

GOVERNMENT NOTICE NO 26911 OF 2004

DEPARTMENT OF EDUCATION

CALL FOR COMMENT ON THE EDUCATION LAWS AMENDMENT BILL, 2004

The Minister of Education, hereby publishes the Education Laws Amendment Bill, 2004 for comment.

All interested persons and organisations are invited to comment in writing on the Bill and direct the comments to:

The Director-General, Private Bag X895, PRETORIA, 0001, for attention: Ms M Locke, Fax No. (012) 312 5902, Tel No. (012) 312 5929 or e-mail locke.m@doe.gov.za.

Kindly provide the name, address, telephone and fax numbers and e-mail address of the person or organisation submitting the comments.

The comments must reach the Department by 19 November 2004.

The Bill may also be obtained on www.education.gov.za

GRACE NALEDI MANDISA PANDOR, MP
MINISTER OF EDUCATION

EDUCATION LAWS AMENDMENT BILL, 2004

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the South African Schools Act, 1996, so as to add new definitions in line with the National Norms and Standards for School Funding; to provide for the suspension of the decision of the Head of Department to expel a learner pending an appeal to the Member of the Executive Council; to provide for the Head of Department to impose a suitable sanction on a learner if he decides not to expel such learner; to provide for the prohibition or limitation to levy compulsory school fees by certain categories of public schools; to provide for further provision for the enforcement of payment of compulsory school fees on only those parents who are legally liable to pay school fees; to provide for the right of a learner to participate in the total programme of a public school; to provide for the limitation of the disposal of the movable assets of a public school; to amend the Employment of Educators Act, 1998, so as to provide for the refinement of the process of the appointment of educators; to provide for an appeal by a governing body against the decision of the Head of Department to appoint an educator; to amend the Further Education and Training Act, 1998 so as to provide for the extension of the definition of a public further education and training institution; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 84 of 1996 as amended by section 1 of Act 100 of 1997, section 6 of Act 48 of 1999 and section 1 of Act 50 of 2002

1. Section 1 of the South African Schools Act, 1996, is hereby amended by -

(a) the insertion before the definition of “Constitution” of the following definitions:

“adequate bench mark level of funding per learner’ means the adequate funding per learner applicable to the school as determined by the National Norms and Standards for School Funding;”;

“compulsory school fees’ means the school fees contemplated in section 39;”;

(b) the insertion after the definition of “Minister” of the following definitions:

“table’ means the table contemplated in section 35(2);”;

“national quintile’ means –

(a) the placement of all the learners in ordinary public schools in South Africa into five categories of 20% each ranging from the poorest to the least poor learner according to the table; and

(b) the percentage of learners in a specific province according to the table, which determines the number of schools falling within any quintile;”;

“Norms and Standards for School Funding means the national norms and standards for funding of public schools determined in terms of section 35 by the Minister;”;

(c) the insertion after the definition of “school” of the following definition:

“school fees’ means any form of contribution, in cash or kind, made by a parent in relation to the attendance or participation of a learner in any programme of a public school;”;

Amendment of section 9 of Act 84 of 1996 as amended by section 7 of Act 48 of 1999

2. Section 9 of the South African Schools Act, 1996, is hereby amended by:

(a) the substitution for subsection (1) of the following subsection:

“(1) **[Subject to this Act and any applicable provincial law]** The governing body of a public school may, after a fair hearing, suspend a learner from attending school –

(a) as a correctional measure for a period not longer than one week; or

(b) in **[consultation]** agreement with the Head of Department , pending a decision within 14 days as to whether the learner is to be expelled from the school by the Head of Department.”.

(b) the substitution for subsection (2) of the following subsection:

“(2) **[Subject to any applicable provincial law, a]** A learner at a public school may be expelled only-

(a) by the Head of Department; and

(b) if found guilty of serious misconduct after a fair hearing.”.

(c) the substitution for subsection (4) of the following subsection:

“(4) A learner or the parent of a learner who has been expelled from a public school may appeal against the decision of the Head of Department to the Member of the Executive Council within 14 days after receiving the notice of expulsion;”;

(c) the addition of the following subsections:

“(6) A learner who has appealed to the Member of the Executive Council against the decision of the Head of Department to expel him or her from a public school, must be allowed to attend school in the manner determined by the Head of Department, pending the outcome of the appeal;”;

“(7) If the Head of Department decides not to expel a learner as contemplated in subsection(2), he or she may –

- (a) impose a suitable sanction on the learner; or
- (b) refer the matter back to the governing body for an alternative sanction other than expulsion;”;

“(8) The governing body of a public school must implement the sanction contemplated in subsection (7)(a).”.

