

09 June 2022

**TO: MRS BP MBINQO-GIGABA, CHAIRPERSON:
PARLIAMENTARY PORTFOLIO COMMITTEE ON BASIC
EDUCATION**

ATTENTION: MR LLEWELLYN BROWN, COMMITTEE SECRETARY

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Dear Madam

COMMENTARY ON THE BASIC EDUCATION LAWS AMENDMENT BILL [B2-2022]

**(NB: THE SKOLEONDERSTEUNINGSENTRUM (SOS) WOULD ALSO LIKE TO
MAKE ORAL SUBMISSIONS.)**

INTRODUCTION

This submission is made by the Skoleondersteuningsentrum (SOS) in response to the invitation by the Parliamentary Portfolio Committee on Basic Education to make written and oral submissions regarding the proposed Basic Education Laws Amendment Bill (BELAB).

Our submission does not address each individual proposed amendment contained in the 50-odd-page bill. Instead, it conveys our general concerns about the BELAB.

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We trust that our comments will be received in the spirit of constructive engagement and will serve to add value to, and improve on, the BELAB.

In summary, our submission deals with the following:

1. The concerning move towards the centralisation of state power in the amendments proposed in the bill, in violation of the purpose of the South African Schools Act (SASA)
2. Infringement on the powers of school governing bodies (SGBs) in respect of schools' admission policies
3. Infringement on SGBs' powers in respect of schools' language policies to the detriment of Afrikaans schools in particular and the broader Afrikaans-speaking community in general
4. Failure to address the state's responsibility to reimburse schools for mandatory school fee exemptions
5. Failure to provide for a public school to become an independent school, in the same way that SASA allows for an independent school to become a public school
6. The enormous added administrative burden imposed on both schools and the national and provincial education departments by various of the proposed amendments contained in the BELAB.

1. VIOLATION OF THE PURPOSE OF SASA

An historical overview of the education system in South Africa shows that, while the system used to be centralised and bureaucratic in the 20th century, it was transformed in 1996 to afford a greater degree of parental participation through SGBs. The Constitution provides for representative and participatory democracy at all levels of society and enshrines fundamental rights such as the rights to basic education and to use the language of one's choice.

At the outset, it is our submission that the BELAB infringe and violate the foundational values of SASA, and the efforts to decentralise education in South Africa. The preamble to SASA suggests a 'partnership model' as the mechanism through which education will be conducted and achieved, providing as follows:

“WHEREAS this country requires a new national system for schools which will ... uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State ...”

The partnership model contemplated in SASA involves all four major stakeholders in education, namely the state, parents, educators and learners. Education, therefore, is a collective enterprise, with each stakeholder having clearly defined roles and functions. Each stakeholder represents a particular set of interests and bears corresponding rights and obligations in education provision to learners.

At a national level, the Minister of Basic Education must determine norms and standards for school funding,¹ and may prescribe additional minimum uniform norms and standards² for, among others, safety measures at schools, the national curriculum,³ and “the ‘capacity of a school in respect of the number of learners a school can admit’, including norms and standards relating to class size, the number of teachers, and utilisation of available classrooms”.⁴

At a provincial level, it is the responsibility of the relevant Member of the Executive Council (MEC) to establish and provide enough schools in the province to accommodate all children who are of a compulsory school-going age. It is the responsibility of the relevant heads of department (HODs), in turn, to exercise executive control over public schools through school principals, and to monitor, regulate and enforce compulsory attendance, compliance with the minimum norms and standards, and the minimum outcomes and standards of the curriculum.⁵

At school level, parents and SGBs “have an immediate interest in the quality of children’s education. And they play an important role in improving that quality by supplementing state resources with school fees”.⁶

¹ SASA s 35.

² SASA s 61.

³ SASA s 61.

⁴ *Member of the Executive Council for Education in Gauteng Province v Governing Body of the Rivonia Primary School* [2013] ZACC 34 (the ‘Rivonia Primary judgment’) at para 38.

⁵ SASA s 58C.

