights Commission against the Eastern Cape Education Department. This action was taken due to the Department's failure to timely deliver teaching and learning support materials, including textbooks and stationery, for the commencement of the school year on January 19, 2022. We suggest that in the alternative, schools can procure on their own behalf but still have the option to make use of procurement by the Department if this will be in the best interest of the school. But the right to choose stays with the school.

[4] Based on the number of public schools in KZN as reflected in the School Realities 2022 and multiplied by 2 to make provision for admission and language policies.

Presently, provincial departments face challenges in managing routine day-to-day submissions and correspondence, a situation evident in various instances. Numerous schools, particularly in the Eastern Cape, KwaZulu-Natal, and Limpopo, grapple with teacher shortages. This issue persists despite legal precedent affirming that both teaching and non-teaching posts constitute fundamental rights linked to the right to a basic education. The failure of these provincial departments is evident in their inability to consistently publish or adequately fill positions. Moreover, in the Eastern Cape, merely 66% of the designated National Norms and Standards for School Funding (NNSSF) is directly allocated to schools. The utilization of the remaining 33% lacks transparency, with no proper accounting for schools. FEDSAS member schools cannot verify any tangible benefits derived from the withheld 33%.

We have difficulty in seeing how the provincial departments will be able to respond to all the additional duties resulting from the proposed amendments. In fact, based on our experience, we anticipate this will not happen. This opens the gate to a flood of litigation against provincial departments for declaratory orders compelling them to respond to submissions.

There are still public schools in our country that do not have basic facilities such as clean, running water, flushing toilets, safe school buildings or enough and adequately trained educators and staff members. Resources that will now be channeled to the implementation of certain proposed amendments can rather be spent where it is most needed - to serve the best interest of the learners and not those of the bureaucracy. Money, time and resources should be spent to ensure that the basic rights of learners are being upheld rather than diminishing the rights of parents by taking away the legitimate rights of governing bodies.

We comment as follows on the supplementary proposed amendments to the Basic Education Law Amendment Bill:

Clause 1

Number 1-3: No comment

Number 4: We suggest the insertion of the word “modified” after “adaptive”.

"…require additional support and adaptive/modified pedagogical methods…"

The use of the word "modified" will broaden the definition to make provision for learners who do not require or need an adaption of the curriculum but rather a modification thereof. The adaption of the curriculum entails the lowering of the standard of the curriculum whereas the modification of the curriculum refers to the amendment of the curriculum without lowering the standards thereof.

Clause 2

Number 1: We support the removal of this sentence.

Number 2 and number 3: We do not support these proposed amendments. This implies that a person may unlawfully and intentionally interrupt, disturb or hinder any other school activity other than official educational activities. The definition of school activity automatically includes official educational activities. The initial proposed amendment protected schools from unlawful interruptions during activities such as SGB meetings, sport games and SGB elections, to name just a few. The proposal to only include official educational activities can possibly expose schools at other activities.

What is the rationale behind this amendment?

Clause 4

Number 1: We support this proposed amendment. The initial proposed amendment would have placed an unnecessary, additional administrative burden on the provinces.

Number 2: We agree with this insertion.

Number 3: We fully agree with this proposed amendment.

Number 4 and number 5: We do not support these proposed amendments. With reference to our previous comments, we strongly reiterate that we have serious reservations about the previous proposed amendments as well as the current proposed amendments. The fundamental and principled objection to these proposed amendments is the centralisation of powers in the Head of Department. This flies directly in the face of constitutional values and the laudable objectives of the White

Papers and the preamble to the Schools Act and guiding principles on school governance as determined by the Courts.

We would like to reiterate our opinion that the proposed amendments of sections 5 and 6 of the Schools Act reflect an attitude that the State is the ultimate bearer of certain powers and that the State may simply take away certain powers from parents. As per the principle of legality the State has no powers or functions unless conferred upon it by the people. The proposed amendments will, in an instant, diminish these rights that South Africa has sought to embed over the last 25 years. It will ultimately turn public schools back into state schools.

We urge the Department to refer to our full comments on these proposed amendments as submitted on 14 June 2022 and attached hereto.

Clause 5

Number 1: We do not support this proposed amendment on the basis that we do not support the initial proposed amendment to section 6 through the addition of sections 6(5) – (20).

We once again refer the Department back to our initial comments on the proposed amendments for serious consideration.

Clause 8

This clause has undergone significant changes in its latest version, deviating substantially from the initially published version that underwent consultation. Such amendments must be subject to thorough and proper consultation to ensure a comprehensive understanding of the implications. FEDSAS supports the original wording of this clause, where the bill advocated for the admission of the sale or use of alcohol during school activities, provided it occurs within a regulated environment and with the permission of the Head of Department. This stance is grounded in the belief that such a measure could serve as a viable means to supplement school resources, acknowledging the financial pressures faced by educational institutions. While the support for resource supplementation is evident, it is emphasized that any such allowances should be within reasonable boundaries to safeguard the well-being and integrity of the educational environment.

Clause 9

Number 1: We support this proposed amendment.

Clause 14

We support this proposed amendment.

Clause 15

No comment.

Clause 22

We support this proposed amendment.

Clause 37

No comments.

Clause 41

No comments.

Long title

See our relevant comments under the applicable clauses.

ANNEXURE A

14 June 2022

Mrs BP Mbinqo-Gigaba
Chairperson
Portfolio Committee on Basic Education

Attention: Mr LA Brown
Per e-mail: belabill02@parliament.gov.za

Dear Mrs Mbinqo-Gigaba

FEDSAS' COMMENTS ON THE BASIC EDUCATION LAWS AMENDMENT BILL B2-2022

Please find attached hereto FEDSAS' comments on the proposed Education Laws Amendment Bill.

We look forward to further intensive engagements with the Portfolio Committee on the way forward regarding this proposed bill. FEDSAS also confirms that it intends to make oral submissions in parliament on behalf of our members.

Kindly acknowledge receipt.

Yours faithfully

Dr HJ Deacon
FEDSAS CEO
jaco@fedsas.org.za

1. **FEDSAS comments on the draft Basic Education Laws Amendment Bill, 2022**

Our comments are made with the fundamental approach and following questions in mind: *How might the amendment of education laws contribute to the improvement of the quality of education every child in this country is entitled to and is in fact receiving – or, in the majority of cases, not receiving? Would the proposed amendments improve the experience and quality of the education children are receiving?*

The overall goal of amendments to the basic education laws should be to give effect to the objectives of these acts. The South African Schools Act was enacted to give effect to the following:

- Redressing past injustices in educational provision;
- Providing an education of progressively high quality for all learners and in doing so lay a strong foundation for the development of all our people's talents and capabilities;
- Advancing the democratic transformation of society, combating racism and sexism and all other forms of unfair discrimination and intolerance;
- Contributing to the eradication of poverty and the economic well-being of society;
- Protecting and advancing our diverse cultures and languages;
- Upholding the rights of all learners, parents and educators, and promoting their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State;
- Setting uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa.

