

The BELA Act: A brief overview of some of the main issues

Faranaaz Veriava

School of Law, University Of Pretoria

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Purpose

- Update the legal framework for schooling
- SASA & The Employment of Educators Act
- Biggest reform since 2005
- **Alignment with developments jurisprudentially***
- Alignment with law and policy gaps
- Addressing systemic issues that have come to the fore

Overview

1. BELA ACT TIMELINE
2. DEFINITION OF BASIC EDUCATION & INTRODUCTION OF GRADE R
3. ENFORCEMENT OF COMPULSORY EDUCATION
4. ENFORCEMENT OF THE CORPORAL PUNISHMENT BAN
5. LEARNER RETENTION
6. REGULATING HOME SCHOOLING
7. RANDOM SEARCH PROVISIONS
8. GENERAL COMMENTS ON SGB POLICY MAKING FUNCTIONS
9. CODES OF CONDUCT
- 10. THE ADMISSION & LANGUAGE POLICY MAKING FUNCTIONS OF SGBS**
- 11. WHAT ARE THE LESSONS TO BE LEARNT FROM BELA FOR PRIVATE EDUCATION?**

Timeline of BELA Act

- Bill introduced by DBE in **2017** - 5000 submissions received.
- Revised Bill only introduced in Parliament in **2021** -11 264 participants and 32941 written submissions. National and Provincial Public hearings.
- Revised Bill passes in NA in **2023**.
- The Bill then goes to the NCOP and a new set of provincial hearings. New amendments to SGB powers on language and admission policies.
- **16 May 2023** on the eve of the election, the NA votes on latest version. 78 MPs voting "no" and 223 voting in support of the bill.
- GNU established and DA, Basic Education Minister Siviwe Garube appointed.
- President CR finally signs the BELA on 13 September 2024 . School governance provisions not yet in effect for the next 3 months to allow for further consultations.

Compulsory education and basic education definition

- Basic education **definition** includes grade R to grade 12
- The DBE's recognition 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*.
- **S2** makes grade R compulsory.
- It is essential that compulsory Grade R is accompanied by a measurable improvement in quality education. This requires appropriate and equitable resourcing, learning support and qualified teachers who can implement play-based learning programmes

Criminal sanction to enforce compulsory education

- S2 of BELA seeks to enforce compulsory education
- ***The penalisation of parents who fail to cause their children to attend school*** - 12 mnths or a fine. Or Both
- Fails to recognise what causes children not to attend school .
- ***The penalisation of persons and protests that obstruct or disrupt schooling***
- 12 mnths imprisonment or a fine. Or Both
- 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.

Strengthening of corporal punishment ban by including a definition

- **“corporal punishment”** - 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— (a) hitting, smacking, slapping, pinching or scratching with the hand or any object; (b) kicking, shaking, throwing, throwing objects at, burning, scalding, biting, pulling hair, boxing ears, pulling or pushing children; and (c) 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.’
- Prohibition of CP includes during a school activity, or in a hostel accommodating learners of a school.
- Subj to penalisation ito of the SASA - a fine and imprisonment of 12 months

Learner retention/dropouts

- S3 - If a learner is absent for three consecutive school days without valid reason, the class teacher concerned must report the absence to the principal who must investigate and address with SGB.
- It will not be effective to make individual schools (and their principals, educators and SGBs) solely responsible for tracking learners and providing further interventions for them.
- Look at evidenced-based interventions, rather, a collective effort between all stakeholders is required. See Zero Drop Out

Home Schooling

- MEC Approval subject to application (a) that:
- education at home, is in the **best interests of the learner**;
- the parent understands what home education is and accepts full responsibility for the implementation of home education for the learner;
- the proposed home education programme is **age and grade appropriate and predominantly covers** the acquisition of content and skills at least comparable to the relevant national curriculum determined
- (b) if the parent undertakes to
 - (i) make suitable educational resources available to support the learner's learning;
 - (ii) monitor the learner's academic progress;
 - (iii) arrange for the learner's educational attainment to be assessed by a competent assessor— (aa) at the end of each phase, up to the end of the year in which the learner reaches the age of 15 years or completes grade 9, whichever occurs first; and (bb) **against a standard that is not inferior to the standard determined in the National Curriculum Statement**; and (iv) submit to the Head of Department, at the end of each phase and as evidence of the learner's educational attainment, the learner's assessment report, signed by the competent assessor.

