

REPUBLIC OF SOUTH AFRICA

# **EDUCATION LAWS AMENDMENT BILL**

*(As amended by the Select Committee on Education and Recreation (National Council of  
Provinces))  
(The English text is the official text of the Bill)*

(MINISTER OF EDUCATION)

[B 23D—2005]



reasonable grounds and as a precautionary measure, suspend a *learner* who is suspected of serious misconduct from attending *school*—

- (a) **as a correctional measure for a period not longer than one week;**  
**or**
- (b) **in consultation with the *Head of Department*, pending a decision as to whether the learner is to be expelled from the school by the *Head of Department***

but may only enforce such suspension after the *learner* has been granted a reasonable opportunity to make representations to it in relation to such suspension.

(1A) A *governing body* must conduct disciplinary proceedings in the manner contemplated in section 8 against a *learner* within seven *school* days after the suspension of such *learner*.

(1B) If disciplinary proceedings are not conducted within seven *school* days after the suspension of a *learner*, the *governing body* must obtain the approval of the *Head of Department* for the continuation of the suspension of such *learner*.

(1C) A *governing body* may, if a *learner* is found guilty of serious misconduct during the disciplinary proceedings contemplated in section 8—

- (a) impose the suspension of such *learner* for a period not longer than seven *school* days or any other sanction contemplated in the code of conduct of the *public school*; or
- (b) make a recommendation to the *Head of Department* to expel such *learner* from the *public school*.

(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.

(1E) A *governing body* may suspend or extend the suspension of a *learner* for a period not longer than 14 days pending the decision by the *Head of Department* whether or not to expel such *learner* from the *public school*."

- (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]** disciplinary proceedings contemplated in section 8 were conducted."

- (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 of receiving the notice of expulsion." and

- (d) the addition of the following subsections:

"(6) A *learner* who has appealed in the manner contemplated in subsection (4), must, pending the outcome of the appeal, be given access to education in the manner determined by the *Head of Department*.

(7) The *Head of Department*, in determining the manner of attendance contemplated in subsection (6)

- (a) must take reasonable measures to protect the rights of other *learners* at the *public school*; and
- (b) may consider an alternative method of providing education to the *learner* contemplated in subsection (6).

(8) If the *Head of Department* decides not to expel a *learner* as contemplated in subsection (2), the *Head of Department* may, after consultation with the *governing body*, impose a suitable sanction on the *learner*.

(9) If the *Head of Department* decides not to impose a sanction on the *learner*, the *Head of Department* must refer the matter back to the *governing body* for an alternative sanction in terms of the code of conduct contemplated in section 8, other than expulsion.

(10) The *governing body* must implement the sanction contemplated in subsection (8).".

#### Substitution of section 35 of Act 84 of 1996

3. The following section is hereby substituted for section 35 of the South African Schools Act, 1996:

##### **"Norms and standards for school funding [of public schools]**

**35.** (1) Subject to the *Constitution* and *this Act*, the *Minister* must determine national quintiles for public schools 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 norms and standards for school funding contemplated in subsection (1) must—

- (a) set out criteria for the distribution of state funding to all *public schools* in a fair and equitable manner;
- (b) provide for a system in terms of which *learners* at all *public schools* can be placed into quintiles, referred to as national quintiles for *learners*, according to financial means;
- (c) provide for a system in terms of which all *public schools* in the Republic can be placed into quintiles referred to as national quintiles for *public schools*, according to the distribution of *learners* in the national quintiles for *learners*; and
- (d) determine the procedure in terms of which the *Member of the Executive Council* must apply the criteria contemplated in paragraph (a).".

#### 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 *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 *school fees*[.]; and
- (c) a *school* budget that reflects the estimated cumulative effect of—
  - (i) the established trends of non-payment of *school fees*; and
  - (ii) the total partial or conditional exemptions granted to *parents* in terms of the regulations contemplated in subsection (4)."

and

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

"(5) No *public school* may charge any registration, administration or other fee, except *school fees* as defined in section 1.