White Paper on Education and Training Notice 196 of 1995 (White Paper 1) *The Organisation, Governance and Funding of Schools (Education White Paper 2) General Notice 130 of 1996* (White Paper 2) reflect the policy considerations that informed the drafting and ultimate promulgation of the Schools Act and its objectives listed above. These considerations are of importance in appreciating the very unique distribution of powers in the Schools Act, particularly the vesting of powers in Governing Bodies,

instead of in education departments or bodies or persons which are unaccountable and/or not democratically elected.

South Africa is a differentiated society, consisting of various societal contexts, each with its own constituting principles. This is emphasised by the motto, the first element of our coat of arms – “Diverse People Unite”. Each societal component, including the State, has a particular functional sphere – a particular sovereignty in its own sphere – within which it exists and acts. In essence, the idea of a constitutional state boils down to a societal context or institution with a limited functional sphere of competency. This means that the State can never be exalted to the all-encompassing totality of society, as that would mean that we have relapsed into a totalitarian state. A totalitarian state is an unnatural phenomenon, as the history of South Africa has clearly shown. The State has no powers or functions unless conferred upon it by the people. This is precisely what the citizens of South Africa have done with the Constitution: They have conferred certain powers on the State. These powers, however, should be exercised in a manner that respects, protects, promotes, and fulfils the rights of the people.

In the previous dispensation, prior to the commencement of the Constitution, the State laid claim to totalitarian powers, but our Constitution has restored the balance. Parents, precisely because they are parents, have the power and right to decide about their children’s education. This is precisely what was recognised on page 21 of White Paper 1:

“Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by State authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the State or not, subject to reasonable safeguards which may be required by law. The parents’ right to choose includes choice of the language, cultural or religious foundation of the child’s education, with due respect to the rights of others and the rights of choice of the growing child.”

This is not a right granted to parents by the State, and the State may not interfere, infringe upon or limit this right, except of course where the exercise of this right in itself threatens the public legal order. The establishment of school governing bodies with parent members in the majority does not constitute devolution of power from the State to the parents, but merely represents the recognition, honouring, protection, realisation and promotion of parents' rights. Certain proposed amendments to the South African Schools Act directly contradict these principles and goals established by the Department of Education after 1994 as well as the values and scheme of a constitutional democracy subject to the rule of law. The proposed amendment of sections 5, 6, 43 and the insertion of section 21(3A) of the Schools Act all reflect an attitude that the State is the ultimate bearer of certain powers and that the State may simply take away certain powers from parents. This is not the truth. As we have mentioned earlier, the State has no powers or functions unless conferred upon it by the people. The proposed amendments will, in an instant, diminish these rights that South Africa has sought to embed over the last 20 years. It will ultimately turn public schools back into state schools.

In the *Explanatory Summary of Basic Education Laws Amendment Bill, 2021*[5] it is stated that the proposed amendments to the South African Schools Act, 1996 and the Employment of Educators Act, 1998 are a response to court judgments that protect and give effect to the Bill of Rights. We would like to draw the Department's attention to all the other court judgments and other relevant documents that protect and give effect to the rights, roles and functions of governing bodies, not specifically listed in the Bill of Rights but in other parts of the Constitution or education laws and documents such as the White Papers. These principles, concerning the governance of public schools must also be incorporated into the amendments or reinforced by it. In certain instances, the proposed amendments are rather contradicting these principles than confirming them. We will refer to these instances in our comments.

Through our comments we wish to highlight the:

[5] Government Gazette 45601 GN 705 of 2021.

- Proposed amendments that will not contribute to the spirit of the objectives of specifically the Schools Act as stated above;
- Shortcomings in the proposed amendments that need to be addressed and how we propose to address these shortcomings; and
- Suggestions we support.

With the above mentioned in mind, FEDSAS comments as follows:

2. **Clause 1(a)**

In terms of section 7(2) of the Constitution, the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

In *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*[6] the Constitutional Court confirmed that there is an obligation on the state to take positive steps to respect, protect and fulfil the right to basic education. The proposed definition of the term "basic education" will not give effect to this thought process of the Court and is a missed opportunity for the legislature to "promote and fulfil" the right to basic education as it is constitutionally mandated to do in terms of section 7(2) of the Constitution.

Other court cases such as Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others,[7] Minister of Basic Education v Basic Education for All,[8] and MEC: Department of Education Northwest Province v FEDSAS[9] are examples of instances where the Courts confirmed principles regarding the right to basic education and the legislature in this instance, failed to respond to these findings through the proposed amendments.

We therefore propose that "basic education" be defined as follows:

[6] 1996] ZACC 4.
[7] [2011] ZACC.
[8] [2015] ZASCA.
[9] [2016] ZASCA.

" 'basic education' means grade R to grade 12, as evidenced in the National Curriculum Statement, and includes the norms and standards contemplated in section 5A"

3. **Clause 1(b)**

No comment.

4. **Clause 1(c)**

We support this proposal as clarity on what corporate punishment entails will allow for more efficient prosecution and will prevent possible grey areas in this regard from being exploited. This proposal is in the best interest of the child, a fundamental constitutional right. It supports the objective of upholding the right of the learners.

5. **Clause 1(d)**

We support this proposal. A broader range of substances can be regulated through this proposal also eliminating possible loopholes.

6. **Clause 1(e) to (i)**

No comment.

7. **Clause 1(j)**

We support this proposal. The expansion of the definition of *loan* by excluding permission for the daily operational costs will allow governing bodies to continue with their daily business without unnecessary hold ups. This amendment supports the objective to promote parents' acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State as it will allow parents or governing body members to conduct their business without unnecessary frustrations which in turn will again encourage parents to continue their governing body membership thoroughly and with diligence.

8. **Clause 1(k)**

We are of the opinion that the "exemption from the payment of school fees to the school in respect of the child of an employee, but excluding exemption in terms of the provisions of sections 39 to 41" should not be included under the definition of "Other financial benefits". The exemption of payment from school fees must solely be for

parents who cannot afford school fees and be regulated through the prescribed regulations. Currently, many schools are already under financial strain because of the large number of parents that cannot afford school fees and then apply for exemption from payment of school fees. Now further exemptions may be given to parents who can afford school fees and the burden of these exemptions must be carried by the fee-paying parents. Furthermore, how will these kinds of exemptions be regulated - will it be a total or partial exemption, will the same formulas prescribed for “ordinary” exemptions be used etc?

9. **Clause 1(l)**

No comment.

10. **Clause 1(m)**

We suggest replacing the term “required documents” with “identification documents”.

Only using the term “required documents” may imply that other documentation such as immunisation cards and transfer cards are no longer required when applying for admission to public schools. The National Admission Policy is still valid and in terms of this Policy, learners or their parents must still provide, along with the necessary identification documents, other documentation such as immunisation cards and transfer cards.

