



Education Laws Amendment Bill 2004

Call for comment by the Department of Education, 19 November 2004

Introduction

Over the years the South African Human Rights Commission (SAHRC) has handled many complaints concerning the expulsion of learners from schools and issues pertaining to the non-payment of school fees. The *5th Economic and Social Rights Report* of the SAHRC concluded that the Department of Education had succeeded in achieving progressive realisation of the right to education. However, the report highlighted insufficient public education on school fee exemptions as one of the areas in which the Department fell short of its obligations to progressively realise the right to education. The Report also found that some schools expel learners for not paying school fees and that schools do not always inform parents of the school fees exemption policy. In September 2003, the Western Cape office of the SAHRC hosted a public debate entitled "Right to education – At what cost?" in which the issue of school fees acting as a bar to accessing education was discussed. For this reason, the SAHRC will concentrate its comments on the draft Education Laws Amendment Bill 2004 (Amendment Bill) on clauses 2, 4, and 5, which seek to deal with these issues. The SAHRC welcomes the Amendment Bill as a further endeavour by the Department of Education to protect and promote the rights of learners to access to education.

CLAUSE 2

Expulsion

The amendments provide that a decision to expel a learner must occur within 14 days from the date of suspension and that the decision to expel a learner can be appealed to the Head of Department (HOD) to the Member of the Executive Council within 14 days. These clauses are welcomed as they guard against matters being drawn out thereby ensuring that the matter is dealt with swiftly.

The amendments further state that a learner who has been expelled may attend school in the manner determined by the HOD pending the outcome of the appeal to the MEC; that if the decision to expel is overturned on appeal then the HOD may impose a suitable sanction on the learner or refer the matter back to the governing body for an alternative sanction; and, that the SGB must implement the sanction determined by the HOD.

These amendments are also welcomed.

CLAUSE 4

Access to Information

Clause 4(7) provides for the publication in the Government Gazette by the Minister of the quintile of schools that may not levy compulsory school fees. Clause 4(9) provides that the MEC must publish in the Provincial Gazette a list of schools that fall within the quintiles determined by the Minister.

Very few citizens have access to the Government Gazette and the Provincial Gazette. It is particularly important the schools identified by the MEC as being “no fee paying” are made known to the public; especially to those persons who cannot afford to pay compulsory school fees.

It is suggested that the legislation provide that the list of schools identified by the MEC be published in daily newspapers in the province and that the provincial departments advertise on radio a toll free number which parents may call to establish if a particular school is exempted from paying fees.

CLAUSE 5

The South African Schools Act 84/96 (SASA) provides that no public school may unfairly discriminate against a learner and that no learner may be refused admission to a public school on the basis that school fees have not been paid (Section 5(3)(a) of SASA). Sections 39 – 41 of SASA sets out the powers of parents to determine school fees and the duty to establish an exemption policy. Section 41 of SASA provides that the governing body of a public school may legally enforce the payment of school fees by parents who are liable in terms of section 40 (Parent’s liability for payment of school fees).

Clause 5 of the Amendment Act amends section 41 of SASA. It seeks to clarify the circumstances in which the governing body may resort to legal processes and sets out various preliminary processes that must be followed. It also prohibits the parent’s residence being attached in lieu of school fees; and sets out the right of learners not to be victimised when his or her parents have not paid school fees.

These provisions are generally accepted.

Comments on the amended sections

Section 41(3) The exemption from payment of compulsory school fees in terms of this Act is calculated retrospectively from the beginning of the year, if the parent qualifies for the exemption. (Section 3 of the Exemption Regulations sets out how exemptions are to be determined).

Concern

Does this clause necessarily deal with all situations adequately? What happens if the sole breadwinner in a family dies, and leaves the family without an income? From that date forth the surviving parent would be unable to pay school fees. In terms of the formula set out in the regulations it is possible that

the surviving parent would still be obliged to pay fees if she only qualifies for a partial exemption. Another scenario could be that the surviving parent would be exempted for the entire year from paying school fees. Does the school then have to reimburse the surviving parent for the amounts that had been paid? It is thus not clear that the provision deals with the scenario where parents commit to paying school fees, pay the school fees but during the course of the school year due to an intervening factor (death, serious illness, unemployment) become totally incapable of paying any further fees.

