
**EQUAL EDUCATION : Comments on Basic Laws Amendment Bill, 2009 , Government Gazette,
9 December 2009, Notice 1611 of 2009**

INTRODUCTION:

The following are comments by Equal Education on the Basic Laws Amendment Bill, Notice 1611 of 2009, submitted in response to the request for public comments on the draft Bill.

Equal Education is a movement of, learners, parents, teachers and community members working for quality and equality in South African education, through research, analysis and activism. Our Head Office is in Khayelitsha, Western Cape.

Our interest in the proposed amendments stems primarily as a representative of our members. We, under the banner of Equal Education, are united around a common interest in addressing the perpetual lack of quality service and inequality that plagues our education system. It is our view that these issues can be addressed only through a committed, informed and organised struggle in which citizens become active participants in democratic processes. Through the use and strengthening of our rights to public participation we are able to ensure that our members remain active citizens directly involved in decisions that affect our lives, particularly in terms of education.

The comments and recommendations below refer only to sections that appear to be problematic, while those draft amendments that are in order are not specifically mentioned.

SUMMARY:

Equal Education welcomes the draft amendments to the National Education Policy Act and the South African Schools Act, so as to bring these instruments in line with the creation of the Department and Ministry of Basic Education as distinct from the newly established Department and Ministry of Higher Education (previously existing under one Department and Ministry).

These amendments which seek to change material aspects of the statutes in question so as to reflect the new names of the departments and their respective political heads are necessary.

The draft amendments also go beyond merely correcting the names of the new Department and Ministry of Basic Education and their political heads. The amendments make a number of substantive changes to the statutes including: categorising schools with a special focus as schools which provide education to learners with special needs; the prohibition of non-educational activities during school time and the prohibition of ‘material of a political nature’; a limitation on the use of school property for business purposes other than for a school tuck-shop; and the additional scope for the Minister to identify schools which should be ‘no-fee’ schools. These are a few of the aspects dealt with in the comments and suggestions below.

Equal Education is of the view that the proposed amendments are bona fide and are made with the view of improving South Africa’s education system through effective regulation.

Notwithstanding the above, a number of the draft amendments appear to be ill-conceived and, in the manner in which they have been drafted, would undermine this objective and in some cases may have the potential of reinforcing inequalities in education. Particular aspects of the draft Bill also unreasonably extend the powers of the department and the ministry in a manner that encroaches on the responsibilities and powers of School Governing Bodies. At other times, the amendments do not go far enough in ensuring that critical areas of the education system are addressed by the ministry, specifically with respect to the passing of minimum uniform norms and standards regarding, amongst other things, school infrastructure.

Equal Education understands the importance of public participation in the law making process and is glad to make use of this opportunity to provide input on this matter.

SPECIFIC COMMENTS ON THE DRAFT AMENDMENT BILL :

1. Amendment to Section 1 of the South African Schools Act 84 of 1996.

“Section 1 of the South African Schools Act, 1996, is hereby amended by –

(a) the insertion after the definition of “learner” of the following definition:

“**loan** means any financial obligation based in agreement that creates a liability by a school in favour of any person that must be paid in one in or more installments but does not include payment of staff appointed by the governing body in terms of s20(4) and (5).”



Equal Education Comment and Recommendation:

The proposed amendment contains a grammatical error. The underlined word should be deleted in order for this sentence to make sense.

2. Amendment of Section 5A of the South African Schools Act 84 of 1996.

“Section 5A of the South African Schools Act, 1996, is hereby amended by the substitution of subsection (1) by the following subsection:

(1) The Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulations prescribe minimum uniform norms and standards for –

- (a) school infrastructure;
- (b) capacity of a school in respect of the number of learners a school can admit; and
- (c) the provision of learning and teaching support material.”

Equal Education Comment:

Here, we are in agreement with the view that the Minister of Finance must be consulted before minimum uniform norms and standards are determined. However, with regard to this section, there lies a deeper problem.

Subsection (1) states that the Minister may, by regulation prescribe minimum uniform norms and standards for school infrastructure; capacity of a school in respect of the number of learners a school can admit; and the provision of learning and teaching support material. Subsection 2 provides a list that that the norms and standards mentioned above must provide for. This, with respect to infrastructure, includes classrooms; electricity; water; sanitation; libraries; laboratories and computers.