(6) A *public school* may not charge a *parent* of a *learner* at that *school* different *school fees* based on curriculum or extramural curriculum within the same grade.

(7) Despite subsection (1), the *Minister* must by notice in the Government Gazette annually determine the national quintiles for *public schools* or part of such quintiles which must be used by the *Member of the Executive Council* to identify *schools* that may not charge *school fees*.

(8) The *Minister* may make a determination in terms of subsection (7) only if sufficient funding, not less than the *no fee threshold*, has been secured to fund *learners* at the *schools* affected by the determination.

(9) The *Member of the Executive Council* must identify and draw a list of all the *schools* contemplated in subsection (7) within his or her province.

(10) The *Minister* must—

- (a) consider the list of schools identified in terms of subsection (9);

- (b) compare the list with the determination contemplated in section 35(1); and
- (c) publish the list per *province*, in the Government Gazette if it complies with the determination.

(11) The *schools* contemplated in subsection (7) may, despite that subsection, charge *school fees* if they receive less than the *no fee threshold* from the provincial *education department*.

(12) The right of the *school* to charge *school fees* in terms of subsection (11) is limited to an amount equal to the sum obtained if the actual amount received from the State is deducted from the *no fee threshold*."

#### **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:

##### **"Enforcement of payment of *school fees***

**41.** (1) [The governing body of a] 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 *school fees* must be calculated according to the regulations contemplated in section 39(4).

(3) The exemption from payment of *school fees* in terms of *this Act* is calculated retrospectively from the date on which the *parent* qualifies for the exemption.

(4) A *public school* may act in terms of subsection (1) only after it has ascertained that—

- (a) the *parent* does not qualify for exemption from payment of *school fees* in terms of *this Act*;
- (b) deductions have been made in terms of regulations contemplated in section 39(4), for a *parent* who qualifies for partial exemption; and
- (c) the *parent* has completed and signed the form prescribed in the regulations contemplated in section 39(4).

(5) Despite subsection (4), a *public school* may act in terms of subsection (1) if—

- (a) that *school* can provide proof of a written notification to the *parent* delivered by hand or registered post that the *parent* has failed to apply for exemption contemplated in section 39; and
- (b) despite the notice contemplated in paragraph (a), the *parent* fails to pay the *school fees* after a period of three months from the date of notification.

(6) A *public school* may not attach the dwelling in which a *parent* resides.

(7) A *learner* may not be deprived of his or her right to participate in all aspects of the programme of a *public school* despite the non-payment of *school fees* by his or her *parent* and may not be victimised in any manner, including but not limited to the following conduct:

- (a) Suspension from classes;
- (b) verbal or non-verbal abuse;
- (c) denial of access to—
  - (i) cultural, sporting or social activities of the *school*; or
  - (ii) the nutrition programme of the school for those *learners* who qualify in terms of the applicable policy; or
- (d) denial of a *school* report or transfer certificate."

**Insertion of section 58A in Act 84 of 1996**

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

**"Alienation of assets of public school**

**58A.** (1) The *Head of Department* has the right to compile or inspect an inventory of all the assets of a *public school*.

(2) No person may alienate 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; and
- (b) 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 of the Act 48 of 1999 and section 7 of Act 53 of 2000**

7. (1) Section 6 of the Employment of Educators Act, 1998, is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) (a) Subject to paragraph (m) any appointment promotion or transfer to any post on the educator establishment of a public school or a further education and training institution, may only be made on the recommendation of the governing body of the public school or the council of the further education and training institution, as the case may be, and, if there are educators in the provincial department of education concerned who are in excess of the educator establishment of a public school or further education and training institution due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.

