

Legal framework and advisory: Reasonable accommodation of transgender learners in public schools

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1. Introduction

FEDSAS advice on the reasonable accommodation of transgender learners is provided to member schools on an ad hoc basis, guided by the founding constitutional principles of human dignity, equality and freedom. While the matter is not covered in a dedicated FEDSAS policy document, our advice consistently applies the principles embedded in the statutory framework that governs public schools. Ultimately, the purpose is to ensure that each school governing body (SGB) acts reasonably, lawfully, fairly and compassionately in giving effect to the constitutional promise of inclusive education. As educational institutions, schools are tasked with cultivating learning environments where the dignity of every learner is respected, diversity is embraced, and teaching and learning can flourish. The constitutional mandate is to provide a basic education to every child in school.

2. Schools as educational institutions

Public schools are, first and foremost, centres of teaching and learning, and their core purpose is to provide quality education. Section 20(1)(a) of the South African Schools Act 84 of 1996 (SASA) compels every SGB to “promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners”. This duty to educate represents the framework within which all rights are exercised and balanced.

In fulfilling this duty, an SGB must protect the individual rights of each learner, including equality, dignity, and freedom of expression, while simultaneously safeguarding the collective rights of all learners to a disciplined, safe and effective educational environment. The law requires these competing rights to be balanced in a reasonable manner that advances, rather than undermines, the school’s educational mission. (The school community also has an important part to play in this regard.)

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3. Constitutional and legislative framework

The Constitution of the Republic of South Africa, 1996, underpins schools' educational purpose by guaranteeing equality (section 9), human dignity (section 10) and the paramountcy of the best interests of the child (section 28(2)). Read with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as the Children's Act 38 of 2005, these provisions require every decision taken by an SGB to be lawful, reasonable, and procedurally fair.

SGB decisions must also give tangible effect to these constitutional values in the day-to-day life of the school. A school that manages diversity through fairness and proportionality fulfils its constitutional obligations, while also strengthening its educational purpose.

4. The *Pillay* judgment and the principle of reasonable accommodation

The Constitutional Court's judgment in *MEC for Education: KwaZulu-Natal v Pillay*¹ remains the cornerstone of this area of law. The court affirmed that equality demanded not only the removal of discrimination, but also the introduction of reasonable, positive measures of inclusion that would enable learners from minority or marginalised groups to participate fully in school life.

The court developed the doctrine of 'reasonable accommodation', which requires institutions to take practical and proportionate steps to include those whose sincerely held identities, beliefs or expressions differ from the majority. A mere desire for uniformity without valid grounds cannot justify the limitation of a learner's rights, the court held.² Diversity, when properly understood, is a constitutional virtue that "will enrich our schools and in turn our country".³ Only where accommodation would impose an unreasonable burden or materially disrupt the provision of education, it may be lawfully refused.⁴

¹ 2008 (1) SA 474 (CC).

² *Pillay* para 114.

³ *Pillay* para 107.

⁴ *Pillay* para 107.

5. Application to gender identity

When a learner identifies as transgender or gender-diverse, the SGB must assess how the learner can be reasonably supported to express their gender identity in the school setting. Typical and generally manageable forms of reasonable accommodation would include:

- permitting the learner to wear a gender-neutral or modified school uniform aligned with their gender identity;
- using the learner's preferred name and pronouns in all interactions and records; and
- allowing access to a private or unisex bathroom or changeroom, where available, or making another arrangement that ensures privacy, dignity and safety.

These measures are consistent with the school's duty to maintain discipline and ensure an environment conducive to learning. If certain requests raise legitimate concerns about safety, privacy or costs, the school should explore reasonable and proportionate alternatives.

6. Process and procedural fairness

Requests for reasonable accommodation must be handled in accordance with PAJA and the principles of procedural fairness. The process should include:

- tabling the request formally before the SGB;
- inviting the learner and parents to present their views;
- consulting with the SGB and experts, where appropriate; and
- recording the deliberations and providing a reasoned decision in writing.

