

Director: LTSM

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FEDSAS comments on Draft National Policy for the Provision and Management of Learning and Teaching Support Material

1. Introduction

Given the partnership model envisaged in the Schools Act, as well as the cooperative governance scheme described in the Constitution, we hereby request the national Department of Basic Education to engage in good faith with FEDSAS about the proposed policy and the comments made in this document.

Bearing this in mind, FEDSAS comment as follows:

2. Legality

The first question that must always be considered when subordinate legislation is promulgated is whether the enabling legislation authorises the promulgation of such subordinate legislation.

The draft document states (under heading 6 – Legislative context) that section 3 of the National Education Policy Act 1996 mandates the Minister to provide direction so that the standards of education provision, delivery and performance are monitored. In the call for written submissions by stakeholder bodies, Government Gazette No. 379764 September 2014, section 3(4)(o) of the National Education Policy Act, 1996 is stated as

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the specific empowering provision in terms of which the Minister may approve national policy for the provisioning and management of learning and teaching support material.

Section 3(4)(o) deals with the Minister's authority to develop national policy for education support services, including health, welfare, career and vocational development, counselling and guidance for education institutions, within the functional responsibility of a department of education. The support services listed in this section clearly relates to the provision of socio-economic / social development services (health and wealth) or career guidance or management guidance for education institutions. These services do not relate to the provision of support material. Learning and teaching support material cannot be associated with the services referred to in section 3(4)(o) in fact, learning and support material are not even mentioned in the National Education Policy Act.

The principle of legality is a cornerstone of our constitutional dispensation and of the exercise of public power and performance of public functions. The principle itself has been described in the following terms:

"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".

Naturally this means that if the Minister wishes to issue national policy, she must be authorised by law to do so and in this case, she does not have the authority and the policy is *ultra vires*.

In terms of section 5A(1)(c) of the South African Schools Act, 1996 the Minister may, after consultation with the Minister of Finance and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for the provision of learning

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and teaching support material. This is however restricted to the *provision* of LTSM and not the *management* thereof.

The South African Schools Act and the National Norms and Standards for School Funding, 2006 make provision for public school governing bodies to become progressively more responsible for managing aspects of recurrent expenditure. Section 21 of the Schools Act provides that, subject to the Schools Act, a school governing body may apply in writing to the Head of Department to be allocated any of the Section 21 functions. The Section 21(1)(c) function involves the purchasing of textbooks, educational materials or equipment for the school, or in other words, learning and teaching support materials. The Norms and Standards for School Funding set out the transfer procedures where section 21 functions have been allocated to a school. Paragraph 132 determines that schools which have been allocated one or more of the section 21 functions will receive a single transfer in accordance with certain provisions set out in the Norms. Paragraph 133 goes on and provides that school governing bodies that have been allocated the relevant section 21 functions may carry out their own procurement and may deal directly with suppliers and contractors for the relevant budgeted items in accordance with the standard procurement procedures, the financial directions issued in terms of section 37 of the SASA and paragraph 116 of this policy.

To prescribe to schools the manner in which they must perform their section 21 functions, would render the purpose of the section 21 functions superfluous and would definitely not promote better school management. This draft policy constitutes interference in the governing bodies management functions of certain school matters and the Department has over stepped its boundaries and the rule of law has been violated.

With regards to the above, FEDSAS wish to draw your attention to the following irregularities and unlawful provisions contained in the policy:

Glossary

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Learning and teaching support material is firstly defined and is then divided into two categories namely “**core LTSM**” and “**supplementary LTSM**”. “Core” LTSM” supposedly refers to LTSM that is central to teaching the curriculum of a subject for a grade and “supplementary LTSM” refers to LTSM that is used to enhance a specific part of the curriculum. It is however not clear how it will be determined what is essential or central to the curriculum. For example, dictionaries are indicated as “support” LTSM while it is an essential tool for especially language subjects and Science, Technology, Mathematics, Biology apparatus are also not included as “core LTSM” but certain lessons in these subjects cannot be taught without these apparatus. Furthermore, consumable items of an educational nature, such as stationary are not included in either “core” or “supplementary” LTSM. This distinction is unpractical.

Introduction

As indicated under paragraph 2 above, the Minister does not have the authority to prescribe the provision and management of learning and teaching support material to schools.

Background

In terms of this paragraph, the policy has been introduced to ensure that all the injustices and inequalities of the past, with regards to learner support, are addressed (own emphasis). This draft policy deals only with learning and teaching support material, it is absurd to declare that this policy will address all other learner support issues. Learner support issues are much broader than support material.

It is also stated that every learner and teacher must have access to the minimum set of core material. See our comments under “glossary” regarding the definition of “core LTSM”.

Legislative context

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See our comments under paragraph 2 above regarding legality.

In the matter of *The Governing Body of Mikro Primary School and another v Western Cape Minister of Education & others*¹ Judge Thring made the following remark with regards to principle of legality:

“The principle of legality simply means that the state must obey the law. That is such a fundamental principle, and so important in any civilised country, that only in extremely rare cases, if ever, the rule of law may be “held hostage” if it proves to be in the children’s best interests. Indeed, it is difficult to imagine how, in the long term, it could ever be in the best interests of children to grow up in a country where the state and its organs and functionaries have been elevated to a position where they regard themselves as being above the law, as, as far as they are concerned, the rule of law has been abrogated.”

