

REPUBLIC OF SOUTH AFRICA

EDUCATION LAWS AMENDMENT BILL

(As amended by the Portfolio Committee on Education (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF EDUCATION)

[B 48B—2000]

ISBN 0 621 29584 1

No. of copies.....1 800

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 Qualifications Authority Act, 1995, so as to increase the representation of organised labour on the Authority; to amend the South African Schools Act, 1996, so as to make further provision for public schools on private property; to provide for the governance of a new public school until a governing body is constituted; and to provide for safety measures at public schools; to amend the Employment of Educators Act, 1998, so as to substitute certain definitions; to make provision for the appointment of educators to new public schools, public further education and training institutions and public adult learning centres; to amend the provisions dealing with incapacity, misconduct and appeals; to make provision for an incapacity code and procedure and a disciplinary code and procedure; to amend the Further Education and Training Act, 1998, so as to provide additional functions for the council of a public further education and training institution and to amend provisions relating to exemptions of existing private institutions; and to provide for matters connected therewith.

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

Amendment of section 4 of Act 58 of 1995

1. Section 4 of the South African Qualifications Authority Act, 1995, is hereby amended by the substitution in subsection (3) for paragraph (e) of the following paragraph: 5

“(e) **[two]** three members nominated by the national organisations representing organised labour;”.

Amendment of section 14 of Act 84 of 1996, as amended by section 5 of Act 100 of 1997 10

2. Section 14 of the South African Schools Act, 1996, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to the *Constitution* and **[this Act]** an expropriation in terms of section 58 of land or a real right to use the property on which the *public school* is

situated, a *public school* may be provided on private property only in terms of an agreement between the *Member of the Executive Council* and the owner of the private property.”.

Amendment of section 16 of Act 84 of 1996, as amended by section 9 of Act 48 of 1999

5

3. Section 16 of the South African Schools Act, 1996, is hereby amended by the addition of the following subsection:

“(7) If a new *public school* is provided in terms of section 12, the governance of that *school* vests in the *Head of Department* until a *governing body* has been constituted in terms of *this Act*.”.

10

Amendment of section 20 of Act 84 of 1996, as amended by section 6 of Act 100 of 1997

4. Section 20 of the South African Schools Act, 1996, is hereby amended by the substitution for paragraph (k) of subsection (1) of the following paragraph:

“(k) at the request of the *Head of Department*, allow the reasonable use under fair conditions determined by the *Head of Department* of the facilities of the *school* for educational programmes not conducted by the *school*;”.

15

Amendment of section 61 of Act 84 of 1996

5. The South African Schools Act, 1996, is hereby amended by the substitution for section 61 of the following section:

20

“Regulations

61. The *Minister* may make regulations —

(a) to provide for safety measures at *public schools*;

(b) on any matter which must or may be prescribed by regulation under *this Act*; and

25

(c) on any matter which may be necessary or expedient to prescribe in order to achieve the objects of *this Act*.”.

Amendment of section 1 of Act 76 of 1998

6. Section 1 of the Employment of Educators Act, 1998, is hereby amended—

(a) by the substitution for the definition of “further education and training institution” of the following definition:

30

“ ‘further education and training institution’ means a further education and training institution as defined in section 1 of the Further Education and Training Act, 1998 (Act No. 98 of 1998), but does not include any private further education and training institution;”;

35

(b) by the substitution for the definition of “this Act” of the following definition:

“ ‘this Act’ includes a regulation and the Schedules to this Act;”.

Amendment of section 6 of Act 76 of 1998, as amended by section 15 of Act 48 of 1999

7. Section 6 of the Employment of Educators Act, 1998, is hereby amended by the addition to subsection (3) of the following paragraph:

40

“(e) Until the relevant governing body or council 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;

45

(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.”.

50

Substitution of section 12 of Act 76 of 1998

8. The Employment of Educators Act, 1998, is hereby amended by the substitution for section 12 of the following section:

“Discharge on account of ill-health

12. An educator may be discharged on account of ill-health in the circumstances referred to in Schedule 1.” 5

Substitution of section 16 of Act 76 of 1998

9. The Employment of Educators Act, 1998, is hereby amended by the substitution for section 16 of the following section:

“Incapable educators 10

16. If it is alleged that an educator is unfit for the duties attached to the educator’s post or incapable of carrying out those duties efficiently, the employer must assess the capacity of the educator and may take action against the educator in accordance with the incapacity code and procedures for poor work performance as provided in Schedule 1.” 15

Substitution of section 17 of Act 76 of 1998

10. The Employment of Educators Act, 1998, is hereby amended by the substitution for section 17 of the following section:

“Serious misconduct

17. (1) An educator must be dismissed if he or she is found guilty of— 20
 (a) theft, bribery, fraud or an act of corruption in regard to examinations or promotional reports;
 (b) committing an act of sexual assault on a learner, student or other employee;
 (c) having a sexual relationship with a learner of the school where he or she is employed; 25
 (d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee;
 (e) illegal possession of an intoxicating, illegal or stupefying substance; or
 (f) causing a learner or a student to perform any of the acts contemplated in paragraphs (a) to (e). 30
 (2) If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for in Schedule 2.” 35

