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SECTION27 SUBMISSION

Basic Education Laws

Amendment Bill

(B 2B—2022)

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SUMMARY OF RECOMMENDATIONS FOR THE BASIC EDUCATION LAWS AMENDMENT BILL (B 2B-2022)

Compulsory Schooling

1. The introduction of compulsory Grade R through the 2023 BELA is generally welcomed by the early childhood development ("ECD") sector.
2. Moreover, it is essential that compulsory Grade R is accompanied by measurable improvement in quality provisioning. This requires appropriate resourcing and learning support and qualified teachers who can implement play-based learning programmes. Specifically, we recommend that a section is inserted into the 2023 BELA amending section 5A(2)(c) of the South African Schools Act 84 of 1996 ("SASA") concerning the potential norms and standards on learning and teaching support material ("LTSM") to include reference to age-appropriate play material and equipment.
3. SECTION27 welcomes the clarification that basic education extends to Grade 12, which is in line with the recent Constitutional Court judgment of *Moko v Acting Principal of Malusi Secondary School and Others.*[1]

Corporal punishment

4. SECTION27 welcomes the introduction of a definition of corporal punishment and the confirmation that it is abolished in schools. However, we believe that the abolishment of corporal punishment should be extended to include any punishment that is cruel or degrading, including verbal and emotional abuse.
5. Therefore, **clause 10** should be revised to extend the abolishment of corporal punishment to include the abolishment of any form of punishment that is cruel and degrading.
6. To provide clarity on this, **clause 1** should also be revised to introduce a definition of "any form of punishment that is cruel and degrading," which would include "...punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares

[1] *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC).

or ridicules the child."[2] This would therefore encompass non-physical forms of cruel and degrading punishment, such as name-calling or threatening learners.

Learner dropouts

7. While we believe learners dropouts is a crucial issue that needs to be addressed, we submit it will not be effective to make individual schools solely responsible for tracking learners and providing further interventions for them. We therefore recommend that **clause 3** of 2022 BELA should be revised to include a provision obliging government to form intergovernmental committees on the provincial and national level to address the issue. The committees could consist of representatives from the Department of Basic Education (DBE), the Department of Social Development, the Department of Statistics South Africa, and National Treasury.

The admission of undocumented learners

8. The majority of the documentation required in **clause 1** of the 2022 BELA is unnecessary, irrational, and likely to serve as an obstruction to learners' access to education. Much of the documentation required in the clause is not required in terms of the Admissions Policy for Ordinary Public Schools or the Draft Admissions Policy for Ordinary Public Schools.
9. While we note that Clause 4(b) states that, even without such documentation, the learner shall be allowed to attend school, while placing an obligation on the principal to advise the parents or guardians to obtain the documentation, this is not in line with the 2019 case of *Centre for Child Law v Minister of Basic Education* ("*CCL v Minister of Basic Education*").[3]
10. In this case, the High Court (Eastern Cape Division) ruled that for the admission of learners to schools, and for schools to continue to serve their educational needs, learners need only supply their birth certificates or where they do not have a birth certificate, <u>any other proof of identity, such as an affidavit</u>.[4]

[2] General Comment No. 8 (2006) "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)" accessed from https://www.refworld.org/docid/460bc7772.html para 11.
[3] *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG).
[4] Ibid, para 135.

11. The clause should thus be altered to state that the only "required documents" from learners are a birth certificate, and where a birth certificate is not available, any alternative form of identification, such as "...an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified."[5] This is necessary to ensure consistency between the BELA and *CCL v Minister of Basic Education*.

Policy-making functions of school governing bodies (SGBs)

12. The policies of some school governing bodies ("SGBs"), particularly in terms of admissions and language, have had the effect of excluding learners and perpetuating historical patterns of discrimination. We thus believe that the policies of schools should be reviewed by the Head of Department ("HoD"), and we welcome the possibility of this for admissions and language policies in terms of **clauses 4 and 5** of the 2023 BELA.
13. However, we are concerned by the deletion in the 2023 BELA of the HoD's obligation to provide written reasons for its decision, which was present in the Basic Education Laws Amendment Bill (B 2A—2022) (henceforth referred to as "2022 BELA").
14. Written reasons are crucial for transparency and for appeals of the HoD's decision to the MEC to be informed. A failure to provide proper reasons is also inconsistent with principles of administrative justice.
15. We are also concerned that there is no clear process in the event the HoD does not approve a school's language or admissions policy and the SGB does not appeal this decision. In fact, clauses 4 and 5 of the 2023 BELA only state that the HoD "may approve" an admission or language policy.
16. Clauses 4 and 5 of the 2022 BELA stated that if the HoD did not approve of the language or admissions policy of a school, the HoD would return the policies to the SGB with recommendations that may be necessary. However, this is not provided for in clauses 4 or 5 of the 2023 BELA.
17. We thus recommend that clarity be given as to what will happen if the HoD is not satisfied with a school's admission or language policy. Additionally, if a HoD is not

[5] Ibid para 135.

satisfied with such policies, we recommend that the HoD be obliged to provide reasons for this, in order to promote transparency, administrative justice, and ensure that any appeals to the MEC are properly substantiated.

18. Additionally, in order to ensure that the HoD has enough capacity to review the policies of all schools effectively and within the limited time frames provided, we submit that an office, specialising in reviewing schools' policies, be established to undertake the initial review of SGB's language and admissions policies within 30 days of the commencement of the BELA.
19. Further, an individual complaints mechanism should be established for persons wanting to challenge individual school policies they believe are exclusionary, unlawful or unconstitutional outside of the review periods.
20. In terms of the requirement for schools to have an exemption clause in their codes of conduct, we believe **clause 7** should provide guidance to SGBs as to what "just cause" would be in granting or refusing an application for an exemption. This would be to ensure that SGBs take cognisance of certain factors and their duty to reasonably accommodate learners.
21. Finally, to address the ongoing instances of discrimination against learners who are pregnant, there needs to be a clear and express provision in the BELA stating that direct or indirect discrimination against learners on the basis of pregnancy is prohibited.

School governance checks and balances

22. We recognise that there are circumstances in which the HoD should be empowered to dissolve an SGB as provided for in clause 21 of the 2023 BELA. However, we submit that guidance needs to be provided as to what reasonable grounds would be for the HoD to be empowered to dissolve an SGB.
23. Additionally, while inserting provisions into the SASA to ensure greater accountability on the part of SGBs is to be welcomed, SGBs are not adequately trained in how to perform their functions. Therefore, there need to be more effective programmes run by government to build the capacity of SGBs, provide them with all necessary information, and to address the power imbalance between school staff and SGBs.

School closures and mergers

24. We submit that **clause 13** should be revised to place an obligation on the MEC, when it is deciding whether to merge one school with another, to ascertain whether there will be adequate school infrastructure to accommodate all the learners in the proposed merger. Further, the MEC should be required to ensure that transportation arrangements are put in place and that any challenges involving school uniforms are addressed before the commencement of the merger.
25. We are also concerned that the Member of the Executive Council's (MEC) obligation to provide reasons for the decision to merge schools that was included in the 2022 BELA has been taken out of the 2023 BELA. Such an obligation would encourage transparency and accountability. We therefore propose that this obligation be reinserted.

Meaningful engagement

26. **Clause 37** of the 2023 BELA seeks to introduce procedural steps for dealing with a dispute between the HoD or MEC and SGBs. However, the clause fails to provide any normative criteria as to how these parties should deal with a dispute, and therefore fails to incorporate meaningful engagement as a remedy in resolving disputes.
27. We thus submit that normative criteria to guide the resolution of disputes should be added to the 2023 BELA to promote meaningful engagement between the parties. Normative criteria guiding the process of meaningful engagement could include fairness, transparency, flexibility, practicality,[6] as well as the best interests of the child principle.[7]

[6] Gustav Muller, "Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership," Stellenbosch Law Review 22, no. 3 (2011): 742-758, page 756. Muller discusses the benefits of meaningful engagement in the context of evictions.
[7] *Rivonia* para 2.

The central procurement of learning and teaching support material (LTSM)

28. **Clause 14** of the 2023 BELA allows for the centralisation of the procurement of LTSM on the provincial level. However, as was evident in *Khula Development Project v Head of Department: Eastern Cape Department of Education*,[8] the centralisation of the procurement of LTSM will not necessarily solve the issues regarding procurement. Therefore, the Department of Basic Education (DBE) must urgently finalise norms and standards on the procurement of LTSM in terms of section 5A(1)(c) of the SASA. Further, clause 14 must reiterate that the procurement of LTSM must occur in line with the good governance principles set out in section 195 of the Constitution.