11. **Proposed insertion under clause 1**

“Meeting”

The advent of the Covid-19 pandemic forced many schools to adopt measures designed to ensure continuity of the execution of their functions and to ensure that they give effect to their constitutional mandate to provide quality education to learners. SGB’s were accordingly forced to gather and constitute their meetings online. This included parents' annual general meetings at which the school's budget was approved. Without relinquishing any responsibility or accountability, governing bodies were enabled to complete their work more quickly and more effectively with greater parent involvement.

The School's Act does not define a meeting, so there is uncertainty and SGB's and the education departments disagree over whether meetings can still be conducted online. Our proposal is to define a meeting, specifically allowing it to be conducted online. In so doing, continuity of schools is assured as well as the continued development of education as a sector in South Africa. Electronic or online meetings will enable greater participation from board members or parents who may be far-flung geographically or reticent to participate in a traditional meeting.

The 11th edition of the authoritative Robert's Rules of Order recognizes a growing preference for online meetings. The manual offers the following advice: *"A group that holds such alternative meetings does not lose its character as a deliberative assembly so long as the meetings provide, at a minimum, conditions of opportunity for simultaneous aural communication (everyone must be able to hear each other) among all participating members equivalent to those of meetings held in one room or area. Under such conditions, an electronic meeting that is properly authorized in the bylaws is treated as though it were a meeting at which all the members who are participating are actually present.*

We suggest the following definition: "Meeting" is an orderly gathering of two or more persons in order to discuss matters of mutual interest and take decisions. Meetings of the school governing body must be held in accordance with a standard procedure as set out in its constitution, Meetings may be held as follows: - An ordinary meeting: Everyone is personally present in the same venue. - An online meeting: a meeting that is conducted over the Internet through the use of mediating technologies, such as online services.- A hybrid meeting: a meeting that features one group of in person attendees connecting virtually with other meeting attendees.

A meeting may be conducted by electronic communication so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting."

12. Clause 2(a)

FEDSAS supports the amendment which will make Grade R compulsory. It is a necessary step for early childhood development and in line with the National Integrated Childhood Development Policy. However, clarity is needed on the compulsory school going age. The last sentence of the proposed amendment is not clear: *"Provided that a learner who will turn six after 30 June must start attending grade R the following year".* Thus, children who turn six after 30 June may attend grade R in that year but must attend Grade R in the year in which the child turns seven? Or does this imply that all learners who turn six after 30 June may only attend grade R in the year in which the learner turns seven or does it mean that the learner may attend either in the year he/she turns 6 or 7 years old but must attend in the year he/she turns 7 if not he/she enrolled in the previous year?

We suggest the removal of the last sentence to avoid confusion.

13. Clause 2(b) and (c)

We support this inclusion. We would like to suggest the following addition to the proposed amendment: "Any person who, unlawfully and intentionally interrupts, disturbs or hinders any school activity, or hinders or obstructs any school in the performance of the school's activities or prevents learners from attending school activities, is guilty of an offence and liable, on conviction, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and such imprisonment.''

In this instance we refer to cases where learners are prevented from attending school by the actions of either protesters or where the transport of learners to school is disrupted.

14. Clause 3

No comment.

15. Clause 4(a)

No comment.

16. Clause 4(b)

See our comment under clause 1(m). We suggest replacing "required documents" with "identification documents".

17. Clause 4(c)

No comment.

18. Clause 4(d)

We have serious reservations about these proposed amendments. The fundamental and principled objection to these proposed amendments is the centralisation of powers in the Head of Department. This flies directly in the face of constitutional values and the laudable objectives of the White Papers and the preamble to the Schools Act and guiding principles on school governance as determined by the Courts.

The preamble to the Schools Act suggests the existence of a "*partnership model*" as the mechanism through which education will be conducted and achieved. In the relevant part, the preamble provides:

"WHEREAS this country requires a new national system for schools which will … uphold the rights of all learners, parents and educators, and promote their [all learners, parents and educators] acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State". (Own emphasis added).

In *Head of Mpumalanga Department of Education and Another v Hoërskool Ermelo and Others*[10] and *Member of the Executive Council for Education in Gauteng Province and Others v Governing Body of the Rivonia Primary School and Others*[11], the Court recognised that the overall design of the Schools Act is that public schools are run by three crucial partners namely the national government, the provincial governments and Parents of the learners and members of the community in which the school is located are represented in the SGB.

Similarly, in the matter of *Free State Province v Harmony High School and another*[12] the Constitutional Court emphasised the principle that a public school is governed by a partnership.

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[10] 2010 (3) BCLR 177 (CC).

[11] [2013] ZACC 34.

[12] 2013 (9) BCLR 989 (CC).

A further guiding principle on the governance of public schools that emanated from these court judgments is the principle of *"cooperative governance"*, which underlies the functioning of the partnership governing public schools. Given the partnership model envisaged by the Schools Act as well as the co-operative governance scheme set out in section 41 of the Constitution, the relevant functionaries and the SGBs are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the Governing Bodies. The engagement must be directed towards furthering the interests of learners.

Clause 4(d) proposes amending section 5(5) of the SASA by introducing a provision, which seeks to limit the governing body's power to determine the school's admission policy. The first substantive change is that the proposed section 5(5)(a) of the Schools Act states that the HOD, after consultation with the governing body, has the *"final authority"* to admit a learner to a public school.

This proposed amendment is problematic for the following reasons:

The proposal of *"final authority"* conflicts with the cooperative partnership between the SGB, the HOD and the Minister, envisioned by the Schools Act. The notion of a cooperative partnership as envisioned and prescribed in section 41(h) of the Constitution, is undermined by giving the HOD the *"final authority"*.

Pursuant to section 58C(2) of the Schools Act, the MEC *"must ensure that the policy determined by the governing body in terms of section 5(5) and 6(2) complies with the norms and standards."* By now giving the HOD the *"final authority"*, the MEC's powers are reduced and rendered somewhat meaningless, thereby undermining the careful balance of powers in the Schools Act to ensure a partnership with the different stakeholders.

Furthermore, by giving the HOD the *"final authority"*, the Minister's proposed new powers will also be reduced and rendered null and void. In this respect, clause 41 proposes amending section 61 of the Schools Act by including in the Minister's powers the power to promulgate regulations *"on the admission of learners to public schools*".

If *"final authority"* rests with the HOD, then this careful balance of power between the national and provincial spheres of government is threatened.