Substitution of sections 18 to 24 of Act 76 of 1998

11. The Employment of Educators Act, 1998, is hereby amended by the substitution for sections 18 to 24 of the following section:

“Misconduct 40

18. (1) Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she—
 (a) fails to comply with or contravenes this Act or any other statute, regulation or legal obligation relating to education and the employment relationship; 45
 (b) wilfully or negligently mismanages the finances of the State, a school, a further education and training institution or an adult learning centre;

(c)	without permission possesses or wrongfully uses the property of the State, a school, a further education and training institution, an adult learning centre, another employee or a visitor;	
(d)	wilfully, intentionally or negligently damages or causes loss to the property of the State, a school, a further education and training institution or an adult learning centre;	5
(e)	in the course of duty endangers the lives of himself or herself or others by disregarding set safety rules or regulations;	
(f)	unjustifiably prejudices the administration, discipline or efficiency of the Department of Education, an office of the State or a school, further education and training institution or adult learning centre;	10
(g)	misuses his or her position in the Department of Education or a school, further education and training institution or adult learning centre to promote or to prejudice the interests of any person;	
(h)	accepts any compensation in cash or otherwise from a member of the public or another employee for performing his or her duties without written approval from the employer;	15
(i)	fails to carry out a lawful order or routine instruction without just or reasonable cause;	
(j)	absents himself or herself from work without a valid reason or permission;	20
(k)	unfairly discriminates against other persons on the basis of race, gender, disability, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, family responsibility, HIV status, political opinion or other grounds prohibited by the Constitution;	25
(l)	performs poorly or inadequately for reasons other than incapacity;	
(m)	without the written approval of the employer, performs work for compensation for another person or organisation either during or outside working hours;	30
(n)	without prior permission of the employer accepts or demands in respect of the carrying out of or the failure to carry out the educator's duties, any commission, fee, pecuniary or other reward to which the educator is not entitled by virtue of the educator's office, or fails to report to the employer the offer of any such commission, fee or reward;	35
(o)	without authorisation, sleeps on duty;	
(p)	while on duty, is under the influence of an intoxicating, illegal, unauthorised or stupefying substance, including alcohol;	
(q)	while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner;	40
(r)	assaults, or attempts to or threatens to assault, another employee or another person;	
(s)	incites other personnel to unprocedural and unlawful conduct;	
(t)	displays disrespect towards others in the workplace or demonstrates abusive or insolent behaviour;	45
(u)	intimidates or victimises fellow employees, learners or students;	
(v)	prevents other employees from exercising their rights to freely associate with trade unions in terms of any labour legislation;	
(w)	operates any money-lending scheme for employees for his or her own benefit during working hours or from the premises of the educational institution or office where he or she is employed;	50
(x)	carries or keeps firearms or other dangerous weapons on State premises, without the written authorisation of the employer;	
(y)	refuses to obey security regulations;	55
(z)	gives false statements or evidence in the execution of his or her duties;	
(aa)	falsifies records or any other documentation;	
(bb)	participates in unprocedural, unprotected or unlawful industrial action;	
(cc)	fails or refuses to—	60
(i)	follow a formal programme of counselling as contemplated in item 2(4) of Schedule 1;	

- (ii) subject himself or herself to a medical examination as contemplated in item 3(3) of Schedule 1 and in accordance with section 7 of the Employment Equity Act, 1998 (Act No. 55 of 1998); or
- (iii) attend rehabilitation or follow a formal rehabilitation programme as contemplated in item 3(8) of Schedule 1; 5
- (dd) commits a common law or statutory offence;
- (ee) commits an act of dishonesty; or
- (ff) victimises an employee for, amongst others, his or her association with a trade union. 10
- (2) If it is alleged that an educator committed misconduct as contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2.
- (3) If, after having followed the procedures contemplated in subsection (2), a finding is made that the educator committed misconduct as contemplated in subsection (1), the employer may, in accordance with the disciplinary code and procedures contained in Schedule 2, impose a sanction of— 15
 - (a) counselling;
 - (b) a verbal warning;
 - (c) a written warning;
 - (d) a final written warning;
 - (e) a fine not exceeding one month's salary;
 - (f) suspension without pay for a period not exceeding three months;
 - (g) demotion; 20
 - (h) a combination of the sanctions referred to in paragraphs (a) to (f); or
 - (i) dismissal, if the nature or extent of the misconduct warrants dismissal. 25
- (4) Any sanction contemplated in subsection (3)(e), (f) or (g) may be suspended for a specified period on conditions determined by the employer.
- (5) An educator may be dismissed if he or she is found guilty of— 30
 - (a) dishonesty, as contemplated in subsection (1)(ee);
 - (b) victimising an employee for, amongst others, his or her association with a trade union, as contemplated in subsection (1)(ff);
 - (c) unfair discrimination, as contemplated in subsection (1)(k);
 - (d) rape, as contemplated in subsection (1)(dd);
 - (e) murder, as contemplated in subsection (1)(dd);
 - (f) contravening section 10 of the South African Schools Act, 1996 (Act No. 84 of 1996), as contemplated in subsection (1)(dd). 35