The penalisation of parents who fail to cause their children to attend school

29. The criminalisation of parents who fail to cause their children to attend school, in section 3 of the SASA, as a measure to increase school attendance is ineffective, against the best interests of children, and has the potential to disproportionately prejudice mothers. Therefore, instead of increasing the potential sanctions that may be meted out against parents as proposed in clause 2 of the 2023 BELA, the BELA should be revised so as to fully remove the criminal penalties in the SASA for parents who fail to cause their children to attend school.
30. If the criminal sanctions on parents are maintained, these must be made subject to certain considerations to protect the best interests of the child.

The penalisation of persons and protests that obstruct or disrupt schooling

31. SECTION27 appreciates the need to prevent protest action that disrupts school activities and jeopardises the right to basic education and that participation in such protests should be penalised. However, we submit that the creation of a new penalty for such in **clause 2**, is too broad and may negatively affect the constitutional rights of people to assemble, demonstrate, picket, and present petitions;[9] to

[8] *Khula Community Development Project v The Head of Department, Eastern Cape Department of Education and Others* (Eastern Cape Division of the High Court, Makhanda) (unreported, case number 611/2022).
[9] The Constitution of the Republic of South Africa, 1996, section 17.

freedom of expression;[10] and to freedom of association.[11] The existing criminal law provisions penalising persons participating in protests that lead to violence or the destruction of property need to be better enforced to deter participation in such protests in future. We therefore recommend that this amendment be removed in its entirety.

Random searches of learners

32. Schools need additional guidance on how to practice their discretion to search learners beyond what is set out in section 8A of the SASA. We submit that regulations are necessary regarding the searching of learners and that the Minister of Basic Education should be granted the power to make regulations on searches.
33. Further, we recommend that rules regarding the search of learners should be provided for in every school's code of conduct.

Alcohol on school premises

34. The most effective way to protect children from being exposed to or consuming alcohol at school is to have a blanket ban on the presence of alcohol on school grounds or during school activities, except for educational purposes. However, clause 8 of BELA 2022 makes no mention of the banning of alcohol on school premises. Whether the Bill is relying on the definition of 'illegal drug' or 'dangerous object' to include alcohol is unclear.
35. We thus submit **clause 8** of the 2023 BELA should be revised to insert alcohol into the list of banned substances that are prohibited on school premises except for educational use. This will make clear that alcohol is banned on school premises in all circumstances except for educational purposes.

Changes to the preamble of the SASA

36. **Clause 40** of the BELA should be rephrased to encompass the full extent of the obligations imposed by section 7(2) of Constitution on government in relation to the right to basic education. It should therefore state that South Africa's new national

[10] Ibid section 16(1).
[11] Ibid section 18.

system for schools will "...facilitate the education of children through respecting, protecting, promoting, and fulfilling the right to basic education...".

INTRODUCTION

SECTION27's interest in BELA

37. SECTION27 is a public interest law organisation that works to influence, develop, and use the law to further the right to basic education and the right to access to healthcare in South Africa through research, advocacy, and litigation.

38. In 2017, SECTION27 made a submission on the Draft Basic Education Laws Amendment Bill, 2017 (hereafter referred to as the "2017 BELA") in which we commented on the extent to which the 2017 BELA promoted improved access to the right to basic education and effectively aligned legislation with the principles developed in court jurisprudence.

39. In 2022, SECTION27 made a submission on the 2022 BELA to the National Assembly, which proposed to amend multiple areas of the SASA and the Employment of Educators Act 76 of 1998 (EEA).

40. SECTION27 notes the passing of the 2023 BELA in the National Assembly and welcomes that it seeks to align the SASA and the EEA with jurisprudential development and appears to be a concerted attempt to address systemic issues in our schooling system, such as learner drop-out and the exclusion of undocumented learners. Furthermore, we note that the 2023 BELA, in some areas, represents a marked improvement over previous versions of BELA.

41. However, we believe that there are still significant issues with the 2023 BELA that need to be addressed before it aligns sufficiently with jurisprudential developments and government's constitutional obligations in respect of various rights such as the rights to basic education, equality, dignity, and the principle of the best interest of the child.

42. In this regard, SECTION27's submissions on the 2023 BELA will comment on the areas of the Bill relating to:

a. The ages at which schooling is compulsory;
b. Corporal punishment;
c. The prevention of learner dropouts and recovery of learners;
d. The definition of “required documents”;
e. The policy-making functions of SGBs, in particular, in respect of language, admissions and codes of conduct;
f. The checks and balances on the management and administration of school governance;
g. School closures and mergers.
h. The central procurement of LTSM;
i. The penalisation of parents that fail to cause their children to attend school;
j. The sentences proposed for persons and protests that obstruct or disrupt schooling;
k. Random searches of learners;
l. The rules regarding alcohol at school or at school functions; and
m. Changes to the preamble of the SASA.

AGES AT WHICH SCHOOL IS COMPULSORY

43. **Clause 1** of the 2023 BELA clarifies that basic education comprises of Grade R to Grade 12. Grade R is also defined as the reception grade.

44. **Clause 2** makes school attendance compulsory from Grade R in the year a learner turns six until a learner has completed Grade 9 or has turned 15, whichever occurs first.

45. **Clause 4** states that the admission age for Grade R is “four turning five by 30 June in the year of admission.” However, schools must give preference to learners that are subject to compulsory school attendance where schools have constrained capacity.

46. We welcome the proposal to make Grade R compulsory for all children. Early childhood development (ECD) programmes have been found to be beneficial for the school-readiness of children, their long-term educational outcomes, as well their general health (through the provision of school feeding schemes and immunisation programmes in ECD centres).[12] Supporting young children in their early years is also crucial to reducing poverty and inequality, but also a "fundamental and universal human right".

47. We further welcome the clarification that basic education extends to Grade 12, which is in line with the recent Constitutional Court judgment of *Moko v Acting Principal of Malusi Secondary School and Others*, in which the Court confirmed that basic education extends to Grade 12 and encompasses learners' access to their final Matric examinations.[13] In the case the Constitutional Court held –[14]

> *"To limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right."*

48. Good quality Grade R is important for child development and valuable preparation for Grade 1. Currently, an estimated 70% of children enrol in Grade R.[15] However, a 2013 evaluation found that Grade R had virtually no effect on the outcomes of children in the poorest quintiles.[16] The evaluation found that children in Grade R

[12] See Sneha Elango, Jorge Luis García, James J. Heckman, Andrés Hojman "Early Childhood Education" in *Economics of Means-Tested Transfer Programs in the United States* Robert A. Moffitt (ed) (2016) volume 2 accessed from https://www.nber.org/books-and-chapters/economics-means-tested-transfer-programs-united-states-volume-2/early-childhood-education; Arthur J. Reynolds "A Multicomponent, Preschool to Third Grade Preventive Intervention and Educational Attainment at 35 Years of Age" (2018) *JAMA Pediatrics* accessed from https://jamanetwork.com/journals/jamapediatrics/fullarticle/2668645;

[13] *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) paras 31-33.

[14] Ibid para 32.

[15] Grade R enrolment compared to grade 2 enrolment: calculations based on https://www.education.gov.za/Portals/0/Documents/Reports/School%20Realities%202021.pdf?ver=2022-02-07-094832-243

[16] https://resep.sun.ac.za/wp-content/uploads/2014/06/Grade-R-Evaluation-1-3-25-Final-Unpublished-Report-13-06-17.pdf

received a third of the resources that children in ordinary public-schools received in the basic education system.[17]

49. Our support for compulsory Grade R is therefore on condition that: Grade R is appropriately, and equitably resourced; emphasises play-based learning; and that there is adequate training and wages for practitioners in the Grade R sector.