In the Welkom judgement the Constitutional Court stated that the provincial government and governing bodies should not focus on which organ of state has the final authority to determine a school's admission policy, but should rather be focused on cooperative governance and on the best interests of the child.[13] The notion of cooperative governance is undermined by giving one organ of state the *"final authority"*, particularly in light of the Constitutional Court having held that *"one organ of state cannot use its entrusted powers to strong-arm others*".[14]

Furthermore, the reference that the Head of Department, *after consultation* with the governing body of the school, has the final authority, is also problematic. In the matter of *McDonald and Others v Minister of Minerals and Energy and Others,*[15] the Court discussed the differences between provisions that require agreement in order for valid recommendations to be made, and those where agreement is not required. It held:

> *"[17] … where a functionary is required to act 'on recommendation of' another, the law requires that there be agreement between them. …*
>
> *[18] Likewise, where the law requires a functionary to act 'in consultation with' another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act 'after consultation with' another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary."*

The SGB is the most appropriate stakeholder to determine the school's admission policy, including whether a learner meets the requirements for admission. This is because the SGB is able to take into account a range of interconnected factors relating to the planning and governance of the school as a whole. By giving the HOD the "*final*

[13] Welkom judgment (concurring minority judgment) at para 132.
[14] Rivonia Primary judgment at para 78.
[15] 2007 (5) SA 642 (C).

authority" after and not in consultation with the SGB, to determine a learner's admission, the SGB's role in the partnership, and its accountability to the community that it serves, is substantively diminished. Although the provision does require consultation with the SGB, it places the *"final authority"* with the HOD, reducing the notion of cooperative governance to "*consultation*" rather than giving it its full meaning as prescribed in section 41(1)(h) of the Constitution and concurrence between partners.

We would like to reiterate our opinion that the proposed amendments of sections 5 and 6 of the Schools Act reflect an attitude that the State is the ultimate bearer of certain powers and that the State may simply take away certain powers from parents. As per the principle of legality the State has no powers or functions unless conferred upon it by the people. The proposed amendments will, in an instant, diminish these rights that South Africa has sought to embed over the last 25 years. It will ultimately turn public schools back into state schools.

The second substantive change introduced, is the requirement that the governing body submit the admission policy, and any amendments thereto, to the HOD for *"approval"*. This is introduced in sections 5(5)(b), 5(5)(c), and 5(5A) to 5(5D). This proposed amendment is once again in conflict with the scheme of the Schools Act which envisages a cooperative partnership between the governing body and HOD. The requirement of the HOD's *"approval"* creates the same difficulties as the HOD having the *"final authority".* We accordingly re-iterate the concerns raised above.

In addition, has the implication of the enormity of this exercise been considered? Almost 46 000 policies (admission and language policies) will need to be submitted and considered by the Head of Department at least every three years. Already provinces do not have the capacity to deal with ordinary day-to-day submissions and correspondence. Examples of this abound. With 23 000 public schools, and with provinces struggling to deliver on existing legislative obligations, we have difficulty in seeing how they will be able to respond to all the submitted policies. In fact, our experience tells us that this will not happen. This opens the gate to a flood of litigation against provincial education departments for declaratory orders compelling them to respond to submissions.

The proposed amendments are silent on the status of the policy in the event that the HOD makes recommendations concerning certain of its provisions. This raises numerous questions – will those provisions be deemed valid until amended and approved, or will they be deemed invalid in which event there is a *lacuna* in the school's admission policy which may substantially affect the admission of learners.

In light of these observations and clear principles emanating from case law, we reject the proposed amendments to section 5(5) and suggest that the status quo is maintained.

19. Additional issues and opportunities relating to admissions:

Generally, most admissions disputes between governing bodies and provincial education departments have nothing to do with the school's admissions policy. Conflicts typically arise when schools are asked to admit more learners when it is not necessarily financially and/or administratively feasible for the school or purely because there is no space available. As a result, the critical issue in the dispute becomes whether the school has the capacity to accept additional learners.

In the matter *MEC for Education in Gauteng Province and Others v Governing Body Rivonia Primary*[16] the Constitutional Court stated that at school level, the SGB determines admissions policy, which may include determining school capacity.[17]

The Court further stated that the determination of school capacity is a complex process, which not only applies to the school, but to each grade and class as well. It requires a range of factors to be considered in terms of the planning and governance of the school as a whole.[18]

From these findings it is only reasonable to conclude that a school's SGB is in the best position to determine the school's capacity - of course considering certain principles and factors.

[16] CCT 135/12 [2013] ZACC 34

[17] At par 41 of the judgement.

[18] Par 71.

Given the cooperative governance model envisaged in our constitution, it is imperative that national and provincial education departments and school governing bodies are given clear directions on the determination of a school's capacity. There is a great need for a set of objective criteria to guide the determination of school capacity, taking into account the Minimum Uniform Norms and Standards for Public Schools.

We propose that a set of objective criteria to guide the determination of school capacity be determined and regulated through national regulations published by the Minister. Please see, as annexure "A" attached hereto, FEDSAS' comments on the determination of capacity submitted during a consultation process on possible amendments to the National Admission Policy. We submit these comments as possible recommendations to be included in the proposed regulations on the determination of capacity.

We propose the following amendment to section 5(5):

"(5) Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school, which may include determining school capacity."

Furthermore, the COVID-19 pandemic, which reached South Africa in mid-March 2020, caused an immediate shutdown of all schools, which forced educators to switch to online teaching. The Department seized the opportunity and regulated, in collaboration with Education partners, a newly devised alternative schooling model. Many schools adopted remote teaching (and learning) where in-person, face-to-face teaching was migrated into an online digital space accessed remotely.

Secondly, the Department followed a phased in return approach to accommodate learners and personnel back at schools in June 2020. Through the publication of directions, schools were provided with a few rotational options which included: daily and weekly rotation, bi-weekly rotation, platooning or shifts, whereby learners could rotate by way of different grades or classes.

This allowed for a hybrid model of blended learning where learners learn some lessons during face-to-face classroom instruction and other lessons virtually, away from the

physical classroom. Many schools implemented a hybrid model of blended learning during the state of disaster. Schools were looking for ways to reduce class sizes, provide learners with more flexibility, improve differentiation, and leverage the advantages of both face-to-face instruction and online learning. In the face of the COVID-19 restrictions, many schools have turned to the hybrid model as a way to improve school safety and make physical distancing more attainable.

The unique challenges of 2020 have increased the popularity of a hybrid model of blended learning and have made it a common part of many educational delivery systems that work. Additionally, this will provide a solution to the problem of capacity constraints and will make it possible for schools in high-density areas to accommodate more learners.

We propose that alternative modes of instruction be made available. The implementation, administration and other related matters on alternative modes of instruction can be determined and regulated through regulations published by the Minister.

20. Clause 4(e)

We support the provisions regarding automatic approval/permission in cases where decision-makers are not replying within prescribed days. This will eliminate any uncertainty with regards to the status of policies and governance documents.

21. Clause 4(g)

With regards to the proposed insertion of section 5(10), the SGB must also be notified of the decision of the MEC as the decision may affect the school.

22. Clause 5(a) and (b)

No comment.

23. Clause 5(c)

This clause proposes amending section 6 of the Schools Act by adding subsections (5) to (20), which seek to limit the governing body's power to determine the school's language policy. The first substantive change introduced, is the requirement that the

SGB submit the admission policy, and any amendments thereto, to the HOD for *"approval"*.