(b) In considering the applications, the governing body or the council, as the case may be, must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to—

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

(c) The governing body or the council, as the case may be, must submit, in order of preference to the Head of Department, a list of—

- (i) at least three names of recommended candidates; or
- (ii) fewer than three candidates in consultation with the Head of Department.

(d) When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must, before making an appointment, ensure that the governing body or council, as the case may, has met the requirements in paragraph (b).

(e) If the governing body or council, as the case may be, has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(f) Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list.

- (g) If the Head of Department declines a recommendation, he or she must—
- (i) consider all the applications submitted for that post;
  - (ii) apply the requirements in paragraph (b)(i) to (iv); and
  - (iii) despite paragraph (a), appoint a suitable candidate temporarily or re-advertise the post.

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

(i) The appeal contemplated in paragraph (h) must be lodged within 14 days of receiving the notice of appointment.

(j) The appeal must be finalised by the Member of the Executive Council within 30 days.

(k) If no appeal is lodged within 14 days, the Head of Department may convert the temporary appointment into a permanent appointment as contemplated in section 6B.

(l) A recommendation contemplated in paragraph (a) shall be made within two months from the date on which a governing body or council, as the case may be, was requested to make a recommendation, failing which the Head of Department may, subject to paragraph (g), make an appointment without such recommendation.

(m) Until the relevant governing body or council, as the case may be, is established, the appointment, promotion or transfer in a temporary capacity to any post on the educator establishment must be made by the Head of Department where a—

- (i) new public school is established in terms of the South African Schools Act, 1996, and any applicable provincial law;
- (ii) new further education and training institution is established in terms of the Further Education and Training Act, 1998, and any applicable provincial law; or
- (iii) new public adult learning centre is established in terms of the Adult Basic Education and Training Act 2000, and any applicable provincial law."

(2) Any vacant post that was advertised before the commencement of this section must be filled in terms of the provisions of the Employment of Educators Act, 1998, as it existed immediately before the commencement of this section if interviews in respect of the vacant post were held before such commencement.

#### **Insertion of section 6B in Act 76 of 1998**

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

#### **"Conversion of temporary employment to permanent employment**

**6B.** The Head of Department may, after consultation with the governing body of a public school or the council of a further education and training institution as the case may be convert the temporary appointment of an educator appointed to a post on the educator establishment of the public school or the further education and training institution into a permanent appointment in that post without the recommendation of the governing body or the council as the case may be."

#### **Repeal of laws**

9. The laws mentioned in the second column of the Schedule are hereby repealed to the extent indicated in the third column of that Schedule.

#### **Short title**

10. This Act is called the Education Laws Amendment Act, 2005.



**SCHEDULE**  
**LAWS REPEALED**  
**(SECTION 9)**

<b>No. and year of law</b>	<b>Short title</b>	<b>Extent of repeal</b>
Act No. 25 of 1941	Higher Education (Amendment) Act, 1941.	The whole.
Act No. 18 of 1946	Higher Education (Amendment) Act, 1946.	The whole.
Act No. 9 of 1960	Matriculation Exemption Act, 1960.	The whole.
Act No. 82 of 1963	Orange Free State Study Bursary Fund Act, 1963.	The whole.
Act No. 73 of 1969	National Education Policy Amendment Act, 1969.	The whole.
Act No. 90 of 1970	National Study Loans and Bursaries Amendment Act, 1970.	The whole.
Act No. 60 of 1972	Educational Services Amendment Act, 1972.	The whole.
Act No. 5 of 1973	University Education (Agricultural and Veterinary Science Affairs) Act, 1973.	The whole.
Act No. 69 of 1973	Education Laws Amendment Act, 1973.	The whole.
Act No. 92 of 1974	National Education Policy Amendment Act, 1974.	The whole.
Act No. 17 of 1975	National Education Policy Amendment Act, 1975.	The whole.
Act No. 23 of 1978	National Study Loans and Bursaries Amendment Act, 1978.	The whole.
Act No. 25 of 1978	National Education Policy Amendment Act, 1978.	The whole.
Act No. 11 of 1981	Culture and Education Laws Amendment Act, 1981.	The whole.
Act No. 106 of 1981	Vista University Act, 1981.	The whole.
Act No. 16 of 1982	Education Services Amendment Act, 1982.	The whole.
Act No. 6 of 1984	Education and Heraldry Laws Amendment Act, 1984.	The whole.
Act No. 57 of 1985	Universities and Technikons Advisory Council Amendment Act, 1985.	The whole.
Act No. 71 of 1985	Universities for Blacks, Technikons (Education and Training), Education, and Training Amendment Act, 1985.	The whole.
Act No. 8 of 1986	National Study Loans and Bursaries Act Repeal Act, 1986.	The whole.
Act No. 10 of 1986	National Policy for General Education Affairs Amendment Act, 1986.	The whole.
Act No 40 of 1993	Vista University Amendment Act 1993	The whole