Substitution of section 25 of Act 76 of 1998

12. The Employment of Educators Act, 1998, is hereby amended by the substitution for section 25 of the following section: 40

“Appeals

- 25. (1) An educator may appeal to the Minister or the Member of the Executive Council, as the case may be, against a decision to demote, transfer or terminate the services of the educator on the grounds of incapacity contemplated in section 16. 45
- (2) An educator has a right to appeal to the Minister or the Member of the Executive Council, as the case may be, against the finding by the presiding officer of a disciplinary hearing that the educator has committed misconduct, as contemplated in section 17 or 18, and against the sanction imposed in terms of section 18(3)(e) to (i). 50
- (3) In lodging an appeal, the educator must comply with the procedure laid down in Schedule 2.”.

Amendment of section 36 of Act 76 of 1998

13. Section 36 of the Employment of Educators Act, 1998, is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) delegate to the Director-General or any other person in the service of the Department of Education any power conferred upon the Minister by or under this Act, other than the power referred to in section **[16(10),] 25[(3)]** or 35, on such conditions as the Minister may determine; or”; and

(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) delegate to the Head of Department or any other person in the service of the provincial department of education any power conferred upon the Member of the Executive Council by or under this Act, other than the power referred to in section **[16(10) or] 25[(3)]**, on such conditions as the Member of the Executive Council may determine; or”.

Insertion of section 38A in Act 76 of 1998

14. The Employment of Educators Act, 1998, is hereby amended by the insertion after section 38 of the following section:

“ Transitional arrangements in respect of disciplinary proceedings

38A. Any disciplinary proceedings instituted against an educator for an alleged misconduct prior to the commencement of the Education Laws Amendment Act, 2000, must be continued and concluded in terms of Chapter 5 of the Employment of Educators Act, 1998.”.

Addition of Schedules to Act 76 of 1998

15. The Employment of Educators Act, 1998, is hereby amended by the addition after section 39 of the following Schedules:

“SCHEDULE 1

INCAPACITY CODE AND PROCEDURES FOR POOR WORK PERFORMANCE

Codes, rules and standards

1. (1) The Code of Good Practice contained in Schedule 8 to the Labour Relations Act, 1995 (Act No. 66 of 1995), insofar as it relates to incapacity, constitutes part of this Code and Procedures, in respect of poor work performance.

(2) In applying this Code and Procedures, the relevant employer must assess the incapacity of an educator by considering—

- (a) the extent to which the incapacity impacts on the work of the Department of Education or provincial department of education, or the public school, public further education and training institution or public adult learning centre;
- (b) the extent to which the educator fails to meet the required performance standards as contemplated in item 2(2);
- (c) the extent to which the educator lacks the necessary skills to perform in accordance with the educator’s job description;
- (d) the nature of the educator’s work and responsibilities; and
- (e) the circumstances of the educator.

Procedure in respect of poor performance

2. (1) If the employer is of the view that an educator, whether on probation or a permanent staff member, is not performing in accordance with the job that the educator has been employed to do, the employer must— 5
- (a) give written reasons to the educator why it is necessary to initiate the procedure in respect of poor performance; and
 - (b) after serving the written reasons referred to in paragraph (a), meet with— 10
 - (i) the educator; or
 - (ii) the educator and the educator's trade union representative or a fellow employee, if the educator so chooses.
- (2) The performance of educators must be evaluated according to performance standards agreed upon by the parties to the Educators Labour Relations Council. 15
- (3) In the meeting referred to in item 2(1)(b), the employer must—
- (a) explain the requirements, grade, skills and nature of the job;
 - (b) evaluate the educator's performance in relation to the job;
 - (c) indicate the perceived poor performance; and
 - (d) hear the educator or, if the educator agrees, the educator's trade union representative or a fellow employee on— 20
 - (i) whether or not the educator has performed in accordance with the requirements of the job; or
 - (ii) reasons why the educator has not performed in accordance with the requirements of the job. 25
- (4) After hearing the educator, his or her trade union representative or the educator's fellow employee, the employer must, if necessary, develop and initiate a formal programme of counselling and training to enable the educator to reach the required standard of performance, which must include— 30
- (a) assessing the time that it would take for the educator to overcome the poor work performance;
 - (b) on the basis of the assessment referred to in paragraph (a), the establishment of realistic time frames within which the employer will expect the educator to meet the required performance standards; and 35
 - (c) the identification and provision of appropriate training.
- (5) (a) If the educator fails or refuses to follow a formal programme of counselling and training as contemplated in subitem (4), the employer may initiate disciplinary proceedings against the educator for misconduct as contemplated in section 18. 40
- (b) If the educator, after being subjected to a formal programme of counselling and training as contemplated in subitem (4), fails to meet the required performance standard for the post, the employer, after consulting the educator, may—
- (i) provide further training to the educator; 45
 - (ii) provide counselling to the educator;
 - (iii) transfer the educator;
 - (iv) demote the educator; or
 - (v) terminate the employment of the educator.
- (6) (a) Before transferring or demoting an educator or terminating his or her services for poor performance, the employer must convene an inquiry in order to give the educator the opportunity to make representations in response to the allegations against him or her, which shall include the right to— 50
- (i) call, examine and cross-examine witnesses; 55
 - (ii) bring all relevant documentation to the attention of the person presiding over the inquiry, and have access to documents produced in evidence by the employer;
 - (iii) be represented at the proceedings by a co-employee or trade union representative; 60
 - (iv) have an interpreter present if the educator so requires;

(v) lead all relevant evidence, including evidence in mitigation of the sanction, if necessary.