The proposed amendment is problematic for the following reasons:

The requirement of the HOD's *"approval"* of a school's language policy conflicts with the scheme of the Schools Act which envisages a cooperative partnership between the school governing body and HOD. The requirement of the HOD's *"approval"* of the language policy creates the same difficulties as the proposed change to section 5(5) requiring the HOD's *"approval"* of the admission policy – in both instances, the delicate balance of power giving effect to cooperative governance is disturbed in favour of granting power to the HOD.

We re-iterate the concerns raised under clause 4(d) above and we reject the proposed amendments made to section 6(5) and the proposed insertions of sections 6(6)-(12).

We suggest that the *status quo* is maintained.

24. Clause 6

No comment.

25. Clause 7(a) and (b)

No comment.

26. Clause 7(c)

With regards to the proposed insertion of section 4(b) - "Just cause" should be replaced by "religious, cultural or medical grounds". "Just cause" is simply too wide and may lead to frivolous applications for exemption.

It may well be argued that frivolous applications may be dismissed simply on the ground that they are frivolous, but it still means that SGBs must meet to consider and deliberate on these applications, react to them in a reasoned manner and come to a rational decision. That requires a commitment from non-remunerated volunteers whose valuable time should be spent on much more important issues regarding good

governance of the school. In any event, are there any conceivable grounds that could justify exemption other than religious, cultural or medical grounds? These are also the grounds that a governing body should consider when the code of conduct is adopted, so it only makes sense to allow exemption based on these grounds.

27. Clause 7(d)

No comment.

28. Clause 8(a)

We support the admission of sale or use of alcohol during school activities, in a regulated environment and with the permission of the Head of Department, as this can supplement school resources. Schools are under huge financial pressures and any means to supplement resources are welcomed, within reasonable boundaries.

29. Clause 8(b)-(i)

No comment.

30. Clause 9

We support this proposal as a broader definition of “serious misconduct” will aid governing bodies during disciplinary processes which is in the best interest of all parties involved.

Proposed amendments to section 9

Section 9(1D) - HOD's failure to respond to an expulsion recommendation

After receiving the recommendation for expulsion from the SGB, the HOD has 14 days to decide whether to expel a learner. The learner will be required to return to school if the HOD does not decide within that prescribed time frame. More often than not, the HOD fails to respond within the specified time frame or does not respond at all. As a result of the learner's return, the school but more importantly the victims are left vulnerable. Maintaining discipline in schools becomes a major challenge.

As opposed to returning the learner to school, the default position should be that the learner will be deemed expelled if the HOD fails to respond.

We propose the following amendments to section 9(1D):

"(1D) A Head of Department must consider the recommendation by the governing body referred to in subsection (1C)(b) and must decide whether or not to expel a learner within 14 days of receiving such recommendation, failing which the expulsion will be regarded as having been approved by the Head of Department''.

This proposed amendment will be in line with other provisions of the Schools Act in instances where the HOD fails to respond to the actions or communication of a governing body in terms of the Schools Act.

Section 9(4) - Right to appeal:

A learner who has been expelled from a public school has the right to appeal against the HOD's decision to the MEC under Section 9(4) of SASA. However, the SGB is not granted this right and must resort to the High Court if it wishes to contest the decision of the HOD. It is our opinion that the same right should be accorded to the governing body and that this section should be amended to establish a right of appeal for the governing body as well.

31. Clause 10

No comment.

32. Clause 11

No comment.

33. Clause 12

No comment on the proposed amendment.

Proposed amendment to section 12

We propose the following amendment to section 12(1):

"12(1)*(a)* The Member of the Executive Council must provide sufficient public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.

(b) The Member of the Executive Council must provide sufficient educators and non-educators for public schools out of funds appropriated for this purpose by the provincial legislature.

(c) The Member of the Executive Council must ensure that the funds and other resources provided to public schools are sufficient for the provision of an education of progressively high quality for all learners."

34. Clause 13(a)

No comment.

35. Clause 13(b)

No comment.

36. Clause 13(c)

We have serious reservations with regards to the provision that the MEC can decide on the date of establishment of the public school; the name of the public school; and the physical location and official address of the public school, *after* consultation with the SGB.

We reiterate our comments with regards to the notions of *in consultation* and *after consultation.* Once again, the SGBs of the schools that merge are the most appropriate stakeholders to especially determine the new school's name and location. This is because the SGB can take into account a range of interconnected factors relating to the determination of a name suitable in the specific school community. By giving the MEC the right to determine this *and after and not in consultation with the SGB*, the SGB's role in the partnership, and its accountability to the community that it serves, is substantively diminished.

We suggest the following amendment:

''(4) (a) If the Member of the Executive Council decides to merge the public schools in question, the governing bodies of the public schools that are to be merged, must determine (i) the name of the public school; and (ii) the physical location and official address of the public school during the meeting contemplated in sub section (6)(a).

The Member of the Executive Council must, after consultation with the governing bodies of the public schools that are to be merged, determine, by notice contemplated in subsection (1) the date of establishment of the public school;"

37. Clause 13(d) and (e)

No comment.

38. Suggested amendment to section 16

Section 16 of the Act deals with the governance and professional management of the School. The professional management of the school is the responsibility of the school principal but in most schools the professional management of the school is an additional responsibility for the principal. He or she is first and foremost an educator. Needless to say, the absence of the principal, as with any other educator, may lead to critical loss of teaching time that is not in the best interest of the learners. But the additional task of professional management entails, amongst under responsibilities, the attendance of meetings and some meetings even take place during school hours necessitating the principal to take time off from contact or teaching time from learners. As the amendments aim to criminalise the unlawful and intentional interruption of school activities, we suggest that it also prohibits the scheduling of meetings during school hours in order to ensure that educators and principals are present and available in their classes and at the school.

We suggest the following insertion under section 16:

"16(8) No meetings with regards to the governance and/or professional management of a school and of which the attendance of a school principal or an educator is required, must, as far as reasonably practicable, be held during official school hours."

39. Clause 14

We are of the opinion that the proposed insertion of section 18A(4A) is unreasonable and may very well deter some parents from making themselves available to be elected onto a school governing body. Firstly, the scope of financial interests that must be disclosed is too wide. Only financial information of an SGB member or a close family member that has any relevance to a particular school matter where the SGB or the

SGB member is involved and may become a matter of conflict of interest, should be disclosed. In small communities there will most likely always be financial interests associated with school business but not necessarily conflict of interest.

Secondly, personal information, such as financial information, may be processed only if, given the purpose for which it is processed, such processing is adequate, relevant, not excessive, and in accordance with the relevant provisions of POPIA. The purpose must relate to a function or an activity of the school.

We are of the opinion that the information requested in terms of clause 14 is excessive, nor relevant in all circumstances with regards to a specific governing body member's role.