50. An important component of quality early childhood development is play-based learning. As the UN Committee on the Rights of the Child ("CRC") has cautioned, there is a risk of overemphasising "formal learning" and academic achievement for young children "at the expense of participation in play".[18]

51. Significantly, Article 31 of the UN Convention on the Rights of the Child, which South Africa has ratified, protects children's rights to play and recreation. In its General Comment No 17,[19] the CRC emphasises the link between children's right to play and their educational development, particularly in their early years, as follows:

> *"[I]nclusive education and inclusive play are mutually reinforcing and should be facilitated during the course of every day throughout early childhood education and care (preschool) as well as primary and secondary school. While relevant and necessary for children of all ages,* ***play is particularly significant in the early years of schooling.*** *Research has shown that* ***play is an important means through which children learn****." (Our emphasis).*

52. School (including pre-school) therefore plays a significant role in facilitating children's right to play. As such, the CRC indicates that state parties should aim to ensure, amongst others, adequate indoor and outdoor space, as well as safe equipment to facilitate play, including for children with disabilities.

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[17] Own calculation based off the cost per public ordinary school learner (excluding Grade R) in 2011/12 compared to cost for Grade R enrolment. https://resep.sun.ac.za/wp-content/uploads/2014/06/Grade-R-Evaluation-1-3-25-Final-Unpublished-Report-13-06-17.pdf

[18] General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) at para 41.

[19] Ibid.

53. While SASA does currently refer to the Minister's power to determine norms and standards for "sport and recreational facilities", we believe that more specific emphasis on ***age-appropriate play material and equipment*** is needed, particularly with the introduction of compulsory Grade R.

54. We accordingly recommend that the 2023 BELA specifically require that minimum norms and standards (determined by the Minister in respect of learning and teaching support material in terms of section 5A of the SASA) provide for play material and equipment.

55. This can be achieved by altering the 2023 BELA to insert the following underlined subsection under section 5A of SASA:

> "5A Norms and standards for basic infrastructure and capacity in public schools
>
> …
>
> (c) in respect of provision of learning and teaching support material, the availability of—
>
> …
>
> <u>(vii) age-appropriate play material and equipment.</u>"

CORPORAL PUNISHMENT AND INITIATION

56. Corporal punishment is defined in **clause 1**, which states the following:

> "'corporal punishment' means any deliberate act against a child that inflicts pain or physical discomfort, however light, to punish or contain the child, which includes, but is not limited to—
>
> hitting, smacking, slapping, pinching or scratching with the hand or any object; kicking, shaking, throwing, throwing objects at, burning, scalding, biting, pulling hair, boxing ears, pulling or pushing children; and

forcing children to stay in uncomfortable positions, forced ingestion, washing children's mouths out with soap, denying meals, heat and shelter, forcing a child to do exercises which are not in accordance with the curriculum applicable to the learner or denying or restricting a child's use of the toilet;"

57. **Clause 10** states that corporal punishment "is abolished" and extends the prohibition of corporal punishment to during school activities or in hostels.

58. We welcome the move to define corporal punishment and to clarify that it is abolished within the full schooling environment. However, we believe that the abolishment of corporal punishment should be extended to include any punishment that is cruel or degrading, which would include non-physical forms of punishment. A report looking into the enforcement of the corporal punishment ban that was commissioned by the Centre for Child Law in 2014 also recommended that a definition should be wide enough to encompass verbal abuse.[20]

59. Abolishing any form of punishment that is cruel and degrading would be in line with numerous constitutional provisions, including the right to dignity (section 10); the right to freedom and security of the person which includes the right not to be treated or punished in a way that is degrading, cruel, or inhuman (section 12(1)(e)); the right of every child to appropriate alternative care when outside the family environment (section 28(1)(b)); the right of every child to be protected from "maltreatment, neglect, abuse or degradation" (section 28(1)(d)); the right of every child to have their best interests be considered as paramount in all matters concerning them (section 28(2)); and the right to basic education (section 29(1)(a)).

60. In circumstances where educators are prohibited from meting out physical punishment against children but are not willing, or properly equipped, to use

[20] Faranaaz Veriava *Promoting effective enforcement of the prohibition against corporal punishment in South African schools* (2014) at 20, available at http://www.ci.uct.ac.za/violence-schools/reports/promoting-effective-enforcement-of-the-prohibition-against-corporal-punishment-in-SA-schools.

positive forms of discipline, it has been observed that such educators will resort to using non-physical, but nevertheless damaging, forms of punishment.[21]

61. Non-physical punishment from educators that is cruel and degrading is linked to negative developmental outcomes in children, and may lead to psychological, emotional, and behavioural problems.[22] Verbal abuse against children, which is often used as a form of punishment, includes the consistent "...use of sarcasm, ridicule or denigrating statements, yelling, name-calling, insulting, mocking a student's appearance or disabilities and making negative comments about a child's family."[23] Non-verbal emotional abuse can include persistent patterns of "...neglect such as ignoring the student and behaviours such as assigning homework to impose discipline and using punishment for not responding correctly to an exercise/question."[24]

62. Cruel and degrading non-physical punishment from educators weakens the bond between a learner and their educators as well as their school environment.[25] This can lead to increased disengagement, worsened academic performance, and even increased instances of learners dropping out of school.[26] Because of the harmful impact of cruel and degrading punishment, as well as it being in clear disregard of the humanity of learners, its continued use by educators is a violation of the constitutional rights of learners.

63. In General Comment No. 8 (2006), the CRC clarified that any form of punishment that is cruel and degrading, including "...punishment which belittles, humiliates,

[21] See Carol Bower "Prohibition of Corporal and Humiliating Punishment in the Home" (2013) *PAN: Children* accessed from https://www.childlinesa.org.za/wp-content/uploads/prohibition-of-corporal-and-humiliating-punishment-at-home.pdf.
[22] See Finiki Nearchou "Resilience following emotional abuse by teachers: Insights from a cross-sectional study with Greek students" (2018) 78 *Child Abuse & Neglect* accessed from https://www.sciencedirect.com/science/article/pii/S0145213417304064.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

denigrates, scapegoats, threatens, scares or ridicules the child", is incompatible with the Convention on the Rights of the Child,[27] The CRC stated:[28]

> *"Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."* (Own emphasis).

64. We therefore submit, in line with the CRC's General Comment No. 8 and South Africa's international human rights and constitutional obligations, that any form of punishment that is cruel and degrading – whether it is physical or otherwise – should be abolished, alongside corporal punishment. To clarify the abolishment of "any form of punishment that is cruel and degrading," a definition of such should be provided in clause 1 of the 2023 BELA in line with the CRC's General Comment 8. Such a definition would thus include verbal and non-verbal "...punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."[29]

PREVENTION OF LEARNER DROPOUTS

65. **Clause 3** of the 2023 BELA proposes to insert a section in SASA that would place the duty of monitoring and encouraging school attendance on educators, school principals, and SGBs. The purpose of the provision is to promote learner attendance and reduce dropout rates.
    a. The role of educators would be to report the absence of a learner to the principal if a learner is not at school for more than three days without a valid reason.

[27] General Comment No. 8 (2006) "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)" accessed from https://www.refworld.org/docid/460bc7772.html para 11.
[28] Ibid para 18.
[29] Ibid para 11.

b. The role of principals would be to investigate the matter within 24 hours of receiving a notification of a learners' absence from an educator by making a "reasonable effort" to contact the parents "by whatever means are suitable for the circumstances of the school and the family concerned." Further, the principal would also report the matter to the SGB for "further intervention".
c. The role of SGBs would be to include rules dealing with punctuality and school attendance in their codes of conduct. Further, although this is not explicitly stated, the SGB would presumably be responsible for "further intervention" after the absence of a learner has been reported to them and the principal has made a reasonable effort to contact the learner's parent.

66. The massive scale of the problem of learners dropping out of school in South Africa is ongoing. As has been noted by the Zero Dropout Campaign, there are many factors leading to what is termed "disengagement," which is the phenomenon that leads to learners dropping out of school.[30] These factors include school-related factors such as poor academic performance, failure, and grade repetition. However, factors outside of school, such as poverty and inequality, domestic violence, learner pregnancy, and substance abuse, are also relevant.[31]

67. To appropriately address the issue of learner drop-out collective effort between all stakeholders, including local, provincial, and national government, is required to promote learner attendance and reduce dropout rates. Educators, principals, and SGBs cannot be given the sole responsibility of tracking and tracing learners, particularly when they have not been given the necessary training and resources to develop a comprehensive system to report absences and trace learners.