Random search provisions

Extended from dangerous objects and illegal drugs to also include alcohol.

Policy-making functions of SGBs – general comments

- Policy making functions of SGBS in SASA - admissions policy; language policy; the school's code of conduct, including pregnancy policies; religion policy; and the fees to be charged at a school
- (1) Major changes admissions and language policies in terms of s 4 and 5 of BELA.
- (2) Changes iro of codes of conduct
- (3) Progressive change to fee exemption application rqmts

Codes of Conduct

- SASA S8 and the **Guidelines** for Schools Codes of Conduct currently guide codes
- S 7 of BELA deals with changes to adopting a code of conduct in S8 of SA.
- Take into account the diverse cultural beliefs, religious observances and medical circumstances of the learners at the school
- Contain an exemption provision.
- Disciplinary proceedings should be age-appropriate, comply with the best interest of the child principle and adhere to the principles of justice, fairness and reasonableness prescribed by the Constitution.
- ***MEC for Education: KwaZulu – Natal v Pillay ('Pillay')***.
- Related to codes of conduct - Clause 39 seeks to amend section 61 of the SASA to extend the powers of the Minister to make regulations on the management of learner pregnancy
- ***Welkom judgment***

Single parents and school fee exemptions

- Provide that when a parent applies for exemption from the payment of school fees, such parent may submit additional documentary such as an affidavit in instances where information cannot be obtained from the other parent of the learner. The proposed amendment aims to lessen the burden on single parents whose ex-partners are untraceable or unwilling to provide information on their financial situation
- ***Head of Department: Western Cape Education Department & another v S (Women's Legal Centre as Amicus Curiae)***

Contesting the school governance model in education decentralisation

- **(1) *The negotiated transition***

- While the liberation movements advocated for parental involvement, particularly following the 1976 Soweto uprising and as response to the authoritarian style of education of the apartheid regime, '[f]or the Nats, placing as much power as possible — and the ability to raise funds — at the school level would largely isolate former white schools from significant changes after the transition'. **Transition tricks**

- Sayed, - a more cooperative governance model, where **centralised norms** were established, was imagined by the liberation movements to transform the education system.

- Woolman and Fleisch note that the model that was adopted during the transition was never meant to be immutable, particularly once it was tried and tested

- **(2) *School governance litigation***

Affirmed specific principles and the rights of learners to equality, basic education and the best interests of the child principle.

- **(3) *BELA Act***

Progressive civil society defending the Bill while DA, Afriforum, Solidariet etc challenged the Bill

The school governing body jurisprudence

- *Head of Department, Mpumalanga Education Department v Hoerskool Ermelo and Another ('Ermelo')*
- *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School and Another ('Welkom High School')*
- *MEC for Education in Gauteng s v Governing Body of Rivonia Primary ('Rivonia').*
- **PRINCIPLES**
- *“The redress principle - The governing body of a public school must in addition recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time but also in the interests of the broader community in which the school is located and in the light of the values of our Constitution.”*
- Cooperative governance. The partnership and meaningful engagement
- Grassroots democracy

Policy-making functions of SGBs – Pre- April 2024

- SGBs submit their admission and language policies or any amendments to these policies to the HOD for approval.
- The HOD can approve or send back to the SGB with the necessary recommendations and reasons.
- When considering these policies, the HOD must be satisfied that they take into specific normative criteria: **(1) the needs of the broader community in the specific education district in which the school is located; (2) the best interests of the child principle, in sec 28 of the Constitution, (3) equality as provided for in sec 9 , (4) whether there are other schools in the community that are accessible to learners, (5) the efficient and effective use of state resources, and (6) the space available at the school.**
- In respect of language policies a few additional criteria had to be considered such as **changing number of learners who speak the language of learning and teaching at the public school and s 6(2) of SASA & s29(2) of the Constitution.**
- Also note the recognition of sign language as one of our official languages.

Policy-making functions of SGBs – Pre-April 2024

- The amendments also inserted timelines into the HOD approval process.
- If there is no response from the HOD within the specified timeframe after receiving the policy for approval, the policy will be regarded as having been approved.
- The amendments also provided for appeal procedures by the SGBs – or in the case of an admission decision, even by a learner – to the MEC of a decision taken by the HOD.
- SGBs must review these policies every three years or whenever the factors above have changed or when requested to do so by the HOD.
- The amendments required in respect of admissions that, after consultation with the SGB, the HOD has the final authority to admit a learner *Rivonia*
- Furthermore, the amendments gave the HOD the power to direct a school to adopt more than one language of instruction after following specified stringent procedural requirements such as public hearings in the community.