We request the removal of this amendment. The proposed amendment to section 26 is sufficient to cover the concerns implied by the insertion of the proposed amendment to section 18A.

40. A proposed amendment by the insertion after section 19 of the following sections:

We propose the following inclusions to the Act:

"19(1)(c) The Head of the Department must prepare and submit to the Ministry an annual report in respect of the training provided in terms of subsections (a) and (b). The Ministry must make such reports available to the national and provincial consultative forums referred to in section 19A.

19(1)(d) If the Ministry, from the reports contemplated in section 19(1)(c) and from other relevant reports, identify that a provincial head of department did not provide sufficient training in terms of either section 19(1)(a) or (b), the Ministry may appoint a recognised governing body association or other appropriate training authority to provide such programmes with minimum requirements determined by the Minister.

19A National and provincial consultative forums for national public school governing body organisations

To guarantee meaningful consultative or negotiating frameworks and to acknowledge national school governing body organisations as legitimate dialogue partners, it is recommended that formal statutory structures be established for governing body organisations at the national and provincial levels. It should be the Minister's responsibility to issue regulations governing the operation of these forums. The Minister of Basic Education of the Republic of South Africa must establish and enact / publish regulations for the function and funding of national and provincial consultative forums for national public school governing body organisations.

We suggest the following insertion as section 19A:

41. **National and provincial consultative forums for national public school governing body organisations**

‘‘19(A)(1) The Minister of Basic Education must establish a forum to facilitate formal negotiations, discussion and interaction between itself and bona fide organisations representing governing bodies of public schools in the Republic of South Africa at a national level at the date of commencement of this Act,

(2) The Member of the Executive Council must establish a forum to facilitate formal negotiations, discussion and interaction between itself and bona fide organisations representing governing bodies of public schools in the Republic of South Africa at a provincial level at the date of commencement of this Act,

(3) The function of the forums is to promote communication between the Department of Education with such organisations concerning national and provincial educational issues affecting the interests of public schools, in general, and the governance of public schools, in particular, in pursuance of the notion of partnership in education between the State and stakeholders in public schools, as represented by such governing bodies;

(4) The participation as members, functioning, meetings of the forums, administration and other related matters to the functioning of the forums must be determined through regulations published by the Minister.

In support of this proposal, a resolution was adopted and minuted at the last NCF meeting held on 3 June 2022.

We further propose that the participation as members, functioning, meetings of the forums, administration and other related matters to the functioning of the forums be determined through regulations published by the Minister. This will necessitate a further amendment to section 61 of the Schools Act empowering the minister to regulate on this matter.

42. Agency fees

Unions throughout the world have for many decades challenged so-called “free riders”. This term refers to employees who fall within a bargaining unit and who do not belong to the union negotiating with the employer on behalf of that bargaining unit. They do, however, invariably enjoy the full benefits of agreements reached. In South Africa, the Labour Relations Act[19] allows for closed and agency shop agreements between representative trade unions and employers. An agency shop results in *free riders* in the bargaining unit being obliged financially to contribute to the majority unions recognised for collective bargaining purposes in that unit. The level of contribution equates with that of normal union dues. Membership of a union is still voluntary.

The same principle should apply to governing bodies that do not belong to NSGBO's, but who benefit from the agreements reached by NSGBO's through negotiations with the respective education departments as "free riders". NSGBOs should have the same right to conclude a collective agreement with education departments, to contribute towards the payment of subscription fees to an acknowledged voluntary association representing public school governing bodies.

We suggest the following insertion:

“19A(5)(a) A representative school governing body organisation and a provincial education department may conclude a collective agreement, to be known as an

[19] Act 66 of 1995.

agency agreement, requiring the provincial education department to deduct an agreed agency fee, from the school allocation from schools identified in the agreement who are not members of the organisation but are eligible for membership thereof. The following conditions must apply with regards to the payment of agency fees:

(i) Schools who are not members of the representative school governing body organisations are not compelled to become members of that organisation;
(ii) The agreed agency fee must be equivalent to, or not less than the National Norms and Standards for School Funding (NNSSF) subsidy to a school to belong to an SGB association
(a) the amount of the subscription payable by the members of the representative organisation;
(iii) That the amount deducted must be paid into a separate account administered by the representative governing body organisation; and
(iv) no agency fee deducted may be used for any expenditure that does not advance or protect the socio-economic interests of schools, promotes governance and/or proper management.

(b) Other related matters must be determined through regulations published by the Minister."

43. Clause 15

No comment.

44. Clause 16

In its present form this provision sounds sensible. It is the practice that is problematic. Increasingly provincial departments are withholding funds payable to schools in terms of the NNSSF on the basis that the departments will then centrally procure LTSM for schools. Schools then either do not receive such LTSM or the quality of the LTSM that is supplied is of such inferior quality that it cannot be utilised at all. In many cases this means that the funding that the schools are entitled to in terms of the NNSSF simply "disappears".

The South African Schools Act and the NNSSF, 2006 make provision for public school governing bodies to become progressively more responsible for managing aspects of

recurrent expenditure. To prescribe to schools the manner in which they must perform their section 21 functions, would render the purpose of the section 21(1)(c) functions superfluous and would definitely not promote better school management. Governing bodies that do not perform their functions with the necessary diligence must be held accountable and their functions can be withdrawn by the Department, but a one-size fits all policy will not work and functional governing bodies must be given the freedom to do their own procurement.

In the present South African context where instances of irregular procurement by the State and State-owned entities is almost the order of the day, we oppose this insertion.

There are sufficient provisions in the existing legislation to deal with procurement economically and productively in the best interest of learners**.**

45. Proposed amendment to section 21

We propose that section 21 should be further amended to make provision for functional and well-functioning governing bodies to apply for further responsibilities. In the handbook *"Handbook of Education Policy Studies*" in Chapter 3 "*Education Governance and School Autonomy: The Progressive Reform of a K–12 School in China"* the following conclusion is made: "*School autonomy is an integral component in the modernization of regional and national education governance systems."* (See chapter attached.)

We propose the following:

- Limited state involvement in school governance and school administration.

State involvement in school governance should be at the minimum required for legal accountability and should in any case be based on participative management.

The governance of every public school is vested in the governing body. So, why would the Education Department (the State) then even be allowed to be involved in school governance? White Paper 2 clearly states that the governance of public schools' forms

part of the country's new democratic dispensation. As such, it should embody a true partnership between a local community and the provincial education department.[20]

The preamble to the Schools Act also refers to a partnership between the State, all learners, parents and educators. This principle then means that the State's involvement as a partner in education should be limited to that which is legally expected of it. Legal accountability means that when public bodies make decisions, they are expected to conform to the requirements of the rule of law by respecting the boundaries of their legal authority, acting rationally, and adhering to fair procedure.[21] What precisely is the minimum required for the Department to be legally accountable? The right to basic education, which is contained in section 29 of the Constitution, is a right that individuals hold against the State,[22] and which the State, in terms of section 7(2) of the Constitution, must "respect, protect, promote and fulfil". It is not a right of or for the State. At most, the State has the duty to harmonise possible conflicts or rights and interests in its role of respecting, protecting, promoting, and fulfilling the right to education. The State has four major obligations:

1. It must provide schools.
2. It must fund education.
3. It must oversee the quality of education.
4. It must provide appropriately trained and qualified teachers. This is the minimum required for legal accountability.