Where a request involves deviation from an existing rule, such as the dress code, it should be treated as an application for exemption under section 8 of SASA and the school's code of conduct. The *Pillay* judgment made clear that even democratically adopted rules – such as a dress code or

a code of conduct – remain subject to constitutional scrutiny;⁵ fairness in substance prevails over formality.

Statutory requirements relating to exemption

In terms of section 8(4)(b) of SASA, every school's code of conduct must contain an exemption provision. This allows a learner, or the parent of a learner, to apply to the SGB for exemption from a rule in the code of conduct if compliance would conflict with the learner's cultural beliefs or religious observances, or on medical grounds. After receiving an application for exemption, the SGB must determine whether the learner's request can and should be met through reasonable accommodation, in line with the constitutional principles affirmed in *Pillay*.

The SGB must communicate its decision within 14 days of receiving the application, and must supply written reasons if the exemption is refused. A learner or parent dissatisfied with the decision may appeal to the Head of Department, who must consider the appeal and provide a reasoned decision, also within 14 days.

While section 8(4)(b) lists certain specific grounds for potential exemption from a school's code of conduct, it also establishes a broader procedural safeguard that promotes general fairness, accountability, and the right to seek exemption from rules that unjustifiably limit constitutional rights. Accordingly, schools should follow this same exemption process when considering requests for reasonable accommodation based on gender identity or other protected characteristics, ensuring procedural fairness and transparency consistent with both *Pillay* and the Constitution.

For a step-by-step guide to this process, turn to the end of this document.

7. Governance and policy approach

FEDSAS does not consider it necessary for schools to adopt separate policies that address every conceivable kind of diversity. A single, well-crafted code of conduct, grounded in constitutional

⁵ *Pillay* paras 82 and 83.

values and the school's ethos, normally suffices to regulate learner behaviour. Where the code unfairly limits a learner's rights, that learner must have the opportunity to apply for exemption or reasonable accommodation.

Where exemption or reasonable accommodation is granted, the learner is expected to comply with the terms of the arrangement. If difficulties arise, the school must address them through supportive engagement rather than punishment. Non-compliance should never result in exclusion from school or any measure that undermines the learner's right to basic education. Instead, the school should meet with the learner and parents to understand the underlying concerns, clarify expectations, and adjust the arrangement where necessary. Disciplinary steps may be considered as a last resort and must always be proportionate, fair, and consistent with the school's educational purpose and the Constitution.

This flexible approach maintains the integrity of school governance, while ensuring that individual circumstances are catered for in a fair and sensitive manner. The school's code of conduct should reflect a values-driven ethos – one that prioritises respect, dignity and responsibility – rather than a purely rule-driven system of control.

8. Collaboration and contextual reasonableness

Effective reasonable accommodation depends on collaboration between the school, parents, learners and, where appropriate, professional experts. Such a partnership promotes mutual understanding and ensures that decisions genuinely serve learners' best interests.

Consultation with parents or guardians, where appropriate and with the learner's consent, helps the school understand the learner's needs and implement reasonable accommodation in a manner that protects dignity, privacy and safety. These engagements support the best-interests-of-the-child principle, while aligning with the ethos of cooperative governance in South African public education.

What is considered reasonable will inevitably differ across contexts. A large, well-resourced urban school may be able to implement measures not feasible in a small or rural setting. Therefore, the

assessment of reasonableness must remain contextual, taking into account available resources, infrastructure, community dynamics, and the school's overarching educational function.

South Africa's model of cooperative governance recognises the school community, parents, educators and the community at large as essential partners in public education. SGBs, as community representatives, play a central role in reflecting community values, while upholding constitutional obligations. Constructive, values-based communication with the broader school community helps prevent misinformation, reinforces trust, and ensures that measures of accommodation are understood as lawful, principled, and consistent with the Constitution and SASSA.

9. Confidentiality and communication

Compliance with the Protection of Personal Information Act 4 of 2013 (POPIA) is essential. A learner's gender identity constitutes sensitive personal information and may not be disclosed without their consent. All staff members must carry out the school's instructions concerning a learner's gender identity in a respectful, consistent way and implement the SGB-approved accommodation measures discreetly.

