10 November 2017

The Director-General
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001

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Dear Mr Mweli

FEDSAS’ COMMENTS ON DRAFT BELA 2015

Please find attached hereto FEDSAS’ comments on the proposed Education Laws Amendment Bill.

We look forward to further intensive engagements with the Ministry and DBE on the way forward regarding this proposed bill as promised by the Minister and Deputy Minister.

Kindly acknowledge receipt.

Yours sincerely

Paul Colditz
CEO
FEDSAS comments on the draft Basic Education Laws Amendment Bill, 2015

Introduction

“As the government wanders slowly around a national playground of trial and error, pupils are finding themselves ill-equipped for life in a modern, industrial and technologically sophisticated world. Some fight to catch up, but many do not and, as time rolls on, never will. They join the ranks of unemployed or the shadow economy of crime.”

https://www.iol.co.za/capetimes/sa-education-system-is-failing-pupils-economy-1573771

“Right from the beginning, they are set up for failure and it is passed on year after year,” explains Schöer.

“The gap doesn’t shrink. It increases. Giving matric won’t solve the skills mismatch. We need to see how we can improve the education system.”


“‘National catastrophe’ and ‘crisis’ was how Basic Education Minister Angie Motshekga described chunks of the country’s education system, which she says is characterised by ‘pockets of disasters’.”


“South Africa’s education system will not work effectively until undue union influence and critical educational factors are resolved, according to Stellenbosch University researchers.”


The above are just a few of the many examples of public outcries regarding our school education system and its failures. What is abundantly clear from all these studies, publications, reports, comments, etc. is that it is neither the law nor school governing bodies that is the problem.
Yet, it seems that the overall purpose of the proposed amendments is to diminish parents’ rights through curtailing governing bodies’ powers.

Against this background the fundamental approach and questions should be: How might the amendment of education laws contribute to the improvement of the quality of education every child in this country is entitled to and is in fact receiving – or, in the majority of cases, not receiving? Would the proposed amendments improve the experience and quality of the education children are receiving?

**A constitutional and principled approach**

Until the mid-1990s, schools in South Africa were characterised by their hierarchical, authoritarian structures and cultures – something the newly established Department of Education was determined to change. As school governance and management used to be the sole responsibility of bureaucrats, principals and their school management teams, with little if any participation by parents, the South African government in 1996 enacted the South African Schools Act¹ in an effort, inter alia, to “uphold the rights of all learners, parents and educators, and promote their acceptance for the organisation, governance and funding of schools in partnership with the State….² The promulgation of the Schools Act shifted the decision-making responsibility in schools from the principal and teachers to a more decentralised and collaborative decision-making structure in line with the values and framework of our Constitution.³

Since 1994, government has made various attempts to transform all facets of the education system. The first policy document on education and training drafted by South Africa’s first democratically elected government was Education White Paper 1.⁴ In

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¹ Act 84 of 1996.
² Preamble, Schools Act.
³ Naong & Morolong “Challenges to parental involvement in school governance” 2011 Acta Academica 236.
1995, the then Ministry of Education proposed numerous principles as the basis of the new policy framework for school ownership, governance and finance. White Paper 1 describes the first steps towards developing such policies. It set new priorities, values and principles for the education and training system and, amongst other principles, comprehensively explains two important policy initiatives for the school system, namely school organisation, management and financing, and the provision of free and compulsory general education. With regard to governance, White Paper 1 proposed several landmarks that we, as South Africans, should have encountered on our democratic journey thus far.

Some of these landmarks clearly acknowledged and established the right of parents to participate in the governance of the schools their children attend, and confirmed the Government’s intention to give effect to these rights.

Some of these principles include:

School governing bodies should be representative of the main stakeholders in the school. Parents have the most at stake in the education of their children, and this should be reflected in the composition of governing bodies, where this is practicably possible. The head or principal of a school should be a member of the governing body ex officio.

Section 23 of the Schools Act determines that the number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights. The Act further provides that the chairperson of the governing body must be a parent. The inclusion of both these provisions acknowledges the

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5 Section 23(9).
6 Section 29(2).
expectation that parents will be given proper recognition of their rightful entitlement as primary educators of their children and the main stakeholders in school governance.  

It is important to note the use of the words “the main stakeholders in the school”. Naong and Morolong point out that, for the first time in South Africa’s history, all public schools are obliged to involve parents in the decision-making processes of schools. Epstein also mentions that parental engagement in a school's decision-making process means much more than what many parents and educators considered involvement in the past. Traditionally, involvement meant, amongst other things, that parents would create a home environment conducive to children being learners, would attend parents’ evenings, would check children’s homework from time to time, and would occasionally volunteer to participate in or help at school activities. Involvement in the decision-making process, however, extends much further: Parents are now part of the inner workings of the school.

With the introduction of the new system of school governance, education had to emerge from its traditional cocoon to venture into the area of parental involvement in school governance. The majority of the proposed amendments will undo all of this work and will again limit the right of parents to be meaningful stakeholders and be part of the decision-making processes that will directly influence their children’s education.

In primary schools, the main stakeholders for purposes of governance comprise the parents and teachers.

In secondary schools, the main stakeholders for purposes of governance comprise parents, teachers and students.

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8 Naong & Morolong “Challenges to parental involvement in school governance” 2011 Acta.
It is recognised that these stakeholders can play different roles with respect to different elements of school governance.