By limiting the State's involvement and interference in governance and administration issues at functional schools with functional governing bodies, crucial resources - in whichever form - can be utilised or redirected to underperforming schools or dysfunctional governing bodies.

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[20] Department of Education Report of the Committee to Review School Organisation, Governance and Funding

[21] O'Cinneide, C. "Legal Accountability and Social Justice" http://www.academia.edu/1464479/Legal_Accountability_and_Social_Justice (visited 4 August 2014).

[22] Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 JOL 14774 (SCA) par 31.

- Receive an annual payment of the national school funding and the governing body administers and governs this payment without state involvement or quarterly/ term reporting. The SGB must report annually on the payment. This can again allow officials of the provincial education department's to rather focus on underperforming or dysfunctional schools and not spend unnecessary time and resources on redundant reports of well performing or functional schools.
- Electronic advertisement for the filling of posts. As soon as a post becomes vacant, the SGB can advertise this post electronically and fill the post as soon as possible accordance with such procedures and such requirements as determined by the Minister. On numerous occasions schools are not able to fill vacant posts due to the delay of the advertisement of vacancy lists by the provincial departments. By allowing functional schools to advertise posts online, it will streamline the process of filling posts which is ultimately in the best interests of the learners for obvious reasons.

This will necessitate a further amendment to section 61 of the Schools Act empowering the Minister to regulate on this matter.

46. Clause 17

No comment.

47. Clause 18

This proposed amendment supports the main objectives of the Act as it will enable governing bodies to discharge their functions on a higher level as they will be able to receive support where specific expertise is necessary, regardless of the school's location. And where a governing body can function on a higher level, the learners will be the beneficiaries.

48. Clause 19

No comment.

49. Clause 20

No comment.

50. Clause 21

No comment.

51. Clause 22

We support this proposed amendment. We suggest that section 26(3) is further amended to determine that an SGB member must recuse him- or herself from disciplinary meetings where a family member is involved.

52. Clause 23

No comment.

53. Clause 24

FEDSAS fully support this amendment. The governing body elections are, along with the national elections, one of the biggest elections that take place in the country. With uniform rules and regulations for elections, a fair process can be ensured in all provinces without the uncertainty created by 9 different provincial regulations every 3 years.

54. Clause 25

No comment.

55. Clause 26

The proposed amendment is welcomed.

56. Clause 27

No comment.

57. Clause 28

No comment.

58. Clause 29

In the last few years, the need for standardizing financial management for all schools in the country has become apparent. While many provinces have not yet issued directives in this regard, those that have, have raised several concerns. Some of the concerns include enforcing the provisions of the Public Finance Management Act ('PFMA') and Treasury Regulations onto schools, even though it does not apply to

them. Provincial directions are also riddled with irregularities, anomalies and ultra vires provisions which also raises the question of whether the provincial department has the expertise and ability to perform this function. Hence, it is our proposal that section 37(1) be amended to allow the Minister, and not the HOD, to determine the directions under which an SGB must establish and administer its school funds in accordance with the Schools Act.

59. Clause 30

We reject the inclusion of subsection (6) and (7).

60. Clause 31

See our comments under clause 1(k) on the inclusion of exemption from school fees as other financial benefits.

In order to prevent possible abuse of this section, we suggest that a reasonable cap is placed on the remuneration, other financial benefit, or benefit in kind that an educator may receive in terms of section 38A.

61. Clause 32

No comment.

62. Clause 33

No comment.

63. Clause 34

We are opposed to the insertion.

The submission of quarterly reports, apart from the annual audited financial statements, that a governing body would have to submit will place a financial and administrative burden on the governing body and the school's resources without any additional provision of financial or administrative personnel or other resources by the department to assist with the command. A mere mechanical submission of quarterly reports such as envisaged will serve no purpose and will simply waste energy and paper, unless it is restricted to instances where rational and justifiable reasons exist for the necessity to submit such reports. The provision, if retained, must therefore be

individualised to instances where sufficient reasons exist for such reports, e.g., where there are irregularities in schools' expenditure with regards to subsidies received for the Department or where another justifiable cause for such intervention is present.

As mentioned earlier, the involvement of the State should be limited to legal accountability, this proposed amendment goes beyond this as it comes down to unnecessary interference in the business of schools.

64. Clause 35

No comment.

65. Clause 36

Again, we are opposed to this excessive reporting requirement. See comments on clause 34.

As mentioned earlier, the involvement of the State should be limited to legal accountability, this proposed amendment goes beyond this as it comes down to unnecessary interference in the business of independent schools.

66. Clause 37

No comment.

67. Clause 38

We support this proposal. Criminalising the act of providing false information to schools by parents will make parents aware of the importance of providing true and correct information to schools to ensure proper administration. This will hopefully deter parents to mislead schools by providing false information.

68. Clause 39

We support these proposed provisions for compulsory mediation processes for matters in respect of which SASA does not provide for an appeal process. Alternative dispute resolution in instances of grievances between the HOD and an SGB can cultivate a culture of speedy resolution.

In order to strengthen the dispute resolution provisions, and to align them more closely with the Constitutional Court's jurisprudence, we propose the following amendments:

Proposed addition to paragraph 59A(1)(c) and (2)(c): The addition of the following words "*through meaningful engagement and in the spirit of cooperative governance*", such that the proposed section 59A(1)(c) and 59A(2)(c) would read: "If the dispute has not been resolved within 14 days after the issuing of the written notice contemplated in paragraph *(b)*, each party must nominate a representative within seven days, and those representatives must meet within 14 days after their nomination in order to resolve the dispute through meaningful engagement and in the spirit of cooperative governance."

69. Clause 40

No comment.

70. Clause 41

We recommend the following inclusion to support our proposed insertion of section 19A and proposed amendment to section 21:

'on the organisation, membership, roles and responsibilities of consultative forums as contemplated in section 19A";

"on the administration and functioning of governing bodies who have been granted additional allocated functions in terms of section 21".

We further recommend the insertion of section 61A:

"61A "This Act and national regulations and other policy documents published in terms of the South African Schools Act by the Minister prevails over any provincial laws, regulations, policies and publications."

According to the Constitution of South African, 1996, provinces have legislative and executive powers, concurrent with the national sphere, over certain matters including education at all levels, excluding university and university of technology education.

Naturally this might lead to conflict between national and provincial legislation. Conflicts between national and provincial legislation is dealt with in section 146 - 150 of the Constitution.