68. Therefore, we recommend that BELA should require government to form intergovernmental committees on the national and provincial levels to address learner dropouts. The committees could consist of representatives from the DBE,

[30] Zero Dropout Campaign 'Policy Brief' (18 June 2020) accessed from https://zerodropout.co.za/zero-dropout-policy-brief-2020/ at 2.
[31] Zero Dropout Campaign (n 13) at 4.

the Department of Social Development, the Department of Statistics South Africa, and National Treasury. On the national level the committee would have the obligation to meet regularly and would have the function of developing an evidence-based national plan to reduce learner dropouts. On the provincial level, committees would have the obligation to meet regularly and could have the function of investigating the scope of the problem of learner dropouts, its causes, and how best to monitor learner attendance. The provincial intergovernmental committees would further be given an obligation to assist schools with tracking and tracing learners who have been absent for more than three days and to offer such learners any necessary psychosocial support and assistance for them to continue their education.

69. Individual schools should be given the obligation to report to the provincial intergovernmental committee where learners have been absent for three or more days. This will allow government to develop a better monitoring system for school absences and dropouts and will assist government in identifying learners at risk of dropping out.

DOCUMENTATION REQUIRED FOR ADMISSION

70. **Clause 4** of the 2023 BELA states that schools must provide education to, and must serve the educational requirements of, learners for the duration of their school attendance, without any unfair discrimination.

71. Clause 4 also provides that when a learner or parent has not provided the "required documents" for admission, the school must nevertheless allow the learner to attend the school. The principal must advise the parents of the learner to secure the required documents.

72. "Required documents" for learners is expanded on in **clause 1** and defined as the following:

a. For learners whose parents are South African citizens, the required documents are the birth certificate of the learner, identity documents of the parents, and (in the case of the death of any parent) the death certificate of the parent.
b. For learners whose parents are not South African citizens but have permanent residence permits or temporary residence visas, the required documents are the learner's birth certificate, passport, study visa or permanent residence permit, and the parents' passports and permanent residence permits or temporary residence visas.
c. For learners whose parents are asylum-seekers or refugees, the required documents are the parent and learner's visas and the learner's birth certificate if they were born in South Africa.

73. Any amendments pertaining to the documentation learners are required to provide to schools or the Department of Education prior to or after admission into a public school must be aligned with the spirit of the case of *CCL v Minister of Basic Education* and Circular 1 of 2020. In the case of *CCL v Minister of Basic Education*,[32] the High Court in Makhanda declared Clauses 15 and 21 of the DBE's National Admission Policy for Ordinary Public Schools (Admissions Policy) to be unconstitutional and invalid.

74. Clause 15 of the Admissions Policy stated that a learner without an official birth certificate could be admitted to a school provisionally, provided that an official birth certificate was provided within three months of the learner's admission.

75. Clause 21 of the Admissions Policy stated that persons who are "illegal aliens" (phrasing of the Admissions Policy) must provide a school with proof that they have applied to the Department of Home Affairs to legalise their presence in South Africa when applying for admission to the school for their children or themselves.

[32] *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG).

76. The High Court ordered that schools are constitutionally obliged to accept learners and continue to serve their education need even in the absence of documentation. The Court stated that the required documentation needed by schools was limited to a birth certificate (where a learner had one) or any other alternative proof of identity, "...such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified."[33]

77. In recognition of the unconstitutionality of Clauses 15 and 21 of the Admissions Policy, the DBE published Circular 1 of 2020, which advised schools across the country that they should unconditionally admit learners without documentation and follow the order set out in *CCL v Minister of Basic Education*. However, some schools in South Africa remain unaware of their obligation to admit undocumented learners unconditionally and provide them with education.

78. This was recognised by the United Nations Committee on Economic, Social and Cultural Rights on 10 November 2021 in their response to South Africa's Follow-up to the Concluding Observations on its Initial Report.[34] In the Committee's response, the Committee found that South Africa has made "insufficient progress" to ensure access to education for undocumented migrant, refugee, or asylum-seeking learners – as is required in terms of South Africa's international obligations under the International Covenant on Economic, Social and Cultural Rights.

79. We submit further that labelling the documentation the government seeks under clause 4 as "required documentation" is a misnomer. The legal position is that in order to serve the educational needs of learners, all that is required is the birth certificate of the learner or (where a birth certificate is not available) any other form identification (such as a sworn statement or affidavit).

[33] Ibid para 135.
[34] 2021-104/CESCR/FU accessed from https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_FUL_ZAF_47179_E.pdf.

80. The “required documentation” listed in clause 4 of the 2022 BELA is wide-ranging, arbitrary, and not even provided for in the Admissions Policy or the Draft Admissions Policy. For example, it is wholly unclear why the Department of Basic Education would require, in any instance, a parent’s passports and permanent residence permits or temporary residence visas. Required documents in terms of clause 4 should be limited to a learner’s birth certificate or when that is not available, an alternative form of identification, including a sworn affidavit.

SCHOOL GOVERNANCE

Introduction

81. Both the 2017 BELA and the 2022 BELA sought to make amendments regarding two aspects of school governance. First, the Bills sought to make amendments regarding the policy making powers of SGBs. In our 2017 and our 2022 submissions, we pointed out that these are targeted at the power struggles between provincial education departments (PEDs) and historically white and privileged schools. Second, the Bills sought to impose additional checks and balances for the administrative and financial functioning of SGBs. In our 2017 and 2022 submissions, we note that this intervention appears to be targeted at historically Black and disadvantaged schools that struggle financially and administratively.

Admissions policies

82. **Clause 4** of the 2023 BELA states that schools must, without any unfair discrimination, admit, provide an education to, and serve learners’ educational requirements for the duration of their school attendance.

83. Clause 4 states further that SGBs must determine school’s admissions policies. However, the HoD, after consultation with the SGB, has the final authority to admit a learner.

84. Additionally, clause 4 requires that SGBs must submit their admission policies and any amendments to the HoD for approval, regarding which the HoD may approve the admissions policy.

85. When considering the admission policy of a school, the HoD must be satisfied that it takes into account the needs of the broader community in the specific education district in which the school is located. The HoD must also consider certain factors, including the best interests of the child, equality as provided for in section 9 of the Constitution, whether there are other schools in the community that are accessible to learners, the efficient and effective use of state resources, the resources available to the school, and the space available at the school. SGBs must review their admission policies every three years, whenever the factors above have changed, when circumstances so require, or when requested by the HoD.

86. Clause 4 also inserts timelines into the section, which were not present in the 2017 BELA. If there is no response from the HoD within 60 days after receiving the admission policy for approval, the admission policy will be regarded as having been approved. For amendments to their admission policies, the HoD will have 30 days to respond, failing which the amendment will be considered as having been approved.

87. Clause 4 further states that learners who have been refused admission to a school can appeal this decision to the MEC. The MEC must consider and decide the appeal within 14 days (this is reduced from 21 days in the 2017 BELA).

88. Additionally, an SGB may also appeal to the MEC if it is unhappy with a decision of the HoD regarding the approval of an admissions policy.

Language policies

89. **Clause 5** of the 2022 BELA, states that SGBs may develop language policies, subject to the Constitution, the SASA and any applicable provincial law. The language policy

of a public school must be limited to one or more of the official languages in the Constitution.

90. Clause 5 further states that SGBs must submit their language policies or any amendments to the HoD for approval, in terms of which the HoD may approve the policy

91. When approving a policy, the HoD must be satisfied that it considers the language needs of the broader community in the education district in which the school is located. Further, the HoD must consider factors including the best interests of the child, equality as provided for in section 9 of the Constitution, the changing number of learners who speak the language of learning or teaching in the school, and the need for effective use of resources and classroom space of the school. Additionally, clause 5 of the 2023 BELA adds that the HoD must consider section 6(2) of the Constitution, section 29(2) of the Constitution, and the school's enrolment trends.

92. Timeframes in which the HoD must respond to the submission of schools' language policy have been added in the 2022 BELA. The HoD has 60 days to respond, failing which the policy is considered as having been approved. For amendments to language policies, the HoD has 30 days to respond to the SGB, failing which the amendment will be considered as having been approved.

93. The HoD is empowered to direct a school to adopt more than one language of instruction when it is practicable to do so and after following specified procedural requirements. In using this power, the HoD must consider factors including the best interests of the child, section 9 of the Constitution and equity, the changing numbers of learners at a school who speak a certain language, the effective use of classroom space and resources at the school, and the language needs of the broader community in the education district in which the school is located.

94. The 2023 BELA further adds that when a school has been directed to adopt a language of instruction, the HoD must, before the implementation of the directive,

ensure that the school has all the necessary resources to provide adequate tuition in the required language. This includes ensuring there are adequate educators and LTSM.