These two principles clearly indicate that, upon taking over in 1994, the then National Department of Education felt strongly about the phenomenon of decentralisation. Decentralisation is also known as “centre (school) based management”, “participatory decision-making”, “restructuring” and “school-based autonomy”.¹¹

The notions of decentralisation and the devolution of power or authority should be understood against the backdrop of the constitutional state that South Africa is. At first glance, it would appear as if decentralisation and other, similar notions imply that certain powers or functions are transferred from the State to the people or, in this case, the schools and parents. However, such an interpretation directly contradicts the objectives and aims of the Constitution of the Republic of South Africa.

South Africa is a differentiated society, consisting of various societal contexts, each with its own constituting principles. This is emphasised by the motto, the first element of our coat of arms – “Diverse People Unite”. Each societal component, including the State, has a particular functional sphere – a particular sovereignty in its own sphere – within which it exists and acts. In essence, the idea of a constitutional state boils down to a societal context or institution with a limited functional sphere of competency. This means that the State can never be exalted to the all-encompassing totality of society, as that would mean that we have relapsed into a totalitarian state. A totalitarian state is an unnatural phenomenon, as the history of South Africa has clearly shown. The State has no powers or functions unless conferred upon it by the people. This is precisely what the citizens of South Africa have done with the Constitution: They have conferred certain powers on the State. These powers, however, should be exercised in a manner that respects, protects, promotes and fulfils the rights of the people. Therefore, decentralisation of power cannot be regarded as the devolution of power.

from the State to the people, as the State is not the source or origin of those (or any) powers. In a constitutional state, the State’s duty simply is to create harmony between competing or overlapping rights and claims of citizens and societal collectivities by way of legislative measures. This, then, occurs through one public legal order.

Therefore, decentralisation or devolution refers to the restoration of differentiation by means of the Constitution by recognising and giving effect to inherent rights of its citizens. In the previous dispensation, prior to the commencement of the Constitution, the State laid claim to totalitarian powers, but our Constitution has restored the balance. Parents, precisely because they are parents, have the power and right to decide about their children’s education.

This is precisely what was recognised on page 21 of White Paper 1:

“Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by State authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the State or not, subject to reasonable safeguards which may be required by law. The parents’ right to choose includes choice of the language, cultural or religious foundation of the child’s education, with due respect to the rights of others and the rights of choice of the growing child.”

This is not a right granted to parents by the State, and the State may not interfere, infringe upon or limit this right, except of course where the exercise of this right in itself threatens the public legal order. The establishment of school governing bodies with parent members in the majority does therefore not constitute devolution of power from the State to the parents, but merely represents the recognition, honouring, protection, realisation and promotion of parents’ rights.
State involvement in school governance should be at the minimum required for legal accountability, and should in any case be based on participative management.

The governance of every public school is vested in the governing body. So, why would the Education Department (the State) then even be allowed to be involved in school governance? White Paper 2 clearly states that the governance of public schools forms part of the country’s new democratic dispensation. As such, it should embody a true partnership between a local community and the provincial education department.\(^\text{12}\) The preamble to the Schools Act also refers to a partnership between the State, all learners, parents and educators. This principle then means that the State’s involvement as a partner in education should be limited to that which is legally expected of it. Legal accountability means that when public bodies make decisions, they are expected to conform to the requirements of the rule of law by respecting the boundaries of their legal authority, acting rationally, and adhering to fair procedure.\(^\text{13}\)

**What precisely is the minimum required for the Department to be legally accountable?**

The right to basic education, which is contained in section 29 of the Constitution, is a right that individuals hold against the State,\(^\text{14}\) and which the State, in terms of section 7(2) of the Constitution, must “respect, protect, promote and fulfil”. It is not a right of or for the State. At most, the State has the duty to harmonise possible conflicts or rights and interests in its role of respecting, protecting, promoting and fulfilling the right to

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\(^\text{13}\) O’Cinneide, C. “Legal Accountability and Social Justice” [http://www.academia.edu/1464479/Legal_Accountability_and_Social_Justice](http://www.academia.edu/1464479/Legal_Accountability_and_Social_Justice) (visited 4 August 2014).

\(^\text{14}\) Western Cape Minister of Education v Governing Body of Mikro Primary School 2005 JOL 14774 (SCA) par 31.
education. These obligations are also enshrined in the relevant provisions of the Schools Act as well as the Employment of Educators Act.

Section 3(3) of the Schools Act stipulates that every Member of the Executive Council must ensure that there are enough school places so that every child in all nine provinces can attend school as required. The Minister of Basic Education must, according to section 6A of the Schools Act, provide the framework of a national curriculum system as well as procedures for evaluating student achievement. Section 12 requires the Member of the Executive Council of each province to provide public schools; section 19 obliges the Head of Department to provide training for governing bodies and imposes an obligation on the Head of Department to ensure that principals and other officers render all necessary assistance to governing bodies in the performance of their functions; while section 34 and section 35 respectively provide that government should fund public schools and the Minister must determine norms and standards, which must set out criteria for the distribution of State funding to all public schools in a fair and equitable manner. The Schools Act further prescribes 19 acts, regulations, measures or guidelines that each and every province should have.

In practical terms, this implies that the State has four major obligations:

1. It must provide schools.
2. It must fund education.
3. It must oversee the quality of education.
4. It must provide appropriately trained and qualified teachers.

This is the minimum required for legal accountability.