Amendment of section 35 of Act 84 of 1996

3. Section 35 of the South African Schools Act, 1996, is hereby amended by the substitution for section 35 of the following section:

“35 Norms and Standards for School Funding

(1) Subject to the Constitution and this Act, the Minister must determine national quintiles and national norms and [minimum] standards for [the] school funding [of public schools] after consultation with the Council of Education Ministers, [the Financial and Fiscal Commission] and the Minister of Finance.”.

“(2) The Minister must publish, on a regular basis, in line with the National Norms and Standards for School Funding, a notice in a Government Gazette containing a table indicating the percentage of learners in ordinary public schools which fall within each of the national quintiles in a specific province.”.

Amendment of section 39 of Act 84 of 1996

4. Section 39 of the South African Schools Act, 1996, is hereby amended by-

(a) the substitution for subsection (2) of the following subsection

“(2) A resolution contemplated in subsection (1) must provide for –

(a) the amount of compulsory school fees to be charged; **[and]**

(b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay compulsory school fees [.]; and

“(c) estimated cumulative effect to the school budget as a result of -

(i) the compulsory school fees contemplated for that year; and

(ii) the total, partial or conditional exemptions granted to parents in terms of the regulations contemplated in subsection (4).”.

(b) the addition after subsection (4) of the following subsections:

“(5) No school may levy any registration, administration or any other compulsory fee , except compulsory school fees.”.

“(6) The school may not charge different compulsory school fees based on curriculum or extramural curriculum within the same grade to a parent of a learner at that school.”.

“(7) Despite subsection (1), the Minister must, by notice in the Government Gazette-

(a) annually determine the national quintile, part of a national quintile or national quintiles, of ordinary public schools that may not levy compulsory school fees; and

(b) the national quintile or part of that quintile must contain the poorest schools in the table contemplated in section 35(2).”.

“(8) The Minister may make a determination as contemplated in subsection 7 only if sufficient funding to at least more than the adequacy benchmark level has been secured to fund learners in the schools affected by the determination.”.

“(9) The Member of the Executive Council must –

- (a) identify all the schools contemplated in subsection (7) within his or her province; and
- (b) publish a list of the schools in the Provincial Gazette.”.

“(10) The schools contemplated in subsection (7) may levy compulsory school fees if -

- (a) they do not receive more than the adequate bench mark level of funding per learner from the provincial education department; and
- (b) the income received from compulsory school fees together with the funds received from the state are on average per learner not more than the adequate bench mark level.”.

Amendment of section 41 of Act 84 of 1996

5. The South African Schools Act, 1996, is hereby amended by the substitution for section 41 of the following section:

“41. Enforcement of payment of compulsory school fees

(1) The governing body of a public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40.

(2) The exemption from payment of compulsory school fees must be calculated according to the regulations contemplated in section 39(4).

(3) The exemption from payment of compulsory school fees in terms of this Act is calculated retrospectively from the beginning of the year, if the parent qualifies for the exemption.

(4) The governing body of a public school may act in terms of subsection (1) only after it has ascertained that -

- (a) the parents do not qualify for exemption from compulsory school fees in terms of this Act;
- (b) deductions have been made in terms of regulations contemplated in section 39(4), for parents who qualify for partial exemption; and
- (c) the parent has completed and signed the form, Annexure A to the regulations.

(5) The governing body may not attach the parent's residence unless alternative accommodation is made available to the parent.

(6) A learner has the right to participate in the total school programme of a public school despite the non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to:

- (a) suspension from classes;
- (b) verbal or non-verbal abuse;
- (c) denial of access to cultural, sporting or social activities of the school; or
- (d) denial of a school report or transfer certificates.”.

Insertion of section 58A of Act 84 of 1996

6. The South African Schools Act, 1996, is hereby amended by the insertion after section 58 of the following section:

“58A Alienation of the assets of a public school

(1) The Head of Department has the right to inspect and compile an inventory of all the assets of a public school.

(2) No person may transfer, donate, sell or alienate in any manner, any assets owned by a public school to another person or body without the written approval of the Member of the Executive Council.