⁶ Rivonia Primary judgment at para 70.

Although the BELAB does not directly seek to amend this key partnership aspect of our basic education system, various of the proposed amendments would, in fact, violate this underscoring principle and obscure the clearly defined roles and responsibilities of the various stakeholders. (This will be elaborated on below.) It is troubling to note that the BELAB uniformly limits the role of SGBs alone, while expanding that of the HOD and MEC. We submit that the foundational concept of partnership should not be altered, and that the decentralised partnership model must remain a determining principle in public school governance.

2. THE SGB'S POWERS IN RESPECT OF ADMISSIONS POLICY

Section 4(d) of the BELAB proposes amending section 5(5) of SASA so as to limit the SGB's power to determine the school's admissions policy. The proposed new section states that the HOD, after consultation with the SGB, has the "final authority" to admit a learner to a public school. This is unacceptable, as it fundamentally undermines the roles of the parties and thwarts collaboration between the HOD and the SGB by prioritising the authority of the former over that of the latter and is a direct violation of the tenets of cooperative governance and the partnership model enshrined in SASA and affirmed in numerous court judgements.⁷

⁷ Including Rivonia Primary judgment, and *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* 2013 (9) BCLR 989 (CC) (the 'Welkom judgment').

The proposed amendment not only diminishes the role and function of the SGB to admit learners to public schools, but shifts it to the HOD, who is not nearly as well placed as the SGB (being the representative body of the school community) to make that determination. The SGB has the right and responsibility to determine the admissions policy – including the capacity – of the school.

Importantly, we submit that this proposed amendment threatens the success and optimal functioning of public schools in providing quality education to learners. This is especially true for those schools who have, through great additional expense to parents, managed to maintain and improve their public infrastructure in the interest of quality basic education.

This centralisation of power goes against the purpose of SASA. State involvement in school governance should be kept at the minimum required for legal accountability and should be based on participatory management.

Instead, a culture of mutual trust and good faith should be created and maintained between the SGB, as representatives of the school community, and the national and provincial departments of education. Mutual trust will go much further towards achieving better outcomes and serving learners' needs than a provision enabling politically motivated individuals to strong-arm schools into admitting learners whom schools are ultimately unable to serve.

3. THE SGB'S POWERS IN RESPECT OF LANGUAGE POLICY

The proposed section 5(c) of the BELAB intends amending section 6 of SASA by adding subsections (5) to (20), which seek to limit the SGB's power to determine the school's language policy. This will have a direct negative impact on Afrikaans schools as well as the protection of the Afrikaans culture and language for future generations. Requiring the SGB to submit the admissions and language policies of the school, and any amendments thereto, to the HOD for "approval" is unacceptable. Moreover, in terms of the language policy specifically, the proposal in the BELAB in proposed section 6(13) that the HOD be granted the power to direct a public school to adopt more than one language of instruction is undemocratic and dictatorial.

The amendment is of particular significance to Afrikaans-medium schools. By targeting the existence of schools as cultural institutions in this way, the Afrikaans culture and language is being threatened, which goes against sections 29(2) and 31(1) of the Constitution. SGBs will be deprived of their vested power in terms of section 6(2) of SASA to determine their schools' language policy. SGBs have the right to determine and affect language policy, and not have it centralised into the hands of state officials.

As the elected representatives of their school communities, SGBs are best placed to determine their schools' language and admissions policies. Requiring that these policies be sent to the provincial HOD for approval is an undue centralisation of power and will unquestionably have an adverse effect on schools' ability to provide quality education.

4. STATE'S RESPONSIBILITY TO REIMBURSE SCHOOLS FOR MANDATORY SCHOOL FEE EXEMPTIONS

The BELAB remains silent on the state's responsibility to reimburse schools for mandatory school fee exemptions at a minimum rate equal to the no-fee allocation per learner. Instead, the bill creates even more potential for school fee exemptions to be granted, thereby increasing the financial burden on schools in ensuring quality education to all its learners.