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16 Colditz 2011.
Proposed amendments to SASA

Certain amendments to the South African Schools Act contradict the principles and goals established by the Department of Education after 1994 as well as the values and scheme of a constitutional democracy subject to the rule of law.

For a more detailed account of how the Schools Act came into existence, the readers hereof are advised to read the book, Charting the pathway to successful schooling schools Act @ 20 years to be launched Tuesday, 14th November 2017, particularly the chapters by Bertelsmann and Colditz.

The proposed amendment of sections 5, 6 and 20(1)(l), 43 and the insertion of section 21(3A) of SASA all reflect an attitude that the State is the ultimate bearer of certain powers and that the State may simply take away certain powers from parents. This is not the truth. As we have mentioned earlier, the State has no powers or functions unless conferred upon it by the people. The proposed amendments will, in an instant, diminish these rights that South Africa has sought to embed over the last 20 years. It will ultimately turn public schools back into state schools.

In the matter of Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and others (40/09 [2009] ZACC 32) the Constitutional Court made the following statement regarding the partnership model according to which education in South Africa ought to be governed:

“[56] An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of
the community in which the school is located are represented in the school governing body which exercises defined autonomy over some of the domestic affairs of the school.”

This principle was reiterated by the Constitutional Court in the matter of *The Head of the Department: Department of Education, Free State Province v Welkom High School & Harmony High School* ((CCT 103/12) [2013] ZACC 25 (10 July 2013)) where the Court stated that:

“[123] The importance of cooperative governance cannot be underestimated. It is a fundamentally important norm of our democratic dispensation, one that underlies the constitutional framework generally and that has been concretised in the Schools Act as an organising principle for the provision of access to education. Neither can we ignore the vital role played by school governing bodies, which function as a ‘beacon of grassroots democracy’ in ensuring a democratically run school and allowing for input from all interested parties.”

These proposed amendments will undermine the “fundamentally important norm of our democratic dispensation” and will infringe on this “defined autonomy” of parents and members of the school community to decide on domestic affairs of their schools. The proposed amendments represent a fundamental denial on the side of the Department of Basic Education, and ultimately the State, that parents have a crucial role to play in the governance of their children’s education, that they are part of the “grassroots democracy” that ensures the involvement of parents. It will emasculate this third level of control and virtually usurp the role of parents by seeking to centralise control in provincial departments in what might at best be seen as a totalitarian intervention.

**Memorandum on the objects of the Basic Education Laws Amendment Bill, 2015**

The publication of the draft bill is accompanied by an explanatory memorandum.
However, we have also been provided with a memorandum that differs from the one published for public comment. To which motivation should we respond? To which motivation should the general public respond, in view of the fact that the published one is less explicit? The document in the public domain, unlike the one shared with governance associations, does not highlight the change of stance.

Against the background of all of the unfortunately shaded adumbration alluded to above we now proceed to comment on the proposed amendments.

Comments on specific proposed amendments/insertions

1. Clause 1(a) to (f)

No comments.

2. Clause 1(g)

The present prohibition against loans has caused numerous problems for schools. The proposed definition of a loan with the proposed insertions is still too wide to create certainty. The words “but are not limited to” creates even more uncertainty against the absence of a clear and common understanding of what “the day-to-day operational costs” of a school would be. Would the payment of insurance premiums, purchasing of food for hostels and school feeding schemes, cleaning services where this has been sub-contracted, be regarded as day-to-day operational costs, and if so, who will be the arbiter to make this decision? It is envisaged in section 60(1)(b) of SASA that schools will enter into insurance agreements while regulation 8A(2) of the School Safety Regulations obliges it to do so. Is it really envisaged that the school should obtain permission from the MEC to enter into such agreements or would that be regarded as
day-to-day operational costs? “Day-to-day operational costs” also requires definition to remove such uncertainty.

We propose a definition of “day-to-day operational costs” that will be reasonable in relation to the normal activities of schools and that will be easy to understand and implement.

3. Clause 1(i)

No comments

4. Clause 1(j)

No comments.

5. Clause 2(a)

No comments.

6. Clause 2(b)

The wording of this clause is problematic. It requires much more consideration and attention. It is conceivable that a person may have to wilfully disrupt or interrupt a school activity for a just cause.

We therefore propose the insertion of “and without just cause” after the word “wilfully”.

13
7. **Clauses 3 and 4**

We have serious reservations about these proposed amendments. FEDSAS is regularly inundated with complaints from members where no response is received from Heads of Departments to correspondence, requests, applications and submissions to them. In our own experience it is rare to receive any response at all from officials to even such serious matters as recommendations for expulsion, let alone within the prescribed 14 days.

These provisions make no provision for a timeframe within which the HOD must reply. Presently this practice is used in Gauteng. Schools have submitted their admission policies for approval at the beginning of the year and only received feedback in August – just before the admission procedures for the next year were to start. The Department did not approve the policies and the schools were told that they may not use their policies for the admission period. This constitutes unfair administrative action and the proposed amendment may lead to more instances like these; more conflict with regard to non-compliance by officials and more litigation.

At the very least, provision must be made for a default position where officials fail to respond to submissions made to them.