(3) Despite subsection (2), the Member of the Executive Council may -

- (a) determine that certain categories of assets below a certain value may be alienated without his or her written approval;
- (b) from time to time, determine and publish the value contemplated in paragraph (a) by notice in the Provincial Gazette.

(4) The assets of a public school may not be attached as a result of any legal action taken against the school.”.

Amendment of section 6 of Act 76 of 1998 as amended by section 15(a) of the Act 48 of 1999 and section 10 of Act 50 of 2002.

7. Section 6 of the Employment of Educators Act 1998, is hereby amended by:

(a) the insertion after paragraph (a) of subsection (3) of the following paragraphs:

“(aa) In considering the applications, the governing body or the council, as the case may be, must comply with the following –

- (i) any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;
- (ii) any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators, with which the candidate must comply;
- (iii) confirm that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators;
- (iv) that the recommendation is not based on undue influence on the members of the governing body or the council, as the case may be;
- (v) the democratic values and principles referred to in section 7(1).”.

“(ab) The governing body or the council, as the case may be, must submit a list of at least 5 names of recommended candidates, in order of preference to the Head of Department or less than 5 candidates in agreement with the Head of Department.”.

“(ac) Despite the order of preference in paragraph (ab) and subject to paragraph (ad), the Head of Department may appoint any suitable candidate on the list.”.

“(ad) When the Head of Department considers the recommendation in paragraph (ab), he or she must, before making an appointment, ensure that the governing body or council, as the case may, has applied the criteria in paragraph (aa).”.

“(ae) If the governing body or council, as the case may be, has not applied the criteria in paragraph (aa), the Head of Department must decline the recommendation.”.

“(af) If the Head of Department declines a recommendation, he or she must –

- (ii) consider all the applications submitted for that post;
- (iii) apply the criteria in paragraph (aa)(ii), (iii) and (v); and
- (iv) appoint temporarily a suitable candidate or readvertise the post.”.

(b) the deletion of paragraphs (b) and (c) of subsection(3) and the insertion of the following paragraphs:

“(b) The governing body or the council, as case may be, may appeal to the Member of the Executive Council against the decision of the Head of Department regarding the appointment contemplated in paragraph (af).”.

“(c) The appeal contemplated in paragraph (b) must be lodged within 5 working days of receiving the notice of appointment.”.

“(d) The appeal must be finalised by the Member of the Executive Council within 30 working days.”.

“(e) If no appeal is lodged within 5 working days, the Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B.”.

Insertion of section 6B of Act 76 of 1998

8. The Employment of Educators Act, 1998, is hereby amended by the insertion after section 6A of the following section:

“6B An educator who has been appointed temporarily to any post on the educator establishment of a public school or a further education and training institution, may be appointed in that post or any other suitable vacant post on a permanent basis by the Head of Department without the recommendation of the governing body or the council, as the case may be.”.

Substitution of the definition of public further education and training institution in section 1 of Act 98 of 1998

9. The Further Education and Training Act, 1998 is hereby amended by the substitution for the definition of public further education and training institution of the following definition:

“public further education and training institution” means any further education and training institution that is established, deemed to be established or declared as a public further education and training institution under this Act and it may also be referred to as public further education and training college.”.

“10. Transitional arrangements in respect of recommendation of educators

Any vacant post that was advertised prior to the commencement of this Act, and if no interviews were held, must be dealt with in terms of this Act.

Short title

11. This Act may be cited as the Education Laws Amendment Act, 2004.

EXPLANATORY MEMORANDUM ON THE EDUCATION LAWS AMENDMENT BILL, 2004

1. PURPOSE OF BILL

1.1 The main purpose of the Bill is to amend the South African Schools Act 84 of 1996, the Employment of Educators Act 76 of 1998 and the Further Education and Training Act 98 of 1998.

1.2 The Bill seeks to amend the Acts so as to:

1.2.1 Add new provisions to the old ones.

1.2.2 Modify or to add terms in the existing legislation.

1.2.3 Alter the scope or effect of existing legislation.

2. RATIONALE BEHIND THE AMENDMENTS

2.1 The South African Schools Act 84 of 1996

Clause 1

This clause introduces various new definitions to give substance to concepts such as “adequate bench mark level of funding per learner”, “compulsory school fees”, “table”, “national quintiles”, “norms and standards for school funding”, and “school fees”. These concepts form a crucial part of the National Norms and Standards for School Funding.