It is suggested that the section needs to provide further, that the current financial situation of the parents must be taken into account. Both the regulations and the Act focus on the annual financial position of the parents and provide little relief to a situation where there is a sudden change in the financial situation of the parents.

Section 41(5) The governing body may not attach the parent's residence unless alternative accommodation is made available to the parent.

Concern

The intention of this clause is good. However, its present form gives rise to a number of concerns:

- There is no definition of alternative accommodation. The Extension of Security of Tenure Act 92/97 sets out such a definition in the context of evictions that occur in non-urban areas.
- The sections are not clear upon whom the duty rests to ensure that alternative accommodation is available.
 - Is the governing body expected to find the alternative accommodation?
 - Will a government department be responsible for finding the alternative accommodation?
 - Will it be the Department of Housing or the Department of Social Development?
 - Will the people become beneficiaries of emergency housing plans that have been established in line with the constitutional courts *Grootboom* decision?
 - Is it the parent's residence or the residence where the child resides that may not be attached?
 - Is the legislator aiming to protect the child's right to adequate shelter – section 28(1)(c) of the constitution or is it the parent's right to adequate housing – section 26(1); or both?

The objectives of this clause need further consideration as its present formulation could give rise to litigation over its' meaning. Perhaps, the clause should merely state that the residence of the child may not be attached.

Section 41(6) A learner has the right to participate in the total school programme of a public school despite the non-payment of compulsory school fees by his or her parent and may not be victimised in any manner, including but not limited to:

- a) *Suspension from classes;*
- b) *Verbal or non-verbal abuse;*
- c) *Denial of access to cultural, sporting or social activities of the school; or*
- d) *Denial of a school report or transfer certificates.*

Comment

The SAHRC particularly welcomes this clause. The Commission routinely deals with complaints of discrimination against learners whose parents are unable to pay school fees. In particular, the commission has dealt with many cases in which school reports and transfer certificate are refused.

Perhaps by ensuring that children may not be discriminated against if their parents do not pay school fees and ensuring that the exemption policy is adequately implemented, school governing bodies will be more cautious and realistic when setting school fees and will ensure that the fees charged at a school are affordable to all of the parents.

Further Comments

Legislation and Regulations need to address the achievement of diversity and equality in schools in terms of learner composition.

The current system whereby SGB's determine school fees can lead to children from poor backgrounds being prejudiced against from attending certain schools as it favours children from similar socio economic backgrounds attending similar schools. There have been many complaints of how schools exclude children from poorer backgrounds (often these children are of a different racial background) in order that parents can set high school fees and provide additional resources and teachers. As race and socio economic background are so closely intertwined in this country, racially exclusive schools are maintained through the charging of schools fees. It thus remains a challenge to the Department of Education to create a school system in which the composition of each school reflects the diverse background of the country in which we live.

Legislation needs to adequately recognise child headed households

The draft legislation fails to recognise the existence of child headed households by referring to parents as the people who fail to pay school fees. The ordinary dictionary definition of parent reflects that parents are the biological or legally assigned mother or father of a child. The common usage of the word does not incorporate the child, who is the head of a child headed household, as a parent. This is a particularly vulnerable group of persons. It is also a group of persons that this legislation should seek to protect, as they will potentially be the beneficiaries of the protections that these amendments seek to afford to persons.

The Children's Bill that is currently being debated in Parliament recognises child headed households. This legal recognition of child headed households will lead to a trickle down effect in many areas of law; particularly, areas of personal law and laws that deal with social and economic rights. Child headed households need to be recognised within the growing recognition of this particular family unit. They need to be catered for within legislation in order

that they do not remain outside of the system. Failure to recognise child headed households, could potentially give rise to discrimination between parents and child headed households.

It is suggested that the Amendment Bill insert a definition of parent, which includes a child who is the head of a child headed household. Alternatively, the legislation must refer to a parent or caregiver throughout and include a definition of caregiver as a child who is the head of a child headed household. The Children's Bill defines caregiver as including "the child at the head of a child headed household to the extent that the child has assumed the responsibility as primary care giver". The Children's Bill goes on to refer to parent or care giver throughout the Bill.