95. After making the decision on whether or not to direct a school to adopt more than one language of instruction, the HoD must communicate this decision, including reasons for the decision, to the SGB and school and must notify the parents and the communities in which the school is located of the decision.

96. Further, the 2023 BELA provides for an appeal procedure for the SGB regarding the decision of the HoD in terms of the approval of a language policy or the directing of a school to adopt a language of instruction to the MEC.

Codes of conduct

97. **Clause 7** of the 2023 BELA subjects the power of an SGB to adopt a code of conduct subject to provincial laws, the SASA and the Constitution, after consultation with the learners, parents, and educators of a school. Clause 7 states that a code of conduct must consider the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school.
98. Codes of conduct must contain an exemption clause, allowing parents and learners to apply to the SGB, on just cause shown, to be exempt from complying with certain rules. Learners or parents would be given the chance to appeal the SGBs decision to the HoD. The HoD has 14 days to decide on the appeal and must give written reasons for its decision.

99. **Clause 7** of the 2022 BELA provides that disciplinary proceedings must be age-appropriate, comply with the best interest of the child principle and adhere to the principles of natural justice, fairness and reasonableness prescribed by the Constitution.

100. **Clause 41** of the 2022 BELA grants the Minister of Basic Education the power to make regulations on the management of learner pregnancy.

Recommendations regarding the potential amendments to the policy making functions of SGBs

101. The changes made to the BELA Bill from 2017 to 2023 regarding enhanced participation and procedural fairness between SGBs and the HoD and MEC are welcomed.

102. One of SECTION27's main concerns with the 2017 BELA was that it had the potential to erode the policy making functions of SGBs and undermine the cooperative governance model that the public schooling system is based on. Although SGBs in historically advantaged schools have at times used their policy making powers to uphold patterns of inequality, SGBs play an important role in promoting grassroots democracy and are often the bodies best suited to cater to the needs of a particular school and school community. Therefore, although SGBs must be prevented from upholding patterns of inequality through language and admissions policies and codes of conduct, the policy making powers of SGB's should not be made completely insignificant.

103. The Constitutional Court in *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* ("*Hoërskool Ermelo"*),[35] elaborated on the ideal functioning and nature of an SGB and stated that:[36]

> *"[A governing body] is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that come with it."*

[35] *Head of Department: Mpumalanga Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC).
[36] Ibid para 57.

104. The 2023 BELA now alleviates some of our concerns regarding the erosion of the policy making functions of SGBs by including amendments regarding the language and admissions policies that place measures of due process in the use of the HoD's power over SGBs. This is because, whereas the 2017 BELA did not provide for appeal mechanisms for SGBs where the HoD overrides SGBs' policies, the 2022 BELA does. Time-frames have also been inserted for the submission and approval of policies. SGBs maintain their roles as the primary policy-making bodies of schools, while the HoD is able to confirm such policies as constitutionally compliant.

105. We are, however, concerned by the deletion in the 2023 BELA of the obligation set out in the 2022 BELA on the MEC to provide reasons regarding the HoD's decision in relation to admissions and language policy where the HoD is not satisfied with the admissions or language policy. Reasons regarding the decision of the HoD are necessary for any meaningful appeal of the HoD's decision to take place.

106. Additionally, we are concerned that there is no procedure set out as to how the HoD is supposed to handle a language or admissions policy that the HoD is not satisfied with. In the 2022 BELA, if the HoD were not to approve of the policy, then the HoD would send it back to the school with necessary recommendations. This is absent in the 2023 BELA, which states only that the HoD may approve the policies.

107. We strongly recommend that the obligation of the HoD to give reasons where he is not satisfied with the language or admissions policy of a school to the SGB is reinserted into the BELA. Further, it is pertinent that the steps to be followed by the HoD or the school (where it is not appealing the decision of the HoD) are set out when the HoD is not satisfied with the admission or language policies. It is currently unclear as to what the implication would be of the HoD not being satisfied with the language or admission policy.

108. In terms of the power of the HoD to direct a school to adopt more than one language of instruction specifically, we believe that the 2023 BELA better aligns with the jurisprudence of the courts.

109. In *Hoërskool Ermelo*, the Constitutional Court stated that the HoD would be able to override an SGB's language policy, but only after due process and on reasonable grounds when pursuing a legitimate purpose.[37]

110. We welcome the fact that the 2023 BELA directly aligns the SASA with the *Hoërskool Ermelo* judgment by allowing the HoD to issue a directive to public schools to adopt more than one language of instruction, subject to the HoD:

    a. Being required to consider a number of normative and practical factors;
    b. Ensuring that there is reasonable cause for such a directive, and
    c. Following substantial procedural steps.

111. Additionally, before such a directive is implemented, the HoD must ensure that the school has the necessary materials and capacity to fulfil the directive, which ensures that the directive is capable of fulfilment. The SGB may also appeal the decision of the HoD to the MEC.

112. However, the 2023 BELA does not address a concern raised by SECTION27 in its previous submissions, which is that, because of capacity constraints, it is likely that the HoD will not be able to substantively engage with the policies of schools within the time frames provided for in the Bill.

113. In circumstances where the HoD has failed to respond to the submission of the policy of the school, the policy is regarded as having been approved. We submit that this, combined with the short timeframes for the HoD to review schools' policies,

[37] Ibid para 73.

may result in unlawful or unconstitutional admissions and language policies falling through the cracks and being approved without the consideration of the HoD.

114. Particularly at the commencement of BELA, where all SGBs will need to submit their language and admissions policies to the HoD, the HoD is given only 60 days to review the policies. If the HoD is unable to do this, then the policy would be "regarded as having been approved."

115. We believe that a period of 60 days is too short a time for the HoD to consider the language and admissions policies of all the SGBs in their respective provinces. As an organisation, we commonly encounter instances of discriminatory policies enacted and maintained by SGBs, which negatively impact the rights of learners at public schools in South Africa. It is thus vital that the HoD adequately considers each and every one timeously and scrupulously.

116. In order to ensure the policies of SGBs are subject to scrutiny regarding their constitutionality, we make two recommendations to capacitate the HoD:
    a. For an office, specialising in reviewing school policies, to be established in terms of BELA under the auspices of the HoD. This will allow for a more effective system to review school policies within the limited time frame.
    b. For a well-functioning individual complaints mechanism to be established for interested parties to challenge school policies that they believe are exclusionary, unlawful or unconstitutional. This will ensure that interested parties – such as learners, parents, educators, or community members – are able to assist the HoD in utilising its power to review school policies. This will also ensure that any school policies that are unlawful are brought to the attention of the HoD outside of the review periods.

117. An example of where a complaints mechanism may be well-suited to vindicate the rights of people would be a complaint received by our advice office regarding a public school located in the North West province. Despite the community surrounding the relevant school predominantly speaking Tswana, the relevant

school only offers English as a first language and Afrikaans as a second language. A parent in the community feels that such a policy deprives him and his children of their cultural heritage and right to learn in their language of choice. If an individual complaints mechanism was established, the parent would be able to make their complaint directly to the HoD or office responsible for reviewing policies. The HoD would then be able to exercise their power to review the policy of the SGB, and, if appropriate, to issue a directive for the SGB to adopt another language in their policy.

118. With regards to the exemptions clause in codes of conduct, we submit that BELA should expand on the determining factors that would inform the meaning of "just cause", which a learner or parent must comply with in order to acquire an exemption from the code of conduct. Expanding on the determining factors that may assist SGBs to apply the exemption clauses in line with what SGBs consider to be "just cause" is unlikely to be monolithic and should thus be guided by certain uniform factors. Suggested factors could be:
    a. the rights of learners to enjoy their culture and practice their religion;[38]
    b. the duty of schools to accommodate the diverse religious and cultural beliefs and religious observances of learners;[39]
    c. The ability of the school to reasonably accommodate the learner;[40]
    d. the medical circumstances of the learner; and
    e. the best interests of the learner.

119. With regards to schools' policies concerning learner pregnancies, section 9(3) of the Constitution prohibits discrimination on the basis of pregnancy, and section 5(1) of SASA prohibits schools from discriminating against learners in any way. However, it is evident that instances of discrimination against learners based on their pregnancy

[38] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC) para 65-66.
[39] Ibid para 114.
[40] Ibid para 78; 95.

status are still occurring.[41] This has serious implications for learners' right to education, equality, and dignity.