Has the implication of the enormity of this exercise been considered? Almost 48 000 policies will need to be submitted and considered by the Head of Department at least every three years. Already, as indicated above, provinces do not have the capacity to deal with ordinary day-to-day submissions and correspondence. Examples of this abound. With just under 24 000 public schools, and with provinces struggling to deliver on existing legislative obligations, we have difficulty in seeing how they will be able to respond to all the submitted policies. In fact, our experience tells us that this will not happen. This opens the gate to a flood of litigation against provincial education departments for declaratory orders compelling them to respond to submissions.
However, the more fundamental and principled objection to these proposed amendments is the centralisation of powers in the Head of Department. This flies directly in the face of constitutional values and the laudable objectives of the White Papers and the preamble to the Schools Act.

The Memorandum makes reference to the judgement of the Constitutional Court in *Rivonia* but is selective in its reference. No mention is made of the obligation on and right of a governing body to determine the capacity of a school and the obligation of consultation imposed on the Head of Department in the event that there is a conflict between the HoD and the SGB. Such obligation is also not reflected in the proposed amendment of section 5.

In practice many schools are overcrowded, while others are standing empty. This is not as a result of admission policies by SGBs, but rather a result of poor planning and poor execution of existing laws and policies by provincial authorities.

We see no need for the proposed amendment regarding admission policies in the proposed amendment of section 5.

It requires little imagination to see that the proposed amendment of section 6 is essentially aimed at single-medium Afrikaans schools which comprise less than 6% of the total number of public schools in the country – 1 274 out of 23 719.

The reason why most schools in the country cannot offer more than one language of instruction is because of the funding model for schools and the current staff provisioning model. Both these models inherently have as a point of departure that all schools are single-medium institutions. They do not sufficiently take account of the additional costs, resources and staffing required to offer more than one medium of instruction. Until this funding problem is rectified, the impracticability of a provision such as the proposed section 6(9) will remain a stumbling block in providing learners access to quality education in whatever language/languages.
In principle, however, the proposed amendments together with the realities of and deficiencies in resourcing, funding and staff provisioning regrettably signify an intention to increase authoritarianism and a reluctance to respect, protect, promote and fulfil the values and provisions of the Constitution.

We see no need for the proposed amendment regarding admission policies in section 6.

8. Clause 5

No comments.

9. Clause 6(a)

No comments.

10. Clause 6(b)

(a) “Just cause” should be replaced by “religious, cultural or medical grounds”. “Just cause” is simply too wide and may lead to frivolous applications for exemption. It may well be argued that frivolous applications may be dismissed simply on the ground that they are frivolous, but it still means that SGBs must meet to consider and deliberate on these applications, react to them in a reasoned manner and come to a rational decision. That requires a commitment from non-remunerated volunteers whose valuable time should be spent on much more important issues regarding good governance of the school. In any event, are there any conceivable grounds that could justify exemption other than religious, cultural or medical grounds?

(b) There is no time limit within which the Head of Department must dispose of the appeal. A time limit of not more than 14 days should be set.
11. Clause 6(c)

We agree with this proposed amendment.

12. Clause 7

“Legitimate educational purposes” as a concept is not defined. Our courts have ruled that “educational purposes” include schools’ fundraising activities. Liquor can form an important element of fundraising activities for schools, such as wine auctions. Fundraising is, in terms of section 36, a function of the SGB. This then begs the question why the principal should be the authorising functionary and not the SGB.

Section 20(2) of the Schools Acts determines that “The governing body may allow the reasonable use of the facilities of the school for community, social and school fundraising purposes, subject to such reasonable and equitable conditions as the governing body may determine, which may include the charging of a fee or tariff which accrues to the school.”

Section 36(2) further determines that “A governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.”

In terms of these provisions, school governing bodies lease out their school halls or facilities to other organisations for social functions, to churches for services or for weddings. As part of these activities liquor may be used (for example for communion
or toasts). If no liquor may be brought onto school premises, schools will lose this income and it will have a detrimental effect on SGBs’ efforts to supplement their resources.

These proposed amendments must not be applicable to fundraising events organised by the school governing body.

We support the proposed amendment to subsection (2) and (8) to the effect that an individual learner can also be subjected to a search and test. We did, however, raise our concern regarding the use of the word “fair” in the phrase “if a fair and reasonable suspicion has been established” when this section was first introduced in 2007. We do this again now. What exactly is a “fair” suspicion? And how is a suspicion to be judged as “fair”? The concept of a “reasonable” suspicion is well established in our law. To use the word fair in conjunction with reasonable, in our view, constitutes confusing and inexact legislation.

We have no further comments on clause 7.

13. Clauses 8 and 9

No comments.

14. Clauses 10(a), 32, 33 and 35

FEDSAS is strongly opposed to this proposed amendment. Whether the motive for this proposed amendment is the arguments contained in the Memorandum on the Objects (the Memorandum) published together with the draft bill, the amended memorandum
that we received via e-mail on 11 October 2017 (and to which the general public ostensibly do not have access), or the statement by the DG in his address on 4 September 2017 at the SAELA conference, all of these arguments are without any merit. Suffice for present purposes to refer to the judgement of the Northern Cape High Court delivered on 1 September 2017 in the matter between Johnson v The Head of Department of Education Northern Cape and Others, case no. 11/2017 and a litany of other judgements in which the vast majority of decisions went against provincial education departments on the basis of irrational decisions, misconceived authority and a host of other grounds showing the inappropriateness of contemplating making provincial departments responsible for making educator appointments without input and recommendation by SGBs.