## MEMORANDUM ON THE OBJECTS OF THE EDUCATION LAWS AMENDMENT BILL, 2005

1. The Bill seeks to amend the South African Schools Act, 1996 (Act No. 84 of 1996) and the Employment of Educators Act, 1998 (Act No. 76 of 1998).

### 2.1 South African Schools Act, 1996 (hereinafter referred to as "SASA")

Various new definitions such as "no fee threshold", "school fees", and "norms and standards for school funding" are provided for. These concepts form a crucial part of the national norms and standards for school funding.

SASA does not provide for a time frame in section 9 within 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 whether to expel a learner or not, thereby causing prejudice to both the school and the learner. A time limit for such a decision is introduced. It is proposed that the suspension of the learner by the governing body pending this decision must now be made in agreement with the Head of Department.

In some public schools, if a learner has appealed against the decision of the Head of Department to expel him or her, that learner is not allowed to attend classes pending the decision by the Member of the Executive Council. The proposed clause makes it clear that the learner must have access to education at least until the outcome of the appeal. In essence, an appeal suspends the implementation of the decision to expel the learner.

If the Head of Department decides not to expel a learner, it is proposed that the Head of Department be allowed to substitute a suitable sanction for expulsion. Alternatively, the Head of Department is also empowered to refer the matter back to the school governing body in order to impose another sanction other than expulsion.

It is further proposed that the national norms and standards for school funding determined by the Minister in consultation with the Council of Education Ministers and the Minister of Finance will provide the criteria that a Member of the Executive Council must apply when he or she drafts a list of schools falling within each of the national quintiles, in the respective provinces.

Section 39 of SASA is amended to compel 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.

It is further proposed that the school fees may not include registration fees, administration or other fees. The school may not charge further school fees for additional subjects chosen by learners from the school programme.

The Minister must determine the national quintiles for public schools that may not charge school fees. However, the Minister may only make such a determination after he or she is satisfied that there are sufficient funds secured 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 charge school fees will only be limited if the school is receiving more than the adequacy benchmark level of funding per learner from the Provincial Department of Education to enable it to function as a public school. If the public school is receiving less from the province than the adequacy benchmark level of funding per learner in terms of the national norms, such school will regain the right to charge school fees until the school's adequacy benchmark level of funding per learner is achieved in terms of the national norms and standards to ensure their effective functioning.

This is an attempt to curb the rising costs to parents of limited financial means of the education of their children. 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 quintiles 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 parents of limited financial means are not spread equally between the provinces. Provinces like the Eastern Cape, Limpopo and KwaZulu-Natal have a much higher distribution of parents of limited financial means 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 national norms and standards it is crucial to limit the rights of certain public schools to charge school fees.

The proposed amendments to section 41 of SASA seek to supplement the current position in terms of section 5 of the Act by ensuring that the funding available to the school is used for the benefit of all the learners in the school and that a learner cannot be excluded from participation in the school programmes, matric farewells or sporting events due to non-payment of school fees by the parent.