Section 146(2)(a) and (b) of the Constitution determines:

"(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met: (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually; (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing— (i) norms and standards; (ii) frameworks; or (iii) national policies."

In the Constitutional Court matter of Fedsas v MEC, Gauteng[23] the Constitutional Court laid down the approach to possible conflicts as follows: "The conflict resolution scheme of sections 146, 149 and 150 of the Constitution departs from the conventional hierarchy that provincial legislation may not be in conflict with national legislation. Automatic repugnancy between the two classes of legislation does not arise. The scheme readily acknowledges and manages the potential conflict related to concurrent national and provincial law-making competences. Under the scheme, provincial legislation prevails over national legislation except if the national legislation applies uniformly countrywide or the matter cannot be regulated effectively by respective provinces or the matter is one listed in the Constitution as requiring uniformity across the nation."

We are of the opinion that the proposed insertion of section 61A will prevent future conflict between national and provincial legislation as it will result in the Schools Act and national regulations and other policy documents published in terms of the South African Schools Act applying uniformly. It is common knowledge that learners and parents are migrating between provinces at unprecedented numbers. In the past six years Gauteng and Western Cape have seen more than 800 000 learners coming to their schools from other provinces. Learners moving to other provinces puts education

[23] [2016] ZACC 14 .

departments under pressure.[24] Having the Schools Act and its regulations and policy documents applied uniformly will be in the best interest of the learners and will help provincial departments in planning and execution of their functions. It will bring uniformity in for example governing matters such as governing body elections, admission of learners, language policies, financial management etc.

One of the objectives of the School Act is “Setting uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa” and this insertion will affirm this objective further.

71. Clause 42

No comment.

72. Clause 43

No comment.

73. Clause 44

No comment.

74. Clause 45

No comment.

75. Clause 46

No comment.

76. Clause 47

No comment.

77. Clause 48

No comment.

78. Clause 49

[24] https://mg.co.za/education/2021-06-12-learners-moving-to-other-provinces-puts-education-departments-under-pressure/ (accessed 31/05/2022).

No comment.

79. Clause 50

No comment.

80. Clause 51

Prohibiting public officials from entering into business transactions with the State is a positive step towards curbing corruption. We support this clause.

81. Clause 52

No comment.

82. Clause 53

No comment.

83. Clause 54

No comment.

84. Clause 55

No comment.

Annexure "A"

We submit these comments as possible recommendations to be included in the proposed regulations on the determination of capacity. These comments are submitted as possible recommendations for inclusion in the proposed regulations concerning capacity determination.

Determination of capacity

The School Governing Body, in determining the capacity of a school, must be guided by the following principles:

The Minimum Uniform Norms and Standards for Public School Infrastructure, as well as the following range of factors in terms of the planning and governance of the school as a whole, which includes but are not limited to:

- That learners' best interests have preference.
- The number of educators available.
- The space available for administrative needs.
- The number of appropriate classrooms available.
- Space needs for sports, cultural and recreational activities.
- The available space in the current media and computer centres, science and technology laboratories and the school hall.
- The sanitary facilities available.
- Parking facilities.
- Safety measures.
- The maximum number of learners permitted per class.
- Internationally recognised best practice regarding class size in order to deliver effective and efficient quality education.

In determining the classroom capacity, the school governing bodies must be guided by the following formula:

Formula for classroom with single tables:

[Class Size (m²) minus teacher's furniture (m²) (furniture/equipment such as cabinets/desks) minus 7 m² (space for educator)] ÷ [Space per learner (m²) + size of learner-table (m²)] = learner capacity per class

Formula for classroom with double tables:
[Class Size (m²) minus teacher's furniture (m²) (furniture/equipment such as cabinets/desks) minus 7 m² (space for educator)] ÷ [Space per learner (m²) + size of learner-table (m²)] times 2 = learner capacity per class

(The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure[25] prescribes the following minimum space allocated for learner and educator:

- **Grade R:** **Learner - 1.6 m²**
  Educator - 7m²
- **Grade 1 - Grade 12:** **Learner - 1 m²**
  Educator - 7m²
- **Students with disabilities:** **Learner - 2 m²)**

Facilities not appropriate as classrooms include but is not limited to:

- Laboratories
- Computer centres
- Media centre
- School hall
- Offices
- Staff room
- Meeting rooms
- Storerooms

[25] Although the objectives of these regulations are to provide the minimum uniform norms and standards for the infrastructure of new public schools, any additions, alterations and improvements to schools that already exist, this is also recommended as a guideline to determine the capacity of existing schools. Furthermore, the proposed occupancy as prescribed by the SANS 10400:2010 - building regulations are simply impractical for schools and therefore the Norms and Standards for public school infrastructure are recommended as a guideline.

- Cafeteria

School Governing Bodies to be guided by the SANS 10400:2010 building regulations in determining the capacity of sanitary fixtures:

Table 1 – Occupancy-of-building classification

1	2
Class of occupancy of building	**Occupancy**
A1	**Entertainment and public assembly** Occupancy where persons gather to eat, drink, dance or participate in other recreation.
A2	**Theatrical and indoor sport** Occupancy where persons gather for the viewing of theatrical, operatic, orchestral, choral, cinematographical or sport performances.
A3	**Places of instruction** Occupancy where school children, students or other persons assemble for the purpose of tuition or learning.
A4	**Worship** Occupancy where persons assemble for the purpose of worshipping.
A5	**Outdoor sport** Occupancy where persons view outdoor sports events.

Table 4 – Provision of sanitary fixtures

1	2	3
Type of occupancy and population	Fixture	Exceptions
A3	Table 6	

Table 6

1	2	3	4	5	6
Population[a]	**Number of sanitary fixtures to be installed**				
	Males			**Females**	
number of people	**Toilet pans**	**Urinals**	**Wash-hand basins**	**Toilet pans**	**Wash-hand basins**
≤ 15	1	1	1	2	1
≤ 30	1	2	2	3	2
≤ 60	2	3	3	5	3
≤ 90	3	5	4	7	4
≤ 120	3	6	5	9	5
> 120	Add 1 sanitary fixture to the above for every 100 persons			Add 1 sanitary fixture to the above for every 50 persons	Add 1 sanitary fixture to the above for every 100 persons
NOTE If the facilities provided in a shopping complex can be conveniently situated so that they are available to the personnel and the public and visitors, it might not be necessary to provide separate facilities for the personnel in individual shops. The minimum number of facilities provided should then be the total required in accordance with this table for the total number of personnel in the shops within the complex who make use of these facilities.					
[a] Population is the number of personnel only of a particular sex in an occupancy. The total number of personnel will, in some cases, be the total population obtained from Regulation **A21**, the public and visitors being very few in number. In other cases the proportion of personnel to the public and visitors will have to be established. The total number of personnel in a shopping complex, or in any particular shop, may be taken as 10 % of the total population for such complex or shop calculated in terms of Regulation **A21**.					