This section is couched in permissive language in the first instance, but imposes an obligation on the Minister to include in the minimum uniform norms and standards specific essential resources. However, this legal obligation only arises upon the Minister deciding to pass such regulations. It is here that the provisions of the Act and the proposed amendments fall short of what is required within the legislative framework in order to address the crisis and inequalities that exist in our education system.

S5A was inserted into the Act in 2007, yet, to date, these minimum uniform norms and standards have not been passed. This is despite the glaring need for these minimum



norms and standards - where there exists a major lack of resources in rural and township schools. Recent statistics show that almost 1000 schools in the country are still without ablution facilities and nearly 2000 with no water and sanitation facilities; over 4000 schools have no (or unreliable) electricity supply; and less than 8 % of our public schools having functioning libraries (to name but a few of the harsh realities faced by our schools).¹

Furthermore, the Act imposes an obligation on School Governing Bodies to, within 12 months of the Minister prescribing minimum norms and standards, review any policy that they have determined in terms of s5(5) of the South African Schools Act and to ensure that such policy complies with the norms and standards. The prescriptive time periods imposed by the Act on School Governing Bodies, and the dire need for the provision of essential resources in our schools, reflect the fundamental importance and need for minimum norms and standards, yet the Act does not impose such an obligation on the Minister to determine such minimum norms and standards. This failure to impose an obligation on the minister, choosing instead to leave this to his/her discretion, undermines the importance of this section, and as is evident in the continued absence of such regulations it permits the perpetuation of dire circumstances faced by so many schools in our country.

This must be addressed urgently as it is evident that South African schools that have better access to resources perform far better than those schools that lack access to essential resources. Research conducted proves that the provision or lack of resources for our schools plays a significant role in the academic performance of our learners.²

Equal Education Recommendation:

It is recommended that that South African Schools Act be amended so as to prescribe that the Minister of Basic Education must determine minimum uniform norms and standards with regard to the provisions of s5A(2) *within a reasonable period*.

¹ National Education Infrastructure Management System (NEIMS) Report, 2009.

² H, Borat "Determinants of Grade 12 Pass Rates in the Post-Apartheid South African Schooling System," 2008, Journal of African Economies.

See also, S Van Der Berg and M Louw, "Lessons learnt from SACMEQII: South African student performance in regional context" 2007, Stellenbosch University, Department of Economics, Working Papers 16/2007.



The continuing urgent need for these minimum uniform norms and standards requires that the Minister must consult with the Council of Ministers, in terms of s5A, and must pass these minimum uniform norms and standards for school infrastructure.³

3. Amendment of Section 9 of the South African Schools Act, 1996,

“Section 9 of the South African Schools Act, 1996, is hereby amended by insertion after subsection (10) of the following subsection:

(11) If an appeal, as contemplated in subsection (4) by a learner who has been expelled from a public school, is upheld by the Member of the Executive council, he or she must ensure that a suitable sanction is then imposed on the learner and the provision of subsections (8) and (9) are applicable subject to the necessary alterations.”

Equal Education Comment:

The effect of this amendment, if interpreted literally, is problematic. It prescribes that, notwithstanding the success of an appeal to the MEC against an expulsion, such MEC ‘must ensure that a suitable sanction is then imposed.’ This seems to imply that even a successful appeal, the outcome of which may reasonably require that no sanction is imposed at all, nevertheless requires that the MEC must impose a sanction. When read with sections 8 and 9, the effect is still the same. The effect is irrational and nonsensical.

Equal Education Recommendation:

It is submitted that this section should allow for the possibility of the MEC, upon upholding an appeal of a learner, to decide that no alternative sanction is necessary. Thus, the section should instead, read:

“(11) If an appeal as contemplated in subsection (4) by a learner who has been expelled from a public school, is upheld by the Member of the Executive Council, he or she must ensure that a suitable sanction is then imposed on the learner, should he or she deem it necessary to impose an alternative sanction, and the provisions of subsection (8) and (9) are applicable subject to the necessary alterations.”