In the published memorandum, reference is made to the fact that theoretically there can be 24 000 interview committees. Is there someone in South Africa that seriously believes that provincial education departments have the capacity to perform the shortlisting, interviews, motivations and recommendations that 24 000 interview committees are doing presently?

A further motivation for the proposed amendment is that many public schools do not have functional governing bodies and persons with the necessary skills to conduct interview processes. The Statement implies that provincial departments all have sufficient people with the necessary skills to conduct interview processes for almost 24 000 schools. We all know that is highly improbable.

The fact that this argument is presented in support of the proposed amendment is furthermore extremely worrying for the following reasons:

(a) In every interview committee there must be an observer and resource person provided by the provincial department of education. The argument suggests that these people are not able to provide the assistance and guidance required. Surely this points to the departmental incapacity.
(b) Section 19 of the Act requires of provincial departments to build capacity through introductory training and continuing training to governing bodies to *promote the effective performance of their functions or to enable them to assume additional functions*. We know that provincial departments have largely failed to provide this training, either because it is not done at all or the training provided is of such inferior quality that this training has not made any meaningful impact at all. Again the issue appears to lie with the capacity of the provincial departments.

(c) In 2011 section 19 was also amended to provide that Heads of Departments may contract recognised governing body associations to train members of governing bodies. On 2 March 2015 FEDSAS wrote to all nine Heads of Department offering to provide training to newly elect governing body members pursuant to the elections of March 2015. Only two Heads of Department acknowledged receipt of the letter but neither took up the offer. Seven Heads of Department did not even acknowledge receipt of the letter. Is this provincial departments’ ineptitude or intransigence?

Presenting such an argument, in support of the proposed amendment, is especially worrying because it is indicative of a reluctance to develop capacity in communities where such development is indeed desperately needed.

The (new) memorandum seeks to justify this amendment on the so-called Volmink Report. Apart from the fact that the Volmink Committee’s report is seriously flawed, it does not take into account that only a Head of Department (or his delegate) can appoint an educator in any position in a school. To be able to obtain an appointment, the signature of this official is required. This means that currently, for every corrupt or ill-qualified person appointed, a senior official of the department of education had to be involved in every instance, to enable the appointment, transfer or promotion to materialise. The source of an appointment recommendation is not the determining factor alone: it is the final decision maker that is key in the process of appointment.
The proposed amendments will simply make it even easier for corrupt people and officials to have their way.

It is worth noting, in the Volmink Report, that not a single negative finding is made regarding the involvement of SGBs in the entire scandal regarding irregular appointments. How removal of the right of SGBs to make recommendations for appointment is being linked to anything the Volmink Committee investigated is thus difficult to understand. Even worse is how the Volmink Report is martialed as justification for the proposed amendments.

In the Volmink Report it is also stated that (another) inconsistency in the appointment process is the weaknesses within some districts. Where districts work strictly according to regulated procedures and where their managerial and administrative staff members are persistent and consistent in carrying out their duties in accordance with a coherent system, the teacher unions in those areas are held in check and procedures and decisions are led by the Department. In other words, where authority is weak, inefficient and dilatory, teacher unions move into the available spaces and determine policies, priorities and appointments and achieve undue influence over matters, which primarily should be the responsibility of the Department. Weak provincial authorities, aggressive unions, compliant principals and teachers eager to benefit from union membership and advancement combine to defeat the achievement of quality education by undermining the values of professionalism (see page 17 and 18 of the Volmink Report). SGBs do not feature in this equation.

On page 44 and 45 it is further stated that the White Paper envisaged that provincial education departments should ensure effective service programmes and that district offices should provide professional leadership and support to school principals, teachers and governing bodies, monitor their development and identify local priorities for resourcing. It is clear that districts have NOT supported SGBs to the extent that is required. Many district directors indicated that they do not have the necessary
resources to provide effective support to governing bodies. Ideally the district should provide a subject advisor and circuit manager to interview committees.

It is therefore clear that it is not SGBs that should be subjected to allegations of suspicion or of irregular action, but rather that districts ought to be held accountable for their lack of leadership and professionalism. They should support SGBs in exercising their functions. The Memorandum fails to point out the weaknesses found within the departments with regard to the recommendation of appointments and instead aims to place all the blame for irregular practices on SGBs.

The Volmink Report further refers to the “Soudien Report”. Chapters 7 and 8 of the Soudien Report offer many useful points from its analysis of aspects of SGBs and their duties. In the macro sense, the Soudien Report recommends the establishment of a national school governing council as well as national and local governance structures (p. 168), all intended to provide SGBs with stronger support than that provided by the Department. The point here is that this country’s third biggest democratic exercise and fourth tier of democracy should be strengthened so as to make it function better as a force in learning and teaching in South Africa as well as a means of establishing productive relationships between schools and communities.

The Volmink Reports asks the following: A deeper question remains and that is whether this trend to remove powers from SGBs is the first step in the gradual centralisation of education in South Africa?

One SADTU representative at provincial level told the Task Team that his union had nothing to fear should independent selection panels be instituted as the majority of people on such panels will be SADTU members and supporters. What this means is that the “undue influence” which now supposedly bedevils SGBs will shift to the Department.

The majority of union opinion is that the participation of SGBs in the appointment process should be retained in some form, providing opportunity for parents and
community members to have a voice in who is appointed to the school staff, and for unions to ensure that the process is carried out fairly and properly.