(b) The provisions of items 5, 7, 8 and 9 of Schedule 2 apply to these inquiries, read with the changes required by the context.

(7) (a) The person appointed by the employer to conduct procedures referred to in subitems (1) to (4), must be an employee on a higher post level than the educator concerned, and must as far as practically possible be his or her direct supervisor or the immediate superior of such supervisor. 5

(b) If the direct supervisor or the immediate superior of such supervisor of the educator is the cause for the procedures referred to in subitems (1) to (4), the employer must appoint a person within the Department of Education or the provincial department of education, as the case may be, who is on the same level as the supervisor or the immediate superior of such supervisor. 10

INCAPACITY CODE AND PROCEDURES IN RESPECT OF ILL HEALTH OR INJURY 15

Procedures in respect of ill health or injury

3. (1) If the employer is of the view that an educator is not performing in accordance with the post requirements that the educator has been employed to perform, as a result of poor health or injury, or an educator applies for a discharge from service on account of continuous ill health or injury, the employer must investigate the extent of the ill health or injury. 20

(2) In conducting the investigation the employer must give the educator, or the trade union representative of the educator or fellow employee, the opportunity to state the case of the educator and to be heard on all the issues that the employer is investigating. 25

(3) (a) Subject to section 7 of the Employment Equity Act, 1998 (Act No. 55 of 1998), the employer must appoint at least one registered medical practitioner to examine the educator at the State's expense and to report on the educator's state of health. 30

(b) An educator is entitled to nominate any other registered medical practitioner of his or her choice at the educator's own expense to report on the educator's state of health.

(c) The record of any medical examination performed in terms of this Act must be kept confidential and may be made available only— 35

(i) in accordance with the ethics of medical practice;

(ii) if required by law or court order; or

(iii) if required by the employer to determine the extent to which the educator is able to perform in accordance with the job requirements.

(d) (i) The medical practitioner contemplated in paragraph (a) must, on completion of the medical examination, provide the employer with a report on the nature and extent of the educator's ill health or injury and whether it is temporary or permanent, and the expected period of the educator's incapacity. 40

(ii) The medical practitioner contemplated in paragraph (b) may also submit a report if the educator is dissatisfied with a report contemplated in paragraph (a). 45

(4) Based on the medical reports the employer must determine whether or not the nature of the educator's ill health or injury is of a temporary or permanent nature and the period of time that the educator is likely to be absent from work. 50

(5) After the investigation of the extent of the educator's ill health or injury, the employer must provide the educator with a written report setting out the results or findings of the investigation.

(6) If the educator's ill health or injury is of a permanent nature the employer must investigate the possibility of— 55

(a) securing alternative employment for the educator;

(b) adapting the duties or work circumstances of the educator to accommodate the educator's ill health or injury; or

- (c) consider the termination of the educator's service with effect from a date determined by the employer.
- (7) If an educator refuses or fails to be subjected to an examination contemplated in subitem (3) when requested to do so by the employer, the employer may initiate disciplinary proceedings against the educator for misconduct as contemplated in section 18. 5
- (8) (a) Before acting in accordance with subitem (6), the employer must convene an inquiry in order to give the educator the opportunity to make representations in response to the allegations against him or her, which shall include the right to— 10
- (i) call, examine and cross-examine witnesses;
 - (ii) bring all relevant documentation to the attention of the person presiding over the inquiry, and have access to documents produced in evidence by the employer;
 - (iii) be represented at the proceedings by a co-employee or trade union representative; 15
 - (iv) have an interpreter present if the educator so requires;
 - (v) lead all relevant evidence, including evidence in mitigation of sanction, if necessary.
- (b) The provisions of items 5, 7, 8 and 9 of Schedule 2 apply to these inquiries, read with the changes required by the context. 20
- (9) If the educator's ill health is as a result of alcohol or drug abuse, the employer may—
- (a) counsel the educator;
 - (b) encourage the educator to attend rehabilitation; 25
 - (c) recommend a formal rehabilitation programme which the educator will be expected to follow at the cost of the employee; or
 - (d) terminate the employment of the educator, if the behavior is repetitive.
- (10) The employer must give the educator or the educator's representative a written report and consult again with the educator if the educator fails to— 30
- (a) follow the formal rehabilitation programme;
 - (b) attend rehabilitation; or
 - (c) address the problem of alcohol or drug abuse.
- (11) After consulting with the educator as contemplated in subitem (10) the employer may initiate disciplinary proceedings against the educator for misconduct as contemplated in section 18. 35

SCHEDULE 2

DISCIPLINARY CODE AND PROCEDURES FOR EDUCATORS

Purpose and scope 40

1. The purpose and scope of this Code and Procedures is to—
- (a) support constructive labour relations in education;
 - (b) promote mutual respect among educators and between educators and the employer;
 - (c) ensure that employers and educators share a common understanding of misconduct and discipline; 45
 - (d) promote acceptable conduct;
 - (e) provide educators and the employer with a quick and easy reference for the application of disciplinary measures;
 - (f) avert and correct unacceptable conduct; and 50
 - (g) prevent arbitrary or discriminatory actions by employers towards educators.