Alternatively, this section should read:

³ Notice Government Gazette, Notice 1439 of 2008 (21 November 2008).



“(11) If an appeal as contemplated in subsection (4) by a learner who has been expelled from a public school, is upheld by the Member of the Executive Council, he or she may ensure that a suitable sanction is then imposed on the learner, and the provisions of subsection (8) and (9) are applicable subject to the necessary alterations.”

4. Amendment of section 12 of the South African Schools Act 84 of 1996.

“Section 12 of the South African Schools Act 84 of 1996, is hereby amended by the insertion after subsection (3) of the following subsection:

“(3A) A public school for learners with special needs as contemplated in subsection (3) may consist of –

- (a) a special school to provide education to learners with barriers to learning;
- or
- (b) a special school which provides education with a specialised focus.”

Equal Education Comment:

The problem with this proposed amendment lies in s3A (b). It includes schools with a specialised focus in the same category as schools which provide education to learners with barriers to learning.

There does not appear to be any reason why schools with a specialised focus should be grouped with schools for learners with barriers to learning. These schools with a specialised focus include schools specialising in Business; Arts and Culture; Commerce and Management; Engineering and Technology etc.

In 2009 the Western Cape Education Department announced that “[o]ver the past three years schools from historically disadvantaged communities [had] been transformed into Focus Schools,” specialising in all of the categories mentioned above, and that this project “was part of the introduction of the New National Curriculum Statement.”⁴ This statement serves as a good example of how these schools with a special focus have been considered by Education departments up until now.

⁴ WCED Media Release, 21 January 2009, see http://wced.wcape.gov.za/comms/press/2009/13_focus.html.



The fact that these schools provide a specialised focus, or that they may be drawn from historically disadvantaged communities provides no justification for deeming them to be anything other than public ordinary schools.

In Guidelines - relating to special schools, published by the (former) Department of Education in 2007, reference is made to special schools only being permitted to admit learners who have “been assessed to be in need of high levels of support.” Furthermore, the guidelines provide that these schools should be organised around special support programmes to address the following barriers to learning: severe learning difficulties; hearing; vision; mobility; language use and social communication; complex, multiple and pervasive disability; behaviour and psycho-social factors; social and economic neglect.⁵ These guidelines make no reference to schools with a specialised focus, nor do they mention any of the specialised areas of focus (Business, Arts and Culture, Commerce and Management etc.). Instead, the special schools referred to are those which provide education to learners with barriers to learning or learning disabilities.

In light of the above, it would be absurd to deem schools which provide education with specialised focus as being more closely associated to schools which provide education for learners with barriers to learning, than to public ordinary schools. Special schools which provide education for learners with barriers to learning are run and organised around the special needs of the learners they cater for. On the other hand, schools which provide education with a specialised focus are organised around providing special focus and outcome for learners of all abilities.

In a media statement released by the Council of Education Ministers regarding the Basic Education Laws Amendment Bill 2009, on the 14 August 2009, it is stated that the Council approved “[a]n amendment that will make a distinction between special schools for learners with barriers to learning and those which provide education with a specialised focus, such as schools of the arts, agricultural or technical schools.”⁶

While the proposed amendment above does appear to create a distinction, it simultaneously groups both these different types of schools as “public school[s] for learners with special education needs.”⁷ This has the opposite effect by making these

⁵ Guidelines to Ensure Quality and Support in Special Schools and in Special School Resource Centres, Department of Education, Directorate of Inclusive Education, 2007

⁶ Media Statement, South African Government information website
<http://www.info.gov.za/speeches/2009/09081810551001.htm>

⁷ s12 (3) South African Schools Act 84 of 1996.



schools seem more similar than different, and is thus contrary to the Council of Minister's stated intention of making a distinction between these types of schools. It instead creates an artificial distinction between these schools and other public ordinary schools. There may be a legitimate reason for distinguishing schools which provide education for learners with barriers to learning and public ordinary schools, but the same cannot be said for public ordinary schools and schools which provide education with a specialised focus.

Equal Education Recommendation:

The effect of this would be unreasonable and the proposed amendment should be abandoned in its entirety.