120. We recognise the publishing of the Policy on the Prevention and Management of Learner Pregnancy in Schools (2021). However, this Policy is not legally binding. Therefore, we submit that there must be a clear and express provision in the SASA stating that direct or indirect discrimination against learners on the basis of pregnancy is prohibited.

121. Finally, concerning the disciplinary proceedings for learners, clause 7 is more specific than what was stated in the 2017 BELA, which was that disciplinary hearings must "...not be rigid and adhere to the principles of justice, fairness and reasonableness prescribed by the Constitution." We welcome the addition that disciplinary proceedings must be age-appropriate and comply with the best interest of the child principle.

FUNCTIONING AND ADMINISTRATION OF SGBS IN HISTORICALLY DISADVANTAGED SCHOOLS

122. The 2022 BELA also has the broad purpose of promoting good governance and minimising opportunities for corruption. **Clause 16** of the 2022 BELA provides that SGB members may co-opt members from within the community, as well as from outside the community, to assist the SGB in discharging its functions. **Clause 20** states that SGB members need to report on "...any direct or indirect personal interest". **Clause 21** of the 2022 BELA states that SGB members may not be remunerated for performing their duties or attending school activities and SGB meetings. **Clause 23** states that the chairperson of the finance committee must be a parent member who is not employed at the school, subject to the proviso that this

[41] See, for instance, a recent article in News24 regarding the exclusion of four learners from a school in the Eastern Cape based on their pregnancy status. Malibongwe Dayimani "Eastern Cape education dept probes allegations that a school told 4 pregnant girls to stay home" (14 March 2022) accessed from https://www.news24.com/news24/SouthAfrica/News/eastern-cape-education-dept-probes-allegations-that-a-school-told-4-pregnant-girls-to-stay-home-20220314.

is only a requirement where it is "reasonably practicable." **Clause 26** states that an SGB must seek the approval of the MEC to enter into lease agreements for any purpose, except where the lease is of the immovable property of the school for less than a year. **Clause 28 of the 2022 BELA provides that the budget of a school must be presented at a general meeting and a document giving explanations** regarding the budget must be provided to parents. Deviations or reallocations from the budget may only occur after a general meeting has been convened specifically for that purpose and approved by a majority of the parents present and voting. **Clause 29 extends the provision** regarding state employees being paid any additional remuneration by stating that SGBs must provide the full details of any benefit. **Clause 31** of the 2022 BELA concerns the duty of SGBs to keep detailed records regarding schools' financial affairs and draw up an annual statement, which must be presented to a general meeting of parents. **Clause 32** of the 2022 BELA empowers the HoD to authorise an investigation into the financial affairs of a school and to request the Auditor-General to audit the financial records and statements of a school or to appoint financial auditors or financial investigators to do this. Further, the clause states that an SGB must provide the HoD with quarterly reports on all income and expenditure.

123. In our 2017 submission, we noted that significant obstacles faced by SGBs in historically disadvantaged schools were systemic in nature. In our work, we had found that the necessary training for SGBs was not being provided in circumstances where many of the functions of SGBs are skills-based, which had led to school staff taking on the SGB's functions or SGB's functioning inadequately. We noted that SGBs were often unaware of their duties or lacked the confidence to make decisions for the school. In particular, we have observed that in some circumstances only the leading five SGB members are given training and the content of the training is vague and does not cover the full scope of their responsibilities. This disempowers SGBs and prevents them from performing their duties. School principals and SGBs demonstrated a lack of collaboration and information sharing, impeding the ability of SGBs to perform their functions. Further, differing levels of education influenced the power dynamics between school staff and SGBs.

124. While we welcome measures for accountability and good governance, we note that the systemic problems SGBs faced are still not addressed in the 2022 BELA. The obstacles the SGBs at historically disadvantaged schools face can only be addressed through measures to facilitate the capacity building of SGBs, and through addressing the power dynamics between school staff and SGBs. This means giving comprehensive training to all members of SGBs on their responsibilities after every election.

Withdrawal of the functions of SGBs and dissolving an SGB

125. Section 22 of SASA currently states that the HoD can withdraw a function of an SGB on reasonable grounds.

126. In our 2017 submission, we noted that while SGBs may sometimes be dissolved or have their functions withdrawn, this must be done in a manner that does not undermine the principles of local governance and participatory democracy, and thus, that there should be guidelines as to when the HoD should utilise its power.

127. We therefore objected to the fact that the 2017 BELA stated that the HoD was empowered to withdraw an SGB's functions, or dissolve an SGB, purely on "reasonable grounds", without any guidance as to when this would be or how procedural or substantive fairness would be ensured.

128. **Clause 15** of 2023 BELA empowers the HoD to withdraw one or more functions of an SGB. This must be done on reasonable grounds and after fulfilling certain requirements. There is a consultation process the HoD must first follow, and the HoD must give due consideration to any representations given by the SGB. In the case of urgency, the HoD can withdraw the functions of an SGB on an interim basis without prior communication with the SGB. After this occurs, the HoD must immediately give the SGB written reasons for its actions and grant the SGB an opportunity to make representations before making a final decision. Provision is

made for the appointment of qualified persons for a certain amount of time to perform the functions of the SGB and build the capacity of the SGB. Clause 15 further provides for an appeal process to the MEC.

129. **Clause 21** of the 2023 BELA empowers the HoD to dissolve an SGB, on reasonable grounds, where an SGB has ceased to perform the functions allocated to it in terms of the SASA or any provincial laws. There is a consultation process the HoD must follow and an appeal process to the MEC is provided.

130. We welcome the addition of an appeal process and public participation requirements for the withdrawal of the functions and dissolving of an SGB, both of which were not present in the 2017 BELA. This allows for a greater amount of procedural fairness and accountability for the decisions of the HoD.

131. However, we note that there is still no guidance for the HoD as to what reasonable grounds would be to dissolve or withdraw the functions of an SGB. Without guidance on what reasonable grounds constitute, the power to withdraw the functions of SGBs or to dissolve them could be exercised arbitrarily. For the purposes of greater certainty, therefore, we submit that guidance as to when the HoD would be empowered to exercise these powers must be included in the BELA.

Meaningful Engagement

132. **Clause 37** seeks to insert a new Section 59A of SASA. The proposed section is a broad overview of the processes to follow when a dispute arises between the HoD or MEC and the SGB. The clause merely provides procedural steps for dealing with a dispute without providing for any normative criteria as to <u>how</u> parties should deal with a dispute. It is thus our view that the section fails to incorporate meaningful engagement as a remedy in resolving disputes.

133. The Constitutional Court has developed the concept of meaningful engagement in various cases raised in housing jurisprudence[42] and thereafter in the education cases in *Welkom*[43] and *Rivonia*.[44] The courts' guidance paves the way to incorporate meaningful engagement within legislation. BELA should create space to pre-empt the possible disputes and infuse meaningful engagement clauses, which include consultation between SGBs and governmental authorities when a dispute arises in implementation of policy or the discriminatory nature of policy.[45] O'Regan J in a dissenting judgment in *MEC for Education: Kwazulu-Natal and Others v Pillay* stated the importance of engagement when resolving disputes:[46]

> *"It needs to be emphasised, however, that the strength of our schools will be enhanced only if parents, learners and teachers accept that we all own our public schools and that we should all take responsibility for their continued growth and success. Where possible processes should be available in schools for the resolution of disputes, and all engaged in such conflict should do so with civility and courtesy. By and large school rules should be observed until an exemption has been granted. In this way, schools will model for learners the way in which disputes in our broader society should be resolved, and they will play an important role in realising the vision of the Preamble to our Constitution: a country that is united in its diversity in which all citizens are recognised as being worthy of equal respect."*

134. Chenwi and Tissington explain that "meaningful engagement is more democratic, flexible and responsive to the practical concerns that these rights raise. It can promote social change on the ground by creating a voice for the poor and

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[42] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 723 (CC).

[43] *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC) ("*Welkom*").

[44] *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) ("*Rivonia*").

[45] *Welkom* and *Rivonia*.

[46] *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 185.

marginalised in South Africa."[47] In so doing the authors propose that the process should:

> "be well structured, coordinated, consistent and comprehensive and not be misleading; take into consideration language preferences; and enable individuals or communities to be treated as partners in the decision-making process."

135. In the context of education, SGBs should be afforded the opportunity to be meaningfully heard. Fairness and transparency must be catered for in the clause. We are of the view that the clause must be expanded to provide for meaningful engagement processes as pronounced by the courts and stated in the Constitution.