Principles

2. The principles underlying the Code and Procedures and any decision to discipline an educator are that— 55
- (a) discipline is a corrective and not a punitive measure;

- (b) discipline must be applied in a prompt, fair, consistent and just manner;
- (c) discipline is the responsibility of an employer;
- (d) a disciplinary code is necessary for the efficient delivery of service and the fair treatment of educators, and ensures that educators— 5
 - (i) have a fair hearing in a formal or informal setting;
 - (ii) are timeously informed of allegations of misconduct made against them;
 - (iii) receive written reasons for any decision taken; and
 - (iv) have the right to appeal against any decision; 10
- (e) as far as possible, disciplinary procedures are held at the place of work and are understandable to all educators;
- (f) if an educator commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings; and 15
- (g) disciplinary proceedings must be concluded in the shortest possible time frame.

Code of Good Practice

3. (1) The Code of Good Practice contained in Schedule 8 of the Labour Relations Act, 1995 (Act No. 66 of 1995), insofar as it relates to discipline, constitutes part of this Code and Procedure. 20

(2) (a) The conduct of an educator that may warrant a disciplinary action is listed in sections 17 and 18.

(b) After consultation with the trade unions, the Minister may prescribe other conduct which constitutes misconduct. 25

(3) In dealing with misconduct contemplated in section 18, the employer must assess the seriousness of the alleged misconduct by considering—

- (a) the extent to which the misconduct impacts on the work of the Department of Education or provincial department of education, or the public school, public further education and training institution or public adult learning centre; 30
- (b) the nature of the educator's work and responsibilities; and
- (c) the circumstances in which the alleged misconduct took place.

(4) The form of disciplinary procedure to be followed in any case must be determined by the employer. 35

Sanctions and disciplinary procedures pertaining to less serious misconduct cases

4. (1)(a) The employer must delegate the function to deal with misconduct referred to in subitems (2) to (6), to—

- (i) the head of the institution or office where the educator is employed; or 40
- (ii) the immediate superior of the educator where the educator concerned is the head of the institution or office;

(b) The employer must determine in writing the specific acts of misconduct to be dealt with under the delegation referred to in paragraph (a). 45

(2) In cases where the seriousness of the misconduct warrants counselling, the employer of the educator must—

- (a) bring the misconduct to the educator's attention;
- (b) determine the nature of the misconduct and give the educator an opportunity to respond to the allegations; 50
- (c) after consultation with the educator decide on a method to remedy the conduct; and
- (d) take steps to implement the decision as contemplated in subitems (3), (4) or (5).

(3) (a) In cases where the seriousness of the misconduct warrants it, the employer of the educator may give the educator a verbal warning. 55

(b) The employer must inform the educator that further misconduct may result in more serious disciplinary action.

(c) The employer must record the warning contemplated in paragraph (b).

(4) In cases where the seriousness of the misconduct warrants it, the employer may give the educator a written warning. The following provisions apply to written warnings:

- (a) The written warning must be in accordance with Form A attached to this Schedule. 5
- (b) The employer must give a copy of the written warning to the educator, who must acknowledge receipt on the copy.
- (c) If the educator refuses to sign the copy for acknowledgement of receipt, the employer must hand the warning to the educator in the presence of another educator, who shall sign in confirmation that the written warning was conveyed to the educator. 10
- (d) The written warning must be filed in the educator's personal file.
- (e) A written warning remains valid for six months. 15
- (f) If, during the six-month period, the educator is subject to disciplinary action, the written warning may be taken into account in deciding on an appropriate sanction.
- (g) (i) If the educator disagrees with the written warning or wishes to add any information, he or she may lodge such additional information or written objection against the sanction. 20
- (ii) The additional information and the objection referred to in paragraph (a) must be filed with the written warning.

(5) In cases where the seriousness or extent of the misconduct warrants it, the employer must give the educator a final written warning. The following provisions apply to a final written warning: 25

- (a) A final written warning must be in accordance with Form B attached to this Schedule.
- (b) The employer must give a copy of the final written warning to the educator, who must sign a copy to acknowledge receipt. 30
- (c) If the educator refuses to sign a copy to acknowledge the receipt of the final written warning, the employer must hand the warning to the educator in the presence of another educator, who must sign in confirmation that the written warning was conveyed to the educator.
- (d) The final written warning must be filed in the educator's personal file. 35
- (e) A final written warning remains valid for six months.
- (f) If during the six-month period, the educator is subject to disciplinary action, the final written warning may be taken into account in deciding on an appropriate sanction.
- (g) (i) If the educator disagrees with the final written warning or wishes to add any information, he or she may lodge such additional information or written objection against the sanction. 40
- (ii) The additional information and the objection referred to in subparagraph (i) must be filed with the final written warning.