In answering this question the Report states that it is noteworthy that districts have not given sufficient attention to the empowerment of SGBs. Though everyone acknowledges the “weakness”, the “inadequacy”, the “vulnerability” of SGBs, District Managers do not take responsibility for having allowed SGBs to languish in neglect instead of nurturing and nourishing that unique form of democracy. In short, SGBs are regarded as a burden and are being wished away. Perhaps there is as much need to develop governance expertise among District Managers to better enable them to empower volunteer and other SGB members.

It should be very clear that the proposed amendments will not solve the problem of undue influence during the appointment of educators by taking away the powers of the SGB – it will only shift the problem.

In the report of the NECT “Reflections and observations on the impact of education laws and policies of the past 20 years, and policy options for the future Outcomes of the Public Education Policy Dialogue Series” the following comment was made:

“In other instances, it is recommended that the policy or legislation be subjected to specific and targeted ‘tweaks’. This is appropriate where unintended consequences of a policy need to be corrected in some way, based on new evidence or knowledge. At the same time, care must be taken not to continuously subject founding legislation to endless amendments, which may seek to address a symptom rather than a cause. The powers and functions of school governing bodies have suffered this fate: almost every amendment to SASA has attempted to ‘tweak’ these in some small way, to address a particular issue (this year it is the appointment of principals); perhaps it is time to go back to the original text and see if the foundations are not in need of a more thorough overhaul.”

We propose removal of the entire clause and retention of the status quo.
15. Clause 10(b)

No explanation for this proposed insertion and amendment is provided in the (published) Memorandum. Any use of facilities of a school necessarily implies financial implications for the school, e.g. overtime payment to SGB-employed staff to make facilities available, higher water and electricity consumption and very often also refreshments. It can never be justifiable that the school fund must foot the bill for such expenses and it would in any event be a contravention of section 37(6) of SASA.

Is it the intention that the department should also be entitled to occupy buildings of the school permanently or for extensive periods without any form of compensation? “Education-related activities” is not defined and can have a particularly wide meaning. One would expect that each and every activity engaged in by provincial education departments would be education-related. Incidentally, in the (new) memorandum the term “educational purposes” is used – a term also not defined but on the face of it one with a more restricted meaning than “education-related”.

In the (new) memorandum the following statement is made as justification for this proposed amendment: The second mentioned proposed amendment must be seen in the context of the fact that public schools are assets of the State” (our emphasis).

This is a puzzling statement. How can a juristic person such as a public school be the asset of the State (itself a juristic person)? Apart from that, the State is indeed the owner of the property on which many public schools are situated, but certainly not all public schools. Thousands of public schools are situated on private property to which the State has no claim other than that which must be established though agreement envisaged in section 14 of the Act.

We propose the removal of this clause.
16. Clause 11

In its present form this provision sounds sensible. It is the practice that is problematic. Increasingly provincial departments are withholding funds payable to schools in terms of the National Norms and Standards for School Funding (NNSSF) on the basis that the departments will then centrally procure LTSM for schools. Schools then either do not receive such LTSM or the quality of the LTSM that is supplied is of such inferior quality that it cannot be utilised at all. In many cases this means that the funding that the schools are entitled to in terms of the NNSSF simply “disappears”.

The South African Schools Act and the NNSSF, 2006 make provision for public school governing bodies to become progressively more responsible for managing aspects of recurrent expenditure. To prescribe to schools the manner in which they must perform their section 21 functions, would render the purpose of the section 21(1)(c) functions superfluous and would definitely not promote better school management. Governing bodies that do not perform their functions with the necessary diligence must be held accountable and their functions can be withdrawn by the Department, but a one-size-fits-all policy will not work and functional governing bodies must be given the freedom to do their own procurement.

In the present South African context where instances of irregular procurement by the State and State-owned entities is almost the order of the day, we oppose this insertion. There are sufficient provisions in the existing legislation to deal with procurement economically and productively in the best interest of learners.

17. Clause 12

No comment.
18. Clause 13

This clause is particularly strange as the power to dissolve a governing body is not conferred upon the Head of Department in any of the provisions of SASA. This section and proposed amendment does not confer such power on the Head of Department, yet it deals with decisions the HOD may take after dissolution. The proposed wording also does not match the heading of the section.

In the absence of an empowering provision this clause is therefore without any rationale. If it is considered to eventually include an empowering provision for the dissolution of an SGB, such provision must include due process provisions similar to those included in sections 22 and 33.

19. Clause 14

No comment.

20. Clause 15

No comment.

21. Clause 16

The proposed amendment is problematic. It is necessary for the chairperson of the finance committee of a school to have at least some financial expertise. It must therefore be made clear that the chairperson of the finance committee may be an elected parent member of the SGB or a member co-opted for his/her expertise in financial management. It does happen that no such parent member is elected to the SGB or that there is no such a person in the parent body of the school. Independent oversight in accordance with the principles of the KING reports will be improved if
provision is specifically made for the fact that such a chairperson can also be a co-opted person not specifically attached to the school in any way but with the necessary skills and knowledge.

22. Clause 17

We support this amendment, but we call for a further amendment to section 32. We believe that learners should not be involved in the appointment of their educators or other staff at the school in any manner whatsoever. Provisions in this regard should be made in this section.

23. Clause 18

No comment.

24. Clause 19

The concept “lease” is not defined in the Act. The common understanding (and legal definition) of lease is an agreement in terms of which property is made available for use by another against payment of compensation. Is it really intended that SGBs must obtain permission from the MEC to lease the school hall (or any other property) for a single meeting?