Clause 2

Section 9(1) of SASA does not provide for the time by which the Head of Department must make a decision whether to expel a learner on the recommendation of the governing body. As a result, in some cases, the Head of Department takes too long to make the decision to expel a learner, causing prejudice to both the school and the learner. This clause provides for the time-limit for such a decision and the suspension of the learner by the governing body pending this decision must now be made in agreement with the Head of Department.

The department has observed from the complaints of parents and learners that, in some public schools, if a learner has appealed against the decision of the HoD to expel him or her, the learner

is not allowed to attend classes pending the decision of the Member of the Executive Council (MEC). This clause makes it clear that the learner must attend classes at least until the outcome of the appeal. In essence, an appeal, suspends the implementation of the decision to expel the learner.

A suspension of a learner during the period, in which the appeal is considered, deprives the learner of his or her right to education. In many cases the governing bodies try to justify this suspension on the basis that the learner endangers the safety of others or violates their rights at the school. The Constitutional imperative is to act in the best interest of the learner, and the learner should get the benefit of the appeal process.

The learner should not be deprived of education just because he may misbehave in the future. If the learner commits a further misconduct during the period of the appeal, then the learner should be dealt with in terms of the provisions of the South African Schools Act (SASA). This amendment is needed to protect the right of the learner to education and the best interest of the learner as contemplated in sections 29 and 28 of the Constitution of the Republic of South African Act 108 of 1996, respectively.

The decision of the Head of Department not to expel a learner who is found guilty of serious misconduct after a fair hearing, closes the matter. No further action is taken against the learner. This is unfair because learners who have been found guilty of less serious misconduct are punished by the school. Therefore, this clause is designed to remedy the situation by allowing the Head of Department to substitute a suitable sanction for expulsion so that the accused learners should not be left off the hook. Alternatively the Head of Department is now also empowered to refer the matter back to the school governing body in order to impose another sanction other than expulsion.

Clause 3

The national poverty distribution table published by the Minister will serve as guide to the MECs when they draft a list of schools falling within each of the national quintiles, in their respective provinces.

Clause 4

A general meeting of parents must be convened by the governing body of a public school in terms of the SASA annually to consider the school's budget. Most public schools convene such meetings around September of every year. It is in this meeting that school fees are determined and charged.

Some governing bodies determine the budget by taking into account the full amount that school may levy regarding all the learners at school. For example, if a school has 1000 learners, the governing body bases its budget on the school fees to be paid by parents on behalf of 1000 learners. However, when it comes to the actual payment of school fees, some of the parents are either totally or partially exempted from paying school fees. Therefore the actual income is not equal to the estimated budget and therefore the budget is not correct.

Sub-clause (a) forces the governing body to consider the effect of the exemptions when determining the budget and, to adjust the activities of the school based on a realistic budget and not on a potential income as if all parents are expected to pay school fees.

Sub-clause (b) provides that the compulsory school fees may not include registration fees, administration or other compulsory fees. The school may also not charge further school fees for additional subjects chosen by learners in terms of the school programme.

Sub-clause (b) also provides for the Minister to determine the national quintiles of public schools that may not levy compulsory school fees, but after securing funds for such a determination. The Member of the Executive Council must subsequently identify and publish a list of these schools in his or her province.

The right to levy compulsory school fees will only be limited if the school is receiving more than the adequate bench mark level of funding per learner from the PED to enable it to function as a public school. If the public school is receiving less from the province than the adequate bench mark level of funding per learner in terms of the national norms, such school will regain the right to levy compulsory school fees until the school's adequate bench mark level of funding per learner is achieved in terms of the norms to ensure their effective functioning.

This is an attempt to curb the rising costs to poor parents regarding the education of their learners. Quintiles one and two are determined on a national basis where the poorest learners in the country as a whole will determine the placement in such a quintile of the schools which they attend according to the percentage of learners falling within the quintiles one and two.

Statistics have shown that distribution patterns of poor parents are not spread equally between the provinces. Provinces like the Eastern Cape, Limpopo and KwaZulu-Natal have a much higher distribution of poor parents than the other provinces. Therefore some provinces will receive more funding from the state than other provinces. The pro-poor approach is one of the cornerstones of the National Norms and Standards for School Funding. In order to give effect to the purpose of the norms it is crucial to limit the rights of certain public schools to levy compulsory school fees.