Policy-making functions of SGBs –Post April 2024

- HOD approval process removed. SGB admission and language policies need not be approved by the HOD, but the policies **must reflect the normative and rights-based criteria** that would have previously informed the HOD approval processes. Potentially these can be taken on review (more litigation).
- SGBs must still review their policies every three years or when some of the factors listed above have changed
- The HOD can still direct a school to admit learners or to adopt an additional language.
- In respect of the adoption of additional languages, this is subject to very specific notice requirements and public participation consultations.
- SGBs can appeal these directives.
- **DA/AFRIFORUM AND OTHERS THREATEN TO CHALLENGE THE BELA ACT**
- **PROGRESSIVES SAY THE POLICY MAKING REFORMS ARE ABOUT THE IMPERATIVE TO TRANSFORM**

Private or Independent Schooling

- Public Schools 22 589
- Private Schools 2282
- The number of schools in South Africa has declined in South Africa since 2000. Private schools have increased from 3.5% to over 10% of all schools in South Africa.
- Low fee, middle income, elite schools

Key principles to note in private school judgments

- ***PRIDWIN***
- Is the **termination clause** constitutionally valid? If so, does its **enforcement** without affording hearing offend a child's right to a basic education [s 29(1)(a)] and the paramountcy of a child's best interest s28(2)?
- Majority Judgment of Theron J
- “In the context of this matter, section 28(2) requires that a fair process be followed by an independent school when it takes a decision that affects the rights of children to a basic education. A determination of what is in the best interests of a child, as provided for section 28(2), cannot be conducted in a discretionary and abstract manner. A mere statement by Pridwin that a balancing of rights has been undertaken is insufficient and does not satisfy the obligations created by the section. That the best interests of the children have been given due consideration should be objectively evident. This is not evident in this matter.” **Para 153**

Key principles to note in private school judgments

- “On s(29(1)(a))The rights set out in section 29 are not mutually exclusive; to the contrary, within the private education sphere, they are cooperative. Section 29(1)(a) speaks to the right of children to be educated and section 29(3) speaks to the freedom given to independent schools to provide education. In providing that education, independent schools are to fulfil their negative obligation in terms of section 29(1)(a) and not obviate children’s rights to basic education. In terms of section 29(3), they also assume a positive obligation, upon establishment of an independent school, to maintain standards not inferior to that of comparable public schools. “(para 167)
- Pridwin’s decision to terminate the Parent Contract was unconstitutional due to the failure to afford the applicants an opportunity to be heard on the best interests of the boys, in breach of sections 28(2) and 29(1)(a) of the Constitution. Due process inferred from these rights.
- See too the *John Wesley* case - court held that the decision to expel a learner must satisfy the rules of due process. Private schools cannot provide less than the minimum standard provided at public school.

The Abidjan Principles – International law guidance

- In February 2019, the ‘Guiding principles on the human rights obligations of States to provide public education and to regulate private involvement in education’ (the Abidjan Principles) were adopted.
- **PRIVATE EDUCATION SUPPORTS NOT SUPPLANTS PUBLIC EDUCATION**
- Available at <<https://www.abidjanprinciples.org>.
- Obligations to provide public education, regulate private education.
- Para 54. As part of their regulatory efforts to protect the right to education, States must define and enforce **minimum standards** applicable to private instructional educational institutions.
- Para 55.
- f. strict limitations to the suspension and expulsion of learners, ensuring due process and that any such suspension or expulsion be reasonable and proportionate;
- g. discipline and the prohibition of corporal punishment;
- h. the protection of learners’ rights in the context of failure or delay in the payment of fees;

THE LESSON FROM BELA FOR PRIVATE SCHOOLS IS THIS:

- **REVISE YOUR POLICIES AND CODES TO ENSURE THAT THEY ARE CONSTITUTIONALLY COMPLIANT & LITIGATION PROOF**
- **SHOULD THERE BE AMENDMENTS TO NATIONAL OR PROVISIONAL LAWS, ENGAGE THE PUBLIC PARTICIPATION PROCESS**