5. Amendment of section 19 of the South African Schools Act 84 of 1996.

"Section 19 of the South African Schools Act, 1996, is hereby amended by –

(a) the insertion after subsection (2) of the following subsections:

"(3) The Head of Department may request a recognized governing body association to train, as contemplated in subsection (1) or section 21(7) and 25, members of a governing body of a particular school or group of schools and -

(a)

(b)

(c) may include, in the agreement contemplated in paragraph (a), the training of members of a governing body of a particular school which may not be a member of the governing body association concerned."

Recommendation:

This section should include the underlined word in order for it to make sense.

6. Insertion of section 33A in Act 84 of 1996 "Prohibition of non-educational activities during school time.

"33A (1) School time may only be used for educational activities.

(2) No Party political activities may be conducted during school time, including -



- (i) campaigning;
 - (ii) conducting rallies;
 - (iii) distribution of pamphlets and fliers; and
 - (iv) hanging of posters.
- (3) A member of a political party may not for party political activities encroach on school time as determined by a governing body as contemplated in section 20(1)(f).
- (4) Schools may not allow the display of material of political nature within the premises of the school.”

Comments:

Equal Education supports a move by the Department of Basic Education to ensure that schools focus on providing educational activities for the learners during school time. “Party political activities” that are conducted during school time may have the effect of distracting learners from such activities, which should be the primary focus of any school day, and such distractions and disruptions should be prohibited.

However, s33A (4) has been drafted in a manner that goes far beyond such prohibition of party political activities, and is problematic for the following reasons:

(i) “material of political nature.”

The wording of this section is a matter of serious concern, due mainly to its vagueness. This section places a blanket prohibition on all material of political nature, whereas the previous activities mentioned in the section are provided within a specific context – namely ‘party political activities,’ the material mentioned in subsection (4) does not appear to fall within the same category.

As a result, it is difficult to discern what exactly would constitute material of political nature as described here. Would this mean, for example, that texts (including text books) or posters relating to the political history of South Africa; documents such as the Constitution; newspapers or magazines containing ‘material of a political nature’ etc. would not be permitted to be displayed in schools? As is, this proposed amendment would thus prohibit the display, and by implication the use of, material of a political nature that would otherwise legitimately be used for educational activities in, for example, history and life orientation classes.

This attempt, seemingly to remove political activities and material from the school premises in its entirety is problematic. Formal Education is by no means a neutral



activity. The National Curriculum Statement is a political statement and education is in itself a political tool that has a far reaching impact on the nature and structure of society. The pre-amble of the South African Schools Act itself speaks to this effect⁸. In the past, under Apartheid South Africa, education was used as a critical instrument within a larger legal apparatus based on racial discrimination, dispossession, and the oppression for a large majority of people in our country. Through struggle and finally the adoption of our Constitution the legal and political environment within which our education system exists today is remarkably different from that of the past. However, this does not detract from the nature and transformative role of education in society today, nor does it signal the end of struggle in education specifically and in the South African society as a whole.

Education in South Africa remains a struggle. The majority of, particularly poor, South African learners still receive poor education and perform badly due to their lack of access to resources; poorly trained teachers and an ill-advised curriculum. Under these conditions there exists an urgent need for the poor and working class children to unite, mobilize and organise themselves and struggle to improve the conditions which continue to undermine their rights to human dignity; equality in education, and freedom. It is through the exercising of, amongst other things, our rights to freedom of association and freedom of expression that these struggles will be fought. It is through these rights that every South African is given the space to voluntarily associate with others, mobilize and organise ourselves, and to express our dissatisfaction with the current state of our education system – whether it be through the use of posters, pamphlets and symbolic expression to protest and raise awareness on any particular issue.

S33A (4) seeks to prohibit these activities in violation of the learners' and teachers' constitutional rights. Such a prohibition should not be allowed to be enacted. Equal Education acknowledges and agrees that there is a need to prohibit manipulative and distracting party political activities in our schools, however this prohibition goes far beyond doing merely that, and in a manner that can not be justified.