However, schools may issue general communications reaffirming their commitment to equality and inclusivity, provided that no identifying information is revealed. In this way, the school demonstrates leadership in modelling the values of respect, empathy and human dignity.

10. Conclusion

Schools are educational institutions; not vehicles for social control. Their fundamental purpose is to ensure teaching and learning, and this educational mission is strengthened, rather than undermined, by the respectful inclusion of diverse learners. Therefore, the SGB must exercise its discretion in a manner that upholds both the school's educational objectives and the constitutional principles of human dignity, equality and freedom.

The guiding principle, drawn from *Pillay* and consistently emphasised in FEDSAS's advisory practice, is that schools must promote teaching and learning through fairness, inclusivity and reasonable accommodation, and never through mechanical uniformity or exclusion. Such an approach affirms the statutory autonomy of the SGB, ensuring that decisions are made as close as possible to the school community and in alignment with the school's unique educational context. The SGB may gather the necessary information, may seek appropriate advice, and must discharge its responsibilities fairly, effectively, and always in the best interests of the child. When managed lawfully and collaboratively, diversity is certainly not a threat to order, but an affirmation of the democratic and educational values on which South African schooling is built.

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STEP-BY-STEP GUIDE TO THE HANDLING OF REQUESTS FOR REASONABLE ACCOMMODATION IN SCHOOLS (INCLUDING BASED ON GENDER IDENTITY)

PREFACE

Schools increasingly receive requests from learners who require accommodation in order to participate fully in school life. These requests may arise from cultural or religious practices, medical or personal circumstances, or issues relating to gender identity. The latter include, for example, learners who identify as transgender or gender-diverse and may require support with matters such as uniform, hairstyles, names, pronouns, or access to facilities. Although these issues have become part of day-to-day school management, the Department of Basic Education has not yet finalised national or provincial guidelines that provide clear direction. As a result, school governing bodies (SGBs) and principals have no consistent framework for decision-making on this sensitive and complex matter.

This step-by-step guide is meant as interim assistance, grounded in South Africa's existing legal framework. The Constitution protects every learner's right to dignity, equality, freedom from discrimination, and meaningful access to education. Section 8(4) of the South African Schools Act (SASA) sets out the process for considering reasonable requests for exemption from school rules. It requires governing bodies to act fairly and provide written reasons in the event of refusal. The Promotion of Administrative Justice Act 3 of 2000 (PAJA), too, requires that decisions affecting learners must be lawful, reasonable and procedurally fair. The Constitutional Court's judgment in *MEC for Education: KwaZulu-Natal v Pillay*, in turn, confirms that schools must apply the principle of reasonable accommodation, making practical, proportionate adjustments to protect a learner's identity and dignity, provided that such adjustments do not impose an unreasonable burden on the school or unfairly infringe the rights of others.

This guide translates these legal obligations into a practical, user-friendly and reasonable process that schools can apply in day-to-day circumstances, including accommodation requests relating to gender identity. It does not prescribe particular outcomes, as each school operates in its own context, and each learner's circumstances are unique. Instead, it provides a fair, transparent and legally grounded procedure to help schools make balanced decisions that respect the rights of all

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learners, reasonably consider the school community, and advance stable teaching and learning. The aim is to enable schools to make reasonable, context-sensitive decisions at school level, supported by appropriate information, consultation and record-keeping.

1. Receive the request

A request for accommodation may be submitted by a learner or parent, and should preferably be in writing. If the request is made verbally, the school should assist by recording it in writing.

Acknowledge the request in writing, and confirm that it will be considered in accordance with the school's code of conduct and section 8 of SASA.

2. Understand the request

Meet with the learner and parents to understand:

- the accommodation being requested;
- the reasons for the request; and
- the impact on the learner's day-to-day experience at school.

Allow the learner a meaningful opportunity to express their views. Explain how the school will protect confidentiality, including information relating to gender identity.

Keep written notes of the meeting.