We do not support this amendment.

25. Clause 20

No comment.

26. Clause 21(6) and (7)

We have serious reservations with regard to this provision. It has happened that just below 15% of parents have turned up for such meetings, constituting some 200 people,
and then only 20 people turn up for the second meeting. The budget is then discussed and approved by a significantly smaller number of parents. The provision is therefore counter-productive.

We are strongly opposed to this proposed amendment.

**27. Clause 22**

We also have serious reservations about the restrictions being placed on SGBs with regard to information that can be obtained concerning the gross income of parents. Fee-paying public schools are experiencing immense financial pressure due to the high percentage of parents that apply for fee exemption, but also, more importantly, failure by parents who are able to pay school fees but simply refuse or neglect to do so. These restrictions will make the process to collect school fees even more difficult for schools. The Regulations for the Exemption of Parents from Paying School Fees determine that the governing body may request relevant further particulars with no restriction on what the further particulars may entail.

Furthermore, a decree of divorce or a divorce agreement is irrelevant for the purposes of determining whether parents are entitled to exemption and this has been confirmed in our courts.

In the matter of *Fish Hoek Primary School v GW* the Court found:

“In considering what is in the best interests of the child, there can be no debate that a co-guardian and co-holder of parental responsibilities and rights, as in this instance, who is unwilling yet has the means to pay his child’s school fees, should be made to do so, and if necessary, by an order of a competent court. As stated in GW (Fish Hoek Primary case) supra at para [14], were the schools not to have the right to recover school fees from such a parent, it will either have to shoulder that loss or mulct other parents with additional charges, which in either event would be detrimental to other learners.”
In *Meeding v HTS Sasolburg* (MM Meeding v Hoër Tegniese Skool Sasolburg) (Free State High Court case number A134/2011), the school summoned parents to appear in the Magistrate’s Court for the payment of school fees. The magistrate found that the parents were jointly and severally liable for the payment of school fees. In this instance, the parents had also been divorced and the father was responsible for paying the child’s maintenance and school fees in terms of the divorce order. The mother appealed to the High Court (Free State division), where two judges heard the matter. The court also relied on the SCA judgement in *Fish Hoek Primary School* to find that the duty to pay school fees rested on both parents. The court distinguished between the payment of school fees and the claim between spouses in terms of the divorce order. After all, a party who had no part in the divorce proceedings (the school) cannot be held to the divorce order.

“There is no room for a finding that this order (divorce order) amends or limits the provisions of the Schools Act in any way. There is no way in which such an order can amend the act or impose a restriction on the rights of the respondent (the school) who was not a party to it. Actually, this puts an end to the matter, in the sense that based on the provisions of the Schools Act, the magistrate was correct in reaching his finding, namely that both parents ... are jointly and severally liable for the payment of school fees.”

**28. Clause 23(4)(a)**

What or who is meant by “officers”? Any officer as defined in section 1? Whatever is meant by the expression, such investigation can only be done by competent persons with financial knowledge and expertise. The question also arises why such a wide discretion is given to the HOD whereas in other sections the words “reasonable” and “good cause” often define the discretion of the HOD. We argue for the removal of sub-clause (a), at the very least. An investigation by the AG or forensic auditors should suffice. More often than not, officials of the departments of education who have
attempted – unlawfully so – to conduct such investigations have had no or extremely limited understanding of financial accounting and affairs.

29. Clause 23(5)(a)

We are opposed to the insertion.

The submission of quarterly reports, apart from the annual audited financial statements, that a governing body would have to submit will place a financial and administrative burden on the governing body and the school’s resources.

We advise our members to submit certificates on an annual basis indicating their compliance with SASA and other relevant financial procedures. We are of the opinion that this certificate would be sufficient written assurance that that school implements effective, efficient and transparent financial management and internal control systems, and the Department can therefore pay transfers. Although the PFMA is not applicable to schools we are aware that the provincial departments must comply with the provisions of the PFMA and we submit that the certificate is sufficient to comply with that act.

A mere mechanical submission of quarterly reports such as envisaged will serve no purpose and will simply waste energy and paper, unless it is restricted to instances where rational and justifiable reasons exist for the necessity to submit such reports. The provision, if retained, must therefore be individualised to instances where sufficient reasons exist for such reports, e.g. where there are irregularities in schools’ expenditure patterns or where another justifiable cause for such intervention is present.

30. Clause 24

No comment.
31. Clause 25

No comment.

32. Clause 26(3)

We strongly support this insertion.

33. Clause 27

We support the principle of insertion of this provision. However, if every dispute between a governing body and a Head of Department is to be subjected to this process, it can lead to unintended consequences. It is indeed foreseeable and common practice that many disputes of relatively simple nature occur which are very often resolved in informal discussions.

34. Clause 28 to 31

No comment.

35. Clause 32

See our comments under clause 10.

36. Clause 33 and 35

See our comments under clause 10

37. Clause 34

No comment.

38. Clauses 36 to 40, 42 to 45

No comment.
39. Clause 41

This proposed insertion in its present wording constitutes an infringement of educators’ as well as their spouse’s or partner’s right to privacy. It should only be necessary to disclose financial interests if it relates to an educator’s employment requirements or business with the State.