136. We recommend incorporating normative criteria to the clause in terms of which meaningful engagement would take place to allow the process of engagement to go beyond just procedural fairness. Normative criteria guiding the process of meaningful engagement could include transparency, flexibility, practicality,[48] as well as the best interests of the child principle.[49]

MERGERS AND CLOSURES

137. **Clause 13** of the 2023 BELA seeks to amend section 12A of the SASA by expanding on and clarifying what the MEC's obligations are and the procedure to be followed when it is exercising its power to merge two or more schools.

[47] L Chenwi and K Tissington Engaging meaningfully with government on socio-economic rights: A focus on the right to housing" p 8 https://docs.escr-net.org/usr_doc/Chenwi_and_Tissington_-_Engaging_meaningfully_with_government_on_socio-economic_rights.pdf.
[48] Gustav Muller, "Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership," Stellenbosch Law Review 22, no. 3 (2011): 742-758, page 756. Muller discusses the benefits of meaningful engagement in the context of evictions.
[49] *Rivonia* para 2.

138. SECTION27 periodically receives complaints from SGBs and community members who seek advice and assistance on their schools being merged with other schools. In many cases we find that the SGB and community members are opposed to plans by the department to merge their school with another school. There are multiple reasons why the SGBs and community members oppose school mergers, including communities wanting a school which belongs to that particular community. However, we have also noticed that what exacerbates the tensions and creates animosity between the community and department representatives is the lack of meaningful engagement.

139. We welcome the clarification of the procedure to be followed by the MEC when merging schools. Particularly the added requirement that the school principal must ensure that every learner receives a notice which the learner must give to their caregivers and the additional requirement of communicating the intention to merge through any other forms of communication which ensure that the information is as widely spread as possible. Moreover, the clarification of the process to be followed by the MEC after the submission of representations from interested parties and the SGB is welcomed.

140. However, we are concerned that the obligation on the MEC to provide reasons for the decision in merging schools that was in the 2022 BELA has been taken out of the 2023 BELA. Such an obligation would encourage transparency and openness in governance. We therefore propose that this obligation is reinserted.

141. While the amendments speak to the rationalisation or redeployment of the workforce at the "new single public school" we note that the amendment does not speak to ensuring that the new school is able to accommodate all the new learners. From our experience with client communities and SGBs, the issues that are prominent when schools are merged include parent's inability to afford the school uniform of the new school their child attends, the failure to provide scholar transport to learners to their new school which is sometimes further away from them, as well as inadequate classroom space and insufficient sanitation facilities.

142. In 2021, Makangwane Secondary School, a client school of SECTION27 located in the Capricorn district in Limpopo, was merged with another school in a neighbouring village. The school which Makangwane was merged with, Ramohlakana Secondary School did not have sufficient sanitation infrastructure to accommodate the increased number of learners it would have to accommodate after the merger. The department nevertheless persisted with merging the two schools prior to the construction of the necessary sanitation infrastructure. During February 2022, another Limpopo SGB whose school was merged with another one, approached SECTION27 and amongst their complaints, they noted that transportation had not been provided to transport the learners to the new school. Another one of our parent clients in the Free State whose school had been merged with another approached SECTION27 because the community could not afford the required school uniform at the new schools.

143. We recommend that, when a school is merged with another, the amendments be revised to require the MEC to ascertain whether the new school has the infrastructure to accommodate the increased number of learners at the school. We also recommend that the MEC be required to ensure that transportation arrangements are put in place and that any challenges involving school uniforms are addressed before the commencement of the merger.

LTSM

144. **Clause 16** of the 2022 BELA gives the power to the HoD to centrally procure identified LTSM for schools, in consultation with the SGB and on the basis of efficient, effective, and economic use of public funds or uniform norms and standards.

145. In *Minister of Basic Education v Basic Education for All* (*BEFA*),[50] the Supreme Court of Appeal declared that:[51]

> *"It is [...] the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed."*

146. The importance of the provision of a textbook to every learner for every relevant subject before the commencement of teaching cannot be overemphasised. In the *BEFA* judgment, the SCA further stated:[52]

> *"Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against."*

147. Despite the recognition of the necessity of textbooks as a component of the right to basic education, shortages of textbooks and other LTSM (such as stationery) are commonplace. As recently as March 2022 the Khula Community Development Project was forced to take the government to court for its failure to deliver textbooks and stationery to schools for the 2022 academic year.[53]

[50] (20793/2014) [2015] ZASCA 198.
[51] Ibid para 53.
[52] Para 49.
[53] Khula Community Development Project v The Head of Department, Eastern Cape Department of Education and Others (Eastern Cape Division of the High Court, Makhanda) (unreported, case number 611/2022).

148. The High Court, in granting the order sought by the Applicant, noted that the HoD's conduct undermined the "...governance principles of efficiency, transparency, responsiveness, equity and accountability."[54] This is because, amongst other reasons, including the immediately realisable nature of the right to basic education, the information the HoD had provided in the course of litigation was vague and lacked detail.

149. The *Khula Community Development Project* case is highly concerning, not least for the fact that textbooks and stationery had not been delivered to schools well into the first term, but also because it was the HoD who was responsible for procuring and delivering such textbooks and had failed to do so.[55]

150. Therefore, a centralised system for the procurement of LTSM, as envisaged by clause 16 of the 2023 BELA, was already in place. However, because of alleged "unprecedented budget shortfalls" the HoD had not delivered on its duty to ensure schools had textbooks and stationery.[56]

151. According to section 5A (1)(c) of the SASA the Minister of Basic Education has the obligation to prescribe norms and standards for the provision of LTSM. In 2014, the DBE published the Draft National Policy for the Provision and Management of Learning and Teaching Support Material (2014) (Draft LTSM Policy). As noted in our submission on the 2017 BELA, SECTION27 was largely supportive of the Policy, which we expressed in our comments on the Policy in 2014. However, to this day, a National LTSM Policy has still not been finalised.

152. The Draft LTSM Policy aimed to centralise procurement of LTSM at the provincial level. This was to occur in line with the principles set out in the Policy, which also set out clear obligations for SGBs and Education Districts.

[54] Ibid para 60.
[55] Ibid para 11.
[56] Ibid para 11.

153. There is no indication in the 2023 BELA as to how the Policy and clause 16 of the 2023 BELA will operate together. Simply centralising procurement without putting in place principles to guide governance and checks and balances will not necessarily lead to improved delivery of LTSM, as was evident in the *Khula Community Development Project* case.

154. We believe it is urgent for norms and standards to be passed for the procurement of LTSM. As we noted in our submission on the 2017 BELA, a clause allowing for centralised procurement of LTSM will not, on its own, address the many issues associated with the procurement of LTSM for schools.

155. If clause 16 is to be retained, we recommend, in line with the *Khula Community Development Project* judgment, that alongside the standards of efficient, effective, and economic use of public funds or uniform norms and standards, clause 16 must reiterate that the procurement of LTSM must also occur in line with section 195 of the Constitution, which sets out the principles and values governing public administration including transparency, responsiveness, accountability and equity.

INCREASE IN PENALTIES FOR PARENTS WHO FAIL TO CAUSE THEIR CHILDREN TO ATTEND SCHOOL

156. **Clause 2** of the 2023 BELA states that any parent who fails to cause their learner to attend compulsory schooling, where there is no "just cause" and the HoD has given written notice, is guilty of an offence and, if convicted, is liable to a fine and/or to a term of imprisonment not longer than 12 months.

157. While the reduction in the proposed period of imprisonment in the 2023 BELA compared to the 2017 BELA – from 6 years to 12 months – seems less draconian, the sentence of 12 months still amounts to double the maximum imprisonment period in SASA currently.

158. It is well known that habitual school absenteeism is harmful to both learners and the wider community, yet criminalising parents who do not ensure the attendance of their children would potentially have the effect of depriving a child of a breadwinner or caregiver. In particular, the imprisonment of parents would deprive children of their right to parental care.[57] There has been no indication that the prosecution of parents actually improves attendance rates and evidence shows that these measures are often counterproductive.[58]

159. According to section 28(2) of the Constitution, a child's best interests are paramount in every matter concerning the child. It is highly questionable whether imposing a prison sentence or a fine on parents for school absences is in the child's best interest.