Currently, parents who cannot afford to pay school fees at fee-charging schools (schools in quintiles 4 and 5) may approach the school to request exemption. This is provided for by SASA and the regulations relating to school fee exemptions. To compensate for the loss in income due to fee exemptions, government sometimes reimburse schools for mandatory exemptions. This compensation is, at best, limited, unpredictable and inconsistent. Many fee-charging schools that are compelled to exempt more than 50% of their learners often do not receive any compensation from provincial government, even though the department has a duty to budget for refunds to schools who grant exemptions. Provinces that do refund schools reimburse only a meagre portion of what the school would have received in funding if the parent were to pay the full fee. Due to this disparity between the compensation for exemptions and the fees generated from full-fee-paying parents, fee-paying parents are often relied on to supplement the loss of income caused by fee exemptions.

Instead of the current system of mandatory exemptions and unregulated state compensation for exemptions, we submit that the equitable allocation of state funds to all public schools should be addressed in order to fund schools on a 'per pupil' basis. Providing quality education to all South African children should be a priority, whether children attend a fee-paying or no-fee public school.

5. PROVISION FOR A PUBLIC SCHOOL TO BECOME AN INDEPENDENT SCHOOL

The legislative and regulatory framework governing all public schools in South Africa adopts a one-size-fits-all approach, irrespective of school functioning and performance. Many schools experience the framework as rigid, restrictive and superfluous, constraining their ability to fulfil their responsibilities to improve basic education in general, and to provide the best possible education to their learners in particular. In view of the fact that SGBs are the representative body of a school community, and that schools are collective enterprises that serve the community's interests, we submit that the BELAB is missing a golden opportunity to allow for greater school independence, self-management and self-governance.

The proposed amendments do not create any opportunity for a public school to become an independent school, in the same way that SASA in section 49 allows for an independent school to become a public school. Since independent schools are

permitted to convert to public, the converse (converting from public to independent) should also be provided for to meet the needs of a specific school community.

We suggest that the BELAB be amended to make provision for a process allowing an SGB to enter into an agreement with the MEC to declare a public school independent once a democratic process has been followed to confirm the will of the parents to do so. Permitting some public schools to convert to independent may be beneficial to the state and could free up more funds for additional school infrastructure and pressing educational needs in disadvantaged communities.⁸

6. ADDED BUREAUCRATIC BURDEN

Many of the proposed amendments contained in the BELAB will impose an enormous additional bureaucratic burden on SGBs, schools and the national and provincial education departments.

A detailed comparison and analysis of the administrative processes and actions of SASA and the additional processes and actions proposed by the BELAB points to a staggering **53%** overall increase in the administrative burden on SGBs, schools and education departments. This will require additional capacity (and costs) from

⁸ In the United States, for instance, 34 out of 50 states allow for public schools to convert to private (or 'charter') schools. See "Charter schools: Does the state allow existing public schools to convert to charter schools?" Available at <https://ecs.secure.force.com/mbdata/mbquestNB2C?rep=CS1702>.

departments and will put more pressure on already overburdened schools. This creates concerns about the executability of the BELAB.

CONCLUSION

Several provisions in the BELAB seek to improve certain provisions of SASA. For instance, we welcome the proposed formalisation of Grade R, given that the state can provide the required funding. Amending sections 21 and 22 of SASA to curtail the HOD's powers and enhance procedural safeguards where an HOD seeks to withdraw functions from the SGB is another step in the right direction.

Regrettably, though, several other key provisions of the bill, if signed into law, will materially and adversely affect the purpose of SASA, violate the democratic rights of communities, and erode the functions of governing bodies.

Only if the provisions of the Constitution aimed at promoting respect for diversity, participation and cooperative governance are upheld and enforced, better education for all can become a reality.

On these premises, we respectfully request that the BELAB be withdrawn in its entirety and referred to the Department of Basic Education for thorough reconsideration to address the various problems and illegalities pointed out in this submission.

We trust that our comments will be duly considered and accommodated in the final formulation of any amendments to our basic education laws.

Signed at Pretoria on this 09 day of June 2022



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