(6) (a) If the seriousness or extent of the misconduct does not warrant a formal enquiry the procedures in paragraphs (b), (c) and (d) must be followed. 45

(b) The employer must convene a meeting where—

- (i) the educator and, if he or she so chooses, the educator's trade union representative or other employee who is based at the institution, are present; 50
- (ii) reasons are given to the educator as to why it is necessary to initiate this procedure; and
- (iii) the educator or the educator's representative is heard on the misconduct and reasons therefor. 55

(c) After hearing the educator or his or her representative, the employer must—

- (i) counsel the educator;
- (ii) issue a verbal warning;
- (iii) issue a written warning; 60
- (iv) issue a final written warning;
- (v) impose a combination of any of the above; or
- (vi) take no further action.

(d) (i) An educator may not appeal against any of the above sanctions but may lodge an objection in writing, against the sanction imposed, or provide additional written information.

(ii) The objection or additional information must be filed together with a record of the sanction in the educator's personal file.

(7) For the purpose of determining appropriate disciplinary actions, valid warnings for similar offences by the educator must be taken into account.

Notice of enquiry for misconduct cases other than those contemplated in item 4

5. (1) The educator must be given written notice at least five working days before the date of the hearing.

(2) The written notice of the disciplinary hearing must be given in accordance with Form C attached to this Schedule and must contain—

- (a) a description of the allegations of misconduct and the main evidence on which the employer will rely;
- (b) details of the time, place and venue of the hearing;
- (c) when delivered by registered post, the date on which the letter was received by the educator as indicated by the post office;
- (d) information on the rights of the educator to representation by a fellow educator or a trade union representative;
- (e) information on the rights of the educator to representation by a legal representative, if the employer so directs; and
- (f) information on the rights of the educator to call witnesses at the hearing.

(3) (a) The educator must acknowledge receipt of the notice by signing a copy of the notice.

(b) If the educator refuses to sign for the receipt of the notice, it must be given to the educator in the presence of a fellow educator, who must sign in confirmation that the notice was conveyed to the educator.

Suspension

6. (1) In the case of serious misconduct in terms of section 17, the employer may suspend the educator on full pay for a maximum period of three months.

(2) In the case of misconduct in terms of section 18, the employer may suspend an educator in accordance with the procedure contemplated in subitem (1), or transfer the educator to another post if the employer believes that the presence of the educator may jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person at the workplace.

(3) (a) If an educator is suspended or transferred, the employer must do everything possible to conclude a disciplinary hearing within one month of the suspension or transfer;

(b) The presiding officer may decide on any further postponement. Such a postponement must not exceed 90 days from the date of suspension.

(c) If the proceedings are not concluded within 90 days, the employer must enquire from the presiding officer what the reasons for the delay are and give directions for the speedy conclusion of the proceedings.

(d) At the time of the enquiry contemplated in paragraph (c) the employer may, after giving the educator an opportunity to make representations, direct that the further suspension will be without pay.

Conducting disciplinary hearing

7. (1) The disciplinary hearing must be held within ten working days after the notice referred to in item 5 is delivered to the educator.

(2) The presiding officer must be appointed by the employer.

(3) If the educator so chooses, he or she may be represented at the hearing by a fellow educator or a representative of a trade union.

(4) If the presiding officer deems it necessary, an interpreter must assist at the hearing.

(5) Subject to section 3(3) of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), if the presiding officer so directs, the employer or educator may be represented by a legal representative.

(6) If the educator fails to attend the hearing and the presiding officer concludes that the educator does not have a valid reason, the hearing may continue in the absence of the educator.

(7) The presiding officer must keep a record of the notice of the disciplinary hearing and of the proceedings.

(8) The presiding officer must read the notice for the record before the start of the hearing.

(9) (a) The representative of the employer must lead evidence on the conduct giving rise to the hearing.

(b) The educator or the educator's representative may question any witness called by the representative of the employer.

(10) For the purposes of the investigation and hearing, the representative of the employer may summon any person who—

(a) may be able to give information of material importance concerning the subject of the investigation or hearing; or

(b) has in his or her possession, custody or control, any book, document or object which may have a bearing on the matter.

(11) Where the educator has requested that a person be present at a hearing as his or her witness, the employer must provide the educator with the assistance to ensure that such witnesses attend.

(12) The summons to appear at a disciplinary hearing, must be in accordance with Form D attached to this Schedule and served on the person by way of delivery by—

(a) hand;

(b) telefax; or

(c) registered post.

(13) The date on which the summons is served will be when delivering by—

(a) hand, the date of delivery;

(b) telefax, the date reflected on the telefax; or

(c) registered post, the date on which the letter was received by the educator as indicated by the post office.

(14) (a) The educator or his or her representative must be given an opportunity to lead evidence.