160. There are many cases where the absenteeism of a child from school is due to factors beyond a parent's control, including lack of transportation and socio-economic circumstances. Imposing a prison sentence and/or fine on a parent for not causing their child to attend school would be to individualise a systemic problem.[59] Instead of assisting families and learners to prevent school absenteeism with supportive measures, the SASA simply incarcerates and/or fines individual parents.

161. Imposing such sentences also has the effect of stigmatising parents and learners in their communities. As stated by Donoghue:[60]

> *"Children may experience ostracism and alienation within their neighbourhoods which may be compounded by community perceptions that prisoner parents are intrinsically bad parents . . . inmate mothers are not only seen to offend against society, but also against their role as mothers'. In addition, children of imprisoned mothers experience feelings of abandonment which can lead to a 'profound sense of loss', depression, 'difficulty sleeping and*

[57] The Constitution section 28(1)(b).
[58] Jane Donoghue "Truancy and the Prosecution of Parents: An Unfair Burden on Mothers?" *The Modern Law Review* at 244.
[59] Ibid at 219.
[60] Ibid at 235.

concentrating', together with other symptoms 'closely associated with post-traumatic stress disorder'."

162. Finally, the criminalisation of not causing one's child to attend school has the potential to disproportionately adversely affect mothers, who are often seen as the primary actors responsible for a family's well-being and are more likely to be the custodial parent. [61]

163. Therefore, we recommend that BELA removes the criminal penalty on parents who fail to cause their children to attend school in section 3(6)(a) of the SASA. However, if the criminal penalty is to be retained, there should be no increase in the maximum possible sentence for parents who are found guilty. Further, any imposition of a prison sentence or fine on a parent based on the absence of their child from school should be a measure of last resort (if ever utilised) and other methods of securing the attendance of the child – such as support measures for both the learner and their parents – should be promoted.

164. In this regard, if the criminal penalty on parents in section 3(6)(a) of the SASA is to remain, we reiterate our endorsement of the Centre for Child Law's (CCL) recommendation made in 2017 for a section to be added to the SASA that would state:

"Any court sentencing a person in relation to a conviction mentioned in [section 3 (6) or 3 (7)] must consider the effects of such period of imprisonment being contemplated on the child or children concerned, keeping in mind the need to protect persons below the age of 18 from detention, except as a measure of last resort, and where the person being sentenced is a caregiver, the importance of alternatives to imprisonment in order to prevent the separation of children and parents."

[61] Ibid at 230.

PENALTY FOR PERSONS WHO DISRUPT, HINDER, OBSTRUCT OR DISTURB SCHOOL ACTIVITIES

165. **Clause 2** of the 2023 BELA proposes to add a provision to the SASA that would make it an offense, which is punishable by a fine and/or imprisonment for up to twelve months, for any person to unlawfully and intentionally disrupt, hinder obstruct or disturbs school activities or schools in the performance of their official activities.

166. An almost identical clause was provided for in the 2017 BELA, except that clause 2 of the 2023 BELA states that the disruption must be "unlawful and intentional" (rather than just "wilful") and the maximum term of imprisonment was set as six years in the 2017 BELA as opposed to 12 months in the 2023 BELA.

167. In SECTION27's 2017 and 2022 submission we noted that we are critical of any protest action that disrupts school activities and jeopardises the right to basic education. In the social unrest in Gauteng and KwaZulu-Natal in 2021 the cost of damage to schools was estimated to be over R141 million.[62] This will no doubt negatively impact the right to education for thousands of learners.

168. In 2016, after mass protests in Vhembe District, Limpopo, twenty-four schools were destroyed. With the ailing infrastructure that already exists in Limpopo, the province suffered a further set-back. Government having to reallocate funds to the schools that were destroyed in the protests hindered the progression of building and maintaining school infrastructure.

169. We welcome the addition of "unlawfully and intentionally" to the proposed provision and we believe that this will exclude the applicability of the provision to those who are protesting lawfully.

[62] Department of Basic Education "Unrest damage to KZN & Gauteng schools; School reopening readiness; with Minister" (3 August 2021) accessed from https://pmg.org.za/committee-meeting/33334/.

170. However, while SECTION27 does not condone unlawful conduct that materially compromises the right to education and best interests of children, there already exist several laws that may be used to deter such conduct. This includes, for example, penalties under the Regulation of Gatherings Act or under criminal law. SECTION27 therefore endorses Equal Education and Equal Education Law Centres' submissions on the 2022 BELA that clause 2(b) be abandoned in its entirety.

RANDOM SEARCHES

171. **Clause 8** of the 2023 BELA expands the power of the principal of the school or their delegate to search a group of learners to include the power to search an individual learner.

172. Section 8A of the SASA states that searches may occur only after all relevant factors have been taken into account, which include the best interests of learners, the safety and health of the learners being searched and the other learners at the school, reasonable evidence of illegal activity, and all other evidence.

173. We recognise the need, in some instances, for searches of individual learners as opposed to groups of learners to be conducted. However, individual searches, as well searches of groups of learners, must occur in a constitutionally compliant manner that protects the rights of learners.

174. For this to occur, we believe that schools need further guidance on how to practice their discretion to search learners where there is reasonable suspicion in a particular case beyond those set out in section 8A of the SASA.

175. In the South African Human Rights Commission's (SAHRC) submission on the Education Laws Amendment Bill, 2007, the SAHRC identifies a number of problems with section 8A of the SASA.[63] In particular, the legislative framework may allow

[63] SAHRC "Comment on the Education Laws Amendment Bill, 2007" accessed from https://www.sahrc.org.za/index.php/sahrc-publications/submission-on-legislation.

principals or their delegates to take on "police roles" and does not give guidance as to what extent a principal or their delegate may search learners. The SAHRC states:

> *"...section 8A(2)(e) states that the body search "must be conducted in a manner that is reasonable and proportional to the suspected illegal activity". This does not indicate whether the body search will include a "patting down", strip-searching or internal cavity searches. The more invasive the search the more concerning the proposed amendments become. The Commission would find it difficult to support body searches that include physical contact between educators and learners as the potential for a violation of rights becomes too high."*

176. In order to prevent the violation of learners' rights (including their rights to dignity, privacy, and bodily integrity)[64] and to give guidance to principals as to when and how searches may occur, we recommend that regulations are developed regarding the searching of learners and that the Minister of Basic Education is granted the power to make regulations on the search of individuals and groups of learners. We further recommend that rules regarding the search of learners be provided for in every school's code of conduct.

THE PROHIBITION OF LIQUOR

177. The SASA currently makes no mention of liquor in relation to 'Random search and seizure and drug testing at schools.' Section 8A was limited to dangerous objects and illegal substances. The 2017 BELA proposed to change this to include the prohibition of liquor, prohibited substances, and illegal drugs and provided a blanket ban on liquor on school premises – except for legitimate educational purposes.

178. **Clause 8** of the 2022 BELA provided that no person may bring liquor, have liquor in his or her possession, or consume or sell liquor on public school premises, or during any public school activity. However, clause 8 in the 2023 BELA no longer contains

[64] The Constitution sections 10, 14, and 12.

the provision banning alcohol from school premises. While we submit that the definition of "drug" incorporates liquor, the lack of express mention of liquor in clause 8 is concerning.

179. It is important to keep alcohol out of the reach of children. Having alcohol available in schools or during school activities at any time undermines this objective. A blanket ban on the presence of alcohol on school property or during school activities is the best way to ensure that children will not have access to alcohol. We, therefore, recommend that clause 8 of 2023 BELA expressly include liquor as a substance that is prohibited on school premises except for educational purposes.

CHANGES TO THE PREAMBLE OF SASA

180. Clause 42 of the 2023 BELA proposes to amend the Preamble of the SASA to add that South Africa's new national system for schools will "...facilitate the education of children through the promotion and protection of the right to basic education".

181. We welcome the recognition of the right to basic education in the Preamble. However, according to section 7(2) read with section 29(1)(a) of the Constitution, the duty of the state (and by extension public schools) is not only to protect and promote the right to basic education, but also to respect and fulfil the right to basic education.

182. We therefore suggest that the relevant part of the sentence be rephrased to encompass the full extent of the obligations imposed by the right. It should therefore be phrased as –

> ...facilitate the education of children through respecting, protecting, promoting, and fulfilling the right to basic education.

CONCLUSION

183. SECTION27 would welcome the opportunity to make oral submissions.

Should you require any further information, kindly contact Mila Harding at harding@section27.org.za or Zeenat Sujee at zeenat@section27.org.za.