These proposed amendments do not seek to address a far more significant issue that relates to ensuring that educational activities remain the primary focus during school time, namely that of the actual teaching and learning during any given school

⁸ The preamble of the South African Schools Act, 84 of 1996, states that: "...this country requires a new national system for schools which will redress past injustices in educational provision...lay a string foundation for the development of all our people's talents and capabilities...advance the democratic transformation of society..." etc.



day. One of the biggest problems with respect to educational activities is that the majority of schools spend a maximum of 3.5 hours of school time for teaching per day.

Equal Education Recommendation:

The section makes reference to the broad categories of “material of political nature [and] the premises of the school.” It is primarily in the broadness of these two terms that this proposed amendment is problematic.

It is submitted that instead the subsection should read:

“s33A (4) Schools may not allow the display of party political material on the school premises, other than for educational purposes.”

7. Amendment of section 36 in Act 84 of 1996.

Prevention of SGBs from availing school property for business purposes other than for use as a tuck-shop.

“Section 36 of the South African Schools Act, 1996, is hereby amended by –

- (a) the substitution of subsection (2) of the following subsection –
....
- (b) the insertion after subsection (3) of the following subsection –

(4) Despite subsection (1), a governing body may not –

- (i) lease, burden, convert or alter school property other than to accommodate the educational activities of that school;
- (ii) subject school property to a lease which exceeds a period of twelve months;
- (iii) avail school property for use as a business premises other than for a school tuck shop; and
- (iv) allow any person to conduct business or activity that is potentially dangerous, hazardous or disruptive to learners or prohibited by the Act or any regulation.”



Equal Education Comment:

Equal Education is not opposed to the assumed intentions of the Council of Education Ministers in the above draft amendment. There is a need for regulating the use of school premises to ensure that schools remain centers of learning and are not manipulated for business or other purposes which are not in line with the purposes of a schools – being to educate its learners.

While this is the case, it must also be accepted that school resources are an important factor in being able to provide high standards of education. Part of these resources are to be provided by the Department of Basic Education, while the schools and their governing bodies are also required to find ways in which to raise funds for the benefit of the school as a whole, in terms of s 36 of the South African Schools Act.

Notwithstanding the above, the problem with this section lies in the use of the term ‘school property.’ The act does not provide a definition of school property. Thus, the legal definition of property must be assumed to apply here. This includes both movable and immovable things over which the school has real rights or limited real rights. Broadly, this will include all things owned by the school. School property, is thus different from school premises which, it is submitted, is narrower than the former and would extend only to that area which constitutes the actual school – where lessons are to be conducted.

However, the property of the school will include things, both movable and immovable, situated on *and* outside of the school premises. In terms of the proposed amendment property of the school which does not form part of the school premises will not be permitted to be used for bona-fide fundraising purposes other than as a tuck-shop. This will have the effect of punishing schools that own property, which is unjustifiable and unreasonable.

Equal Education Recommendation:

In order to avoid the unreasonable effect mentioned above, it is suggested that a definition of ‘school property’ be inserted. This definition, for the purposes of this section should limit its scope to property situated within the school premises – which is to be used for educational activities. In this way, SGB’s would be permitted to avail the school property that is not within the school premises for legitimate fundraising purposes, other than for use as a tuck-shop. Of course, this should not prevent the SGB from availing school property that is situated on the school premises for business and fundraising purposes, as long as it is not during school time.



8. Amendment of section 60 of Act 84 of 1996

“Section 39 of the South African Schools Act, 1996, is hereby amended by the insertion after subsection (12) of the following subsections:

(13)...

(14) The schools identified in subsection (13) must be the schools that has been ranked as the poorest schools in that province falling outside the list of schools contemplated in subsection (10)(c).

(15)...”

Recommendation:

The underlined word should instead read have, in order for this sentence to make grammatical sense.

CONCLUSION

We trust our comments and recommendations will be useful. We hereby request an opportunity to make oral submissions so as to support this submission, should that be necessary.

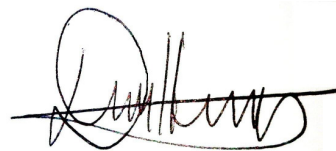
Sincerely



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