3. Identify the relevant school rule

Determine which school rule or policy the request relates to. Requests concerning uniform, appearance, names, pronouns, bathrooms or participation in activities should generally be processed as exemption applications under section 8(4) of SASA.

Record this clearly.

4. Consider the educational and community context

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Schools must balance the need for accommodation with the needs of the broader school community and the primary purpose of the school. Consider:

- whether the accommodation requested would support or undermine teaching and learning;
- whether the accommodation would affect the safety, privacy or rights of other learners;
- whether the community has certain expectations or concerns (without revealing confidential learner information);
- whether any concerns can be addressed through practical arrangements such as supervision or timing; and
- whether alternative forms of accommodation would meet the learner's needs without creating unintended consequences.

The focus is on whether the accommodation is reasonable in the context of the school.

5. Gather information (where necessary to assess the accommodation requested)

The principal or SGB may gather information needed to properly evaluate the accommodation requested.

This may include consulting:

- the school counsellor;
- teachers who are directly involved;
- existing medical or psychological professionals who are supporting the learner;
- district support teams; or
- relevant community structures (without identifying the learner).

Consult only those who need to know, in compliance with the Protection of Personal Information Act 4 of 2013 (POPIA).

Do not impose an unnecessary burden by requiring specialist reports that the learner cannot reasonably obtain. The test remains whether the requested accommodation is reasonable.

6. Apply the test of reasonableness (to the accommodation requested)

Evaluate whether the accommodation is reasonable in light of the following:

For the learner

- Whether the accommodation would support the learner's dignity, identity and safety
- Whether the accommodation would enable meaningful participation
- Whether refusing the accommodation would cause harm, exclusion or stigma

For the school and community

- Whether the accommodation would place an unreasonable burden on school resources, supervision or facilities
- Whether the accommodation would unreasonably infringe the rights of other learners
- Whether alternative forms of accommodation are available that would be equally effective for the learner and less disruptive for the school

A reasonable decision is one that fairly weighs and balances all relevant interests.

7. SGB decision and written record

The SGB (or an authorised committee) must take a well-informed decision about the reasonable accommodation.

Communicate the decision in writing, stating:

- whether the accommodation is granted (in whole or in part) or refused;
- the reasons for the decision (in the event of refusal);
- any conditions attached to the accommodation; and
- when the arrangement will be reviewed.

If accommodation is refused, inform the learner or parent of their right to appeal to the Head of Department under section 8(4)(d).

Store all documentation securely in the learner's file.

8. Implement the accommodation sensitively

Inform only the staff who need to know to implement the accommodation.

Do not single out or identify the learner.

Update internal systems discreetly, where appropriate (e.g. preferred names on class lists).

Implementation must remain proportionate, practical and respectful.

9. Monitor and adjust (if necessary)

Check in with the learner within a reasonable period (such as four to six weeks) to assess whether the accommodation is functioning as intended.

Address any bullying, exclusion or confusion immediately.

If needed, adjust the accommodation, provided that the adjusted accommodation remains reasonable.

10. Review

Review the accommodation periodically, such as once a year, when the learner transitions to a new school phase, or when circumstances change. Include the learner and parent in the review process.

11. The importance of collaboration with parents

Throughout the process of considering accommodation requests, collaboration with parents is essential. Parents have valuable insight into their child's needs, experiences and daily challenges, and their involvement helps ensure that any accommodation adopted by the school is both appropriate and workable. Meaningful engagement with parents also promotes mutual trust, reduces misunderstanding, and strengthens the shared responsibility between home and school to support the learner's wellbeing and educational progress.

Working collaboratively with parents enables schools to identify practical solutions, anticipate challenges and evaluate the impact of accommodation over time. It ensures that decisions are made with a full understanding of the learner's context, and that all parties remain focused on supporting the learner's dignity, safety and participation in school life. Maintaining this cooperative relationship is also consistent with the constitutional principle that a child's best interests are of paramount importance in every matter concerning the child.

By engaging parents respectfully, transparently and consistently, from the moment the request is made until the final review of the arrangement, schools help create a supportive environment where learners can thrive and where decisions about accommodation are reasonable, balanced and sustainable.