(b) The representative of the employer may question the witnesses of the educator.

(15) The presiding officer may ask any witness questions for clarification.

(16) The presiding officer must give a finding whether or not the educator has committed the misconduct, and must inform the educator of the finding and the reasons therefor.

(17) (a) Before deciding on a sanction, the presiding officer must give the educator an opportunity to present evidence in mitigation.

(b) The representative of the employer may present evidence regarding aggravating circumstances.

(18) The presiding officer must communicate the final outcome of the hearing to the employer and the educator within five working days after the conclusion of the disciplinary enquiry, and the outcome must be recorded on the personal file of the educator.

Steps after disciplinary hearing

8. (1) If the presiding officer finds that an educator has committed misconduct, the presiding officer must, on behalf of the employer, impose a sanction, as contemplated in section 18(3) of the Act, taking into account—

(a) the nature of the case;

(b) the seriousness of the matter;

(c) the educator's previous record; and

(d) any mitigating or aggravating circumstances.

(2) With the agreement of the educator, the presiding officer may impose the sanction of suspension without pay or demotion as an alternative to dismissal.

(3) If an educator is demoted, he or she may apply for promotion after a year without prejudice. 5

(4) The employer may not implement the sanction during an appeal by the educator.

Appeals

9. (1) An educator may appeal against a finding or sanction by making an application in accordance with Form E attached to this Schedule. 10

(2) The educator must, within five working days of receiving notice of the final outcome of a disciplinary hearing, submit the appeal form to the Member of the Executive Council or the Minister, as the case may be.

(3) On receipt of the application referred to in subitem (1), the Member of the Executive Council or the Minister, as the case may be, must request the employer to provide him or her with a copy of the record of the proceedings and any other relevant documentation. 15

(4) If the Member of the Executive Council or the Minister, as the case may be, chooses to allow further representations by the educator or his or her representative, he or she must notify the educator of the date, time and place where such representation must be made. 20

(5) The Member of the Executive Council or the Minister, as the case may be, must consider the appeal, and may—

(a) uphold the appeal; 25

(b) in cases of misconduct contemplated in section 18, amend the sanction; or

(c) dismiss the appeal.

(6) The employer must immediately implement the decision of the Member of the Executive Council or the Minister, as the case may be. 30

FORM A

WRITTEN WARNING

[DATE]

[NAME OF EMPLOYEE]

[PERSAL NO.] 35

[PERSONAL DETAILS OF THE EMPLOYEE]

This is a written warning in terms of the disciplinary procedure. Should you engage in further misconduct, this written warning may be taken into account in determining a more serious sanction.

The written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning. 40

If you object to the warning or wish to furnish additional information, you may lodge a written objection or additional information which will be filed together with this warning.

The nature of the misconduct is: 45

SIGNATURE OF EMPLOYER

DATE

SIGNATURE OF EMPLOYEE

DATE

SIGNATURE OF WITNESS (if applicable) 50

DATE

FORM B**FINAL WRITTEN WARNING**

[DATE]

[NAME OF EMPLOYEE]

[PERSAL NO.]

5

[PERSONAL DETAILS OF THE EMPLOYEE]

This is a final written warning in terms of the disciplinary procedure. Should you engage in further transgressions, it could lead to formal misconduct proceedings being instituted against you.

The final written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning. 10

Should you wish to do so, you may lodge a written objection to this final warning, or provide additional information which will be filed together with this final warning.

The nature of the misconduct is: 15

SIGNATURE OF EMPLOYER

DATE

SIGNATURE OF EMPLOYEE

DATE

SIGNATURE OF WITNESS (if applicable)

20

DATE

FORM C**NOTICE OF DISCIPLINARY MEETING**

[DATE]

[NAME OF EMPLOYEE]

25

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

You are hereby given notice to attend a disciplinary hearing in terms of item 6 of the Disciplinary Code.

The alleged misconduct and the available evidence is based on the following evidence: 30

[A DETAILED DESCRIPTION OF MISCONDUCT MAY BE ATTACHED]. 35

The hearing will be held at _____

[PLACE] on _____ [DATE] at

_____ [TIME]. If you do not attend and cannot give reasonable grounds for failing to attend, the hearing will be held in your absence. 40

A fellow employee or a representative of a recognised union may represent you at the hearing.

You may give evidence at the hearing and adduce evidence in the form of documents or through witnesses. You are entitled to question any witness called by the employer. 45

If the presiding officer finds that you are guilty of misconduct, you may present any relevant circumstances which you wish to be taken into account by the presiding officer in determining the sanction.