Amendments/insertions proposed by FEDSAS

FEDSAS proposes the following insertions and/or amendments to SASA:

40. Amendment of definition of loan

The definition of “loan” should be amended to make provision for all transactions below a determined percentage of a school’s budget to be exempted from the approval envisaged in section 37(1) of SASA. Alternatively, “day-to-day-operational expenses” must be defined in such a manner that it is clear that SGBs should not require permission to enter into “loan agreements” that are part of such expenses as determined by the SGB and as provided for in the budget approved by the parents as envisaged in sections 38 and 39 of the Act.

41. Amendment of definition of parent

This definition needs to be re-examined. More specifically, the “c” part of this definition needs closer inspection. As SASA grants parents certain rights and privileges, it is important to have certainty about who is regarded as a parent and who is not. During
the 2015 school governing body elections much uncertainty arose as to who qualifies as a parent in terms of part “c” of the definition. This section of the definition makes allowance for a person to be regarded as a parent of a learner who, for example, has two biological parents, but lives with a family member who has been assigned care or guardianship over the learner by the biological parent. This provision does however also create room for abuse by a person who does not really have a learner’s or the school’s interest at heart but who wants to interfere in the functioning of the governing body and the school for personal or political reasons. This paragraph can result in a learner having numerous “parents” which will lead to administrative and practical difficulties.

We recommend that a restriction is included in this part of the definition in order to prevent any and every person from obtaining certain rights and privileges. We suggest the following amendment: “(c) the person who formally undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school and where a parent as defined in paragraphs (a) and (b) is not able to fulfil his or her obligations towards the learner.”

42. Amendment of section 21 (and insertion of section 12B)
SASA created a “one-size-fits-all” public schooling system especially with regards to the funding model and the functions of SGBs. We propose the inclusion of a new funding regime for public schools. This will include the creation of a new “category of public schools” namely “section 12B schools”. This category will allow those schools that are functioning optimally to apply for this status. This will allow these schools to receive additional functions or powers, such as increased power to determine which publicly paid educators are appointed at the school. Treasury can transfer the funds directly to schools. It will have a significant effect in terms of efficiency and reduction of costs and bureaucratic red-tape. From a system point of view it will undoubtedly also lead to improved accountability, transparency and oversight. It simply is much easier to track wasteful expenditure, inefficiency and proper compliance when the chain of
supply is significantly shortened. There is no reason why, if the necessary capacity and expertise exists, all the funding of the school cannot be handled at school-level. This also includes remuneration of all teachers and other staff employed at the school.

43. Amendment of section 24 and 28

The need for a single set of national Governing Body Election Regulations once again became apparent during the 2015 governing body elections. Some provinces did not publish their regulations in time and other provinces, like the Eastern Cape and Limpopo, did not even publish regulations which caused distinct confusion. There are many discrepancies between the different sets of provincial regulations and the national guidelines. The governing body elections are, along with the national elections, one of the biggest elections that take place in the country. It is incomprehensible why these elections cannot be regulated by a single set of national regulations. We propose that section 24(2)-(4) is amended to allow the Minister, and not the MEC, to determine the number of members in each category referred to in subsection (1) and the manner of election or appointment of such members at every public school for learners with special education needs, as well as an amendment to section 28 to allow the Minister to make regulations with regard to the election of governing body members.

44. Amendment of section 31

With regard to the term of office of governing body members, we propose considering making provision for staggered terms of office for certain governing body members so as to make provision for the retention of expertise and experience and for the introduction of new blood. This proposal requires open, constructive and creative discussions and debate in order to improve the level of governance in all schools.

45. Amendment of section 32
FEDSAS requests an amendment to this section to the effect that learners should also not be allowed to participate in the process of appointment of staff of the school.

46. Alignment of section 20(2) and 36(4)

Section 20(2) allows an SGB to make available facilities of the school for various purposes “which may include the charging of a fee . . .” However, section 36(4) forbids a lease without the permission of the MEC. These sections create problems for schools that receive requests for very short term use of school facilities on short notice. “Lease” as used in section 36(4) should therefore be defined to mean extended lease contracts for specified periods.

47. Section 41(4) and (5)

Section 41(4) should be removed from SASA and section 41(5) appropriately amended. In addition section 41(5) should also make provision for the service of notice by the sheriff of the court in accordance with recognised modes of service provided for in court rules, as well as for more modern modes of delivery such as by e-mail or similar electronic devices.

Conclusion

In conclusion we accept the offer by the Deputy-Minister extended at the meeting on 4 October 2017 with some SGB associations for further detailed and technical discussions regarding the proposed bill, once the process for public comment has been concluded and also the offer of disclosing to us the content of all public representations received in this process.
It is abundantly clear that the proposed bill has met with wide resistance and rejection by the broad South African community. We have been overwhelmed by reactions received from our members, individual members of the public, organisations and institutions involved in education and many other stakeholders. We are still receiving inputs and have noted that some of these comments/inputs have been submitted to the BDE. In the extremely limited time available we have been unable to study and dissect all of these submissions to ensure that legitimate concerns and proposals have all been covered by our own comments as we as a representative organisation is duty bound to do. It has even been impossible simply to draw up a list of all the reactions we received and are still receiving. We are hoping to be able to do that in the months to come and will certainly do so in preparation for the envisaged detailed and technical discussions with the Ministry and DBE.

In the interim we confirm that we submit these comments on behalf of 2 070 of our members.

Paul Colditz
CEO: FEDSAS
10 November 2017