It has also been noted that in some instances, when legal action is taken against a parent for not paying school fees, the home of the parent is attached. This proposal prevents the school from attaching the dwelling in which a parent resides.

In terms of the SASA a public school has a right of ownership of the assets of that public school. The assets of public school are acquired through funds received from the state, from 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 used in 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 offered by such schools. Currently, there is no provision in the SASA to regulate the alienation of these school assets. It has been shown that some public schools alienate school property without the approval of the Member of the Executive Council, and in many cases such property is alienated without an actual value attached to it.

The proposed new clause 6 seeks to ensure that assets that are needed for providing proper educational programmes in a public school are protected. However, since such an approval might create a huge administrative problem in the Provincial Education Department, the Bill seeks to allow the Member of the Executive Council to determine categories of assets below a certain value that may be alienated without 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 Educators Act, 1998**

Currently section 6(3)(c) of the Employment of Educators Act, 1998, provides that if the Head of Department declines a recommendation, he or she has to refer the whole matter back to the governing body and the whole process starts afresh. In order to overcome this situation the Bill seeks to insert a new provision, which provides that if the Head of Department declines the recommendation, he or she may consider all the applications for that post and appoint a suitable candidate temporarily or re-advertise the post.

If the governing body or the council is not satisfied with the temporary appointment of an educator by the Head of Department, it may appeal to the Member of the Executive Council. The appointment of the 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 14 days from receiving the notice of appointment, the Head of Department may appoint the educator permanently. The finalisation of the appeal process is ensured by providing for a time limit.

## **2.3 Repeal of laws**

The South African Law Reform Commission has provided all national departments with an audit of primary legislation still in force since 1910. The commission has noted that most of the laws are unconstitutional, redundant and obsolete, that is, they are disused and therefore should be repealed. Otherwise, if they remain in the statute book, users might apply them only to realise later that they are no longer applicable.

## **3. FINANCIAL IMPLICATIONS FOR STATE**

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

The Bill was published to obtain comments from all role players:

- Department of Labour;
- Department of State Expenditure ;
- Department of Finance;
- DACE;
- SA Onderwysers Unie (SAOU);
- National Professional Teachers Organisation of SA (NAPTOSA);
- Democratic Teachers Union (SADTU);
- SA Federation of Association of Governing Bodies of SA Schools (FEDSAS);
- National Association of School Governing Bodies (NASGB);
- SA Students Representative Council (SASRC);
- Committee of FET College Principals (AFETISA);
- Congress of SA Students (COSAS);
- SA Students' Congress (SASCO);
- Pan African Student Movement (PASMA);
- AZAPO;
- Azanian Students' Congress (AZASCO);
- Azanian Student Movement (AZASM);
- SA Congress Students Association (SASCA);
- Council of Higher Education;
- Committee on Technikon Principals (CTP);
- SA Universities Vice-Chancellors Association (SAUVCA);
- Independent Schools Association of SA (ISASA);
- SAQA;
- GEFETQA;
- National Board for Further Education and Training;
- NABABET;
- National Teachers Union (NATU);
- South African Human Rights Commission.

Comments were received from:

- Persons from various schools, governing bodies, educational institutions and churches;
- Acting Senior Manager Sedibeng District (D8);
- FAK;
- Solidarity;
- TABOK;
- CEPD;
- GPEDU;
- Juris Consulti Collective Bargaining Experts;
- Volkskoördinerende Raad;
- Afrikaner Alliansie;
- Centre for Applied Legal Studies;
- FEDSAS Gauteng;
- SA Foundation of Education and Training;
- MEC Education: Free State Province.

## 5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department of Education are of the opinion that this Bill must be dealt with in accordance with the procedure prescribed by section 76(1) or (2) of the Constitution, since it falls within a functional area listed in Schedule 4 of the Constitution, namely "Education at all levels, excluding tertiary education".

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.