SIGNATURE OF EMPLOYER

DATE

5

ACKNOWLEDGEMENT OF RECEIPT BY EMPLOYEE

DATE

SIGNATURE OF WITNESS (if applicable)

DATE

FORM D

10

SUMMONS TO APPEAR AT DISCIPLINARY HEARING

DATE:

TO:

(Name and residential address of person summoned) 15
You are hereby summoned to appear personally on the
____ day of _____ 20
____ at _____ (time) at
____ (place) before the presiding officer of a
disciplinary hearing in terms of Schedule 2 to the Employment of Educators 20
Act, 1998 (Act No. 76 of 1998), for the purpose of giving evidence
regarding the following misconduct:

_____ 25

and to submit the following book, document or object in your possession,
custody or control, which may have a bearing on the matter:

_____ (specify the book, document or object) 30

SIGNATURE OF REPRESENTATIVE OR EMPLOYER

FORM E

NOTICE OF APPEAL

35

[DATE]

[NAME OF APPEAL AUTHORITY]

I, _____, [NAME OF EMPLOYEE] hereby
appeal against the FINDINGS and/or SANCTION that have been imposed
in terms of the Disciplinary Code and Procedure on _____ 40
[DATE] at _____ [PLACE].

I attach a copy of the final outcome of the disciplinary enquiry. [THE
APPEAL REQUEST IS NOT VALID UNLESS THIS DOCUMENT IS
ATTACHED]

My reasons for appeal are: 45

The desired outcome of the appeal is:

I wish/do not wish [CHOOSE ONE] to provide additional evidence not available at the time of the disciplinary proceedings.

5

SIGNATURE OF EMPLOYEE
DATE
[PERSAL NO]
PERSONAL DETAILS OF THE EMPLOYEE]

NB: Educators may only appeal against the finding and resultant sanction of— 10

1. suspension without pay for a period not exceeding three months;
2. demotion;
3. a fine;
4. a combination of the above sanctions together with warnings; or 15
5. dismissal.”.

Amendment of section 9 of Act 98 of 1998

18. Section 9 of the Further Education and Training Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The council of a public further education and training institution must perform all the functions, including the provision of public adult learning centres, which are necessary to govern the public further education and training institution, **[subject to this Act and any applicable provincial law]** subject to this Act and any applicable national or provincial law.”. 20

Substitution of section 51 of Act 98 of 1998 25

19. The following section is hereby substituted for section 51 of the Further Education and Training Act, 1998:

“Exemption of existing private institutions

51. Sections 24 and 44(3) and (4) do not apply to a person who **[was]** is providing further education and training programmes at a private institution immediately prior to the date **[of commencement of this Act, until a date]** determined by the Minister by notice in the *Gazette*.”. 30

Short title

20. This Act is the Education Laws Amendment Act, 2000.

MEMORANDUM ON THE OBJECTS OF THE EDUCATION LAWS AMENDMENT BILL, 2000

1. DISCUSSION

1.1 The Bill aims to amend the—

- (a) South African Qualifications Authority Act, 1995;
- (b) South African Schools Act, 1996;
- (c) Employment of Educators Act, 1998; and
- (d) Further Education and Training Act, 1998.

1.2 The South African Qualifications Authority Act, 1995, is amended so as to increase the representation of trade union members in the Authority from two to three.

1.3 The South African Schools Act, 1996, is amended in order to—

1.3.1 enable the Member of the Executive Council to expropriate property in terms of section 58 of the Act instead of the Expropriation Act, 1975, which prescribes strict procedures to be followed during the expropriation process; and

1.3.2 make room for the interim governance of a new public school until a governing body is constituted in terms of the Act.

1.4 The Employment of Educators Act, 1998, is amended in order to empower the Head of Department to employ educators in cases where there is no governing body or a council constituted in terms of the relevant Acts. This is to allow a new public school or a new public further education institution to have educators as soon as such a school or an institution is established.

An incapacity code and procedures serve as a guide to the employer and the educator. Certain matters which were not clear in the Employment of Educators Act, 1998, are now clearly spelt out. New innovations which are brought about by the Bill, include counselling and rehabilitation programmes for the educator.

The Bill also makes room for differentiation between serious and less serious misconduct.

The disciplinary code and procedures make room for discipline to be applied in a prompt, fair, consistent and progressive manner. An employer may suspend an educator immediately without any hearing for a period of 7 days with full pay. The days for the notices have been reduced so as to make a disciplinary hearing as short as possible. It will be possible to conclude such hearing within a period of 60 days. A tribunal is no longer required to conduct a disciplinary hearing.

1.5 The Further Education and Training Act, 1998, is amended so as to allow public further education and training institutions to provide—

1.5.1 for public adult learning centres; and

1.5.2 further education and training programmes until the date determined by the Minister by notice in the *Gazette*.

2. FINANCIAL IMPLICATIONS

None.

3. PERSONS/ORGANISATIONS/BODIES CONSULTED

The following bodies and organisations were consulted:

- South African Universities Vice-Chancellors Association.
- Office of the Vice-Chancellor and Rector: RAU.
- Federation of Associations of Governing Bodies of South African Schools (Fedsas).
- South African Democratic Teachers Union.
- Independent Schools Association of Southern Africa.
- National Professional Teachers' Organisation of South Africa.
- The Committee of Technical College Principals.
- Business South Africa.
- South African Qualifications Authority.
- Congress of South African Trade Unions.

4. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Education are of the opinion that the Bill must be dealt with in accordance with section 76 of the Constitution because the Bill falls within a functional area listed in Schedule 4 of the Constitution.