Clause 5

The clause provides that before legal action is taken against a parent of a learner for non-payment of compulsory school fees, the governing body must ensure that the amount exempted, if applicable, is deducted and that the parent is indeed liable to pay such fees. The right to exemption to compulsory school fees will be calculated from the date the parent is liable to pay such school fees. Schools must clearly indicate that they have calculated the amount to be exempted and deducted it from the compulsory school fees to determine what an individual parent is liable to pay. Many parents are not informed of their right to exemption to compulsory school fees and the extent thereof. A school may only approach a court to recover the fees that the parent is due to pay and the onus of proof that necessary calculations have been properly made, will rest on the school.

Presently some public schools discriminate against learners whose parents have not paid compulsory school fees. For instance some schools refuse to allow such learners to participate in the school programmes, matric farewells or sporting events. Some learners are even subjected to verbal and non-verbal abuse, causing them embarrassment among other learners. Section 5 of the SASA provides that this form of discrimination is unlawful. However, this provision deals with access to the school and not utilisation of school funds. This amendment seeks to supplement the current position in section 5 of the Act and ensure that the funding available to the school are used for the benefit of all learners in the school and the exclusion of a learner due to non-payment of school fees by the parent cannot be justified.

It has also been noted that when legal action is taken against a parent for not paying school fees, sometimes the home of the parent is attached. This clause limits such action by providing that if attachment is attempted, alternative accommodation must be made available to the parents.

Clause 6

In terms of the SASA a public school has a right of ownership of the assets of that school. The assets of a school are acquired by a school through funds received from the state, from compulsory school fees or donations to the public school. These are public assets and must be used by all role players of the school. The movable assets of the school consist of school desks, equipment and similar assets which have an impact on the professional delivery of education programmes in the classroom.

In special schools such as agricultural schools, the livestock and agricultural equipment are an integral part of the educational activities. Currently there is no provision in the SASA to regulate the alienation of these school assets. It has been shown that some schools alienate school property without the approval of the MEC and in many cases such property is alienated without an actual value attached to it.

The amendment seeks to ensure that assets that are needed for proper delivery of educational programmes in a school are protected. However, since such an approval might create a huge administrative problem in the PED, the Bill seeks to allow the Member of the Executive Council to determine categories of assets below a certain value to be alienated without such written prior approval.

The clause also protects school assets by prohibiting their attachment as a result of a legal action taken against the school.

2.2 Employment of Educator Act 76 of 1998

Clause 7

The clause provides for the streamlining of the appointment process of educators by allowing the Head of Department to appoint any of the educators on the list of educators recommended by the governing body or the council, as the case may be.

Currently, in terms of section 6(3)(c), the Head of Department, if he or she declines a recommendation, has to refer the whole matter back to the governing body and the whole process would start afresh. Meanwhile the learners are prejudiced due to the lack of an educator at the school or institution, therefore this situation violates sections 28 and 29 of the Constitution.

However, in terms of the new provision of the Bill, if the Head of Department declines the recommendation he or she may consider all applications for that post and appoint a suitable candidate temporarily or readvertise the post.

If the governing body or the council is not satisfied about the temporary appointment of an educator by the Head of Department, it may appeal to the Member of the Executive Council. The appointed educator will remain temporary until the appeal is finalised. If the appeal is upheld, the process of appointment will start from the beginning. If the appeal is dismissed or not lodged within 5 working days, the Head of Department may appoint the educator permanently. The appeal process is made certain and quicker by providing for a time limit for its finalisation.

Clause 8

Since an educator who was appointed temporarily was recommended by the governing body or the council, as the case may be, before such an appointment was made, it is not necessary to require another such recommendation when such an educator is appointed permanently in that post.

2.3 The Further Education and Training Act 98 of 1998

Clause 9

The Further Education and Training Act 1998 is amended so as to make it possible for a Public Further Education and Training Institution to be called a Public Further Education and Training College.

In practice Public Further Education and Training Institutions are called Public Further Education and Training Colleges although this concept is not entrenched in the Act at all.

2.4 Transitional arrangements

Clause 10

These arrangements are made to protect the rights of applicants who have already been interviewed before the commencement of this Act.

3. FINANCIAL IMPLICATIONS

No additional costs are foreseen as a result of the amendments.

4. CONSULTATION

The Bill is published to obtain comments from all role players.

5. PARLIAMENTARY PROCEDURE

The Department of Education and the State Law Adviser are of the opinion that the procedures contemplated in section 73 and 76 of the Constitution of the Republic of South Africa Act 108 of 1996 should be followed since the Bill falls within the ambit of Schedule 4 of the Constitution.