The draft document refers to the national LTSM norms and standards. No such norms and standards have been issued.

Key elements of the policy

Policy objectives

The policy and policy objectives can to the most only apply to the Department and the provision of LTSM to schools that do not have section 21(1)(c) status. This can also only be the case where the departmental officials have the authority to determine procurement, selection and utilisation of LTSM by the schools.

Statements of Policy

¹ 2005 JOL 13716 (C).

(i) And (ii) The statement that all forms of LTSM purchased with government funds, produced through different processes or donated to a school constitute the property of the State is untrue. Section 37(5) of the Schools Act clearly states that all assets acquired by a public school on or after the commencement of this Act are the property of the school (own emphasis added). This section does not distinguish between the manners in which the property were acquired or the type of property. Even property acquired through “government funds” or property donated to the school, will become the school’s property regardless if it is a school with section 20 or 21 functions. All references to LTSM as state property should be removed.

(iv) To (xiii) Please see our comments regarding schools who have been granted section 21(1)(c) functions under paragraph 2 above. In terms of the Norms and Standards for School Funding these schools may carry out their own procurement and may deal directly with suppliers and contractors for the relevant budgeted items in accordance with the standard procurement procedures, the financial directions issued in terms of section 37 of the SASA and paragraph 116 of the Norms and Standards (see par 133). The statements listed in this draft policy are in conflict with these provisions.

With regards to schools that have not been granted the relevant section 21 functions, the Norms and Standards states that the national department and provincial departments must continue to explore innovative solutions to improve the resourcing of non-Section 21 schools. Solutions whereby the PED pays suppliers from whom schools have ordered goods should be considered. The aim is to develop the capacity of the school to determine its own resource mix within the policy framework, to ensure that goods reach schools on time, and to combat the inefficient utilisation of resources, as well as excessive prices for school inputs (see paragraph 136). The proposed procedures mentioned in these statements as well as **paragraph 7.3** does not promote this aim and we suggest that the draft policy be amended to bring it in line with the National Norms and Standards for School Funding.

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Processes for the development of a National Catalogue for Core LTSM

Two Tier Procurement Model - Centralised Procurement Model for Core LTSM

The statement that “All public schools whether or not they have been granted function section 21(1)(c) status will participate in a centralised procurement system for the procurement of Core LTSM” is *ultra vires*. See our comments under paragraph 2 and under “Statements of Policy”. The Department may not usurp clearly allocated Section 21(1)(c) functions in terms of the Schools Act.

(ii) The development of an annual LTSM Procurement and Distribution Plan

This paragraph states that “*provinces may retain the core textbook funds from the total allocation of a school’s Norms and Standards budget*”. This provision is unlawful. We would, once again, like to bring paragraph 132 of the Norms and Standards to your attention:

“Schools which, according to the list of Section 21 status, have been allocated one or more of the three SASA Section 21 functions, will receive a single transfer in accordance with their national quintile, their enrolment, the nation table of targets for the school allocation, and the SASA Section 21 functions that have been allocated to the respective schools.” (Own emphasis added)

We point out that:

Provincial departments are not entitled to withhold allocated funds from schools that have been allocated Section 21(1)(c) functions in terms of the Schools Act.

(iii) To (v) These paragraphs can, again, only apply to schools that have not been allocated Section 21(1)(c) functions.

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(vi) Recording and safe keeping

As mentioned under **Statements of Policy (i) and (ii)**, all assets acquired by a public school on or after the commencement of this Act are the property of the school. section 20(1)(g) of the Schools Act determines that the governing body of a school must administer and control the school's property, and buildings and grounds occupied by the school, ... but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy. In the first place, all LTSM is the property of the school and the governing body must administer and control these materials, the national Department of Basic Education cannot prescribe the manner in which this administration and control must take place. Secondly, neither the national Department of Basic Education nor provincial education departments have the right to visit schools at random to check if LTSM have been delivered.

A Decentralised Procurement Model

This model is unlawful and constitutes interference in the governing bodies' functions especially schools that have been allocated Section 21(1)(c) functions .

(i) – (v) The Department cannot prescribe a procurement process to schools that have been allocated Section 21(1)(c) functions. These paragraphs are unlawful.

(i) The formation of a School LTSM Committee

Section 30 of the Schools Act merely determines that a governing body may establish committees; it does not prescribe which committees must be established and what their functions should be. The establishment and functioning of these committees is determined by the governing body. Neither the national Department of Basic Education nor a provincial department can prescribe which committees must be established and what their functions should be. This applies to both schools that have been allocated

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Section 21(1)(c) functions and schools that have not been allocated Section 21(1)(c) functions.

LTSM Retention and retrieval

LTSM is the property of the governing body and the governing body must administer and control these materials, the national Department of Basic Education cannot prescribe the manner in which this administration and control must take place.

The requirement that all textbooks are to be covered with a strong plastic and tape to protect the book is also impractical and has cost implications for either the school or learners.

With regards to **paragraph (ix)** specifically, this paragraph is not in line with the National Norms and Standards for School Funding. In terms of paragraph 139 of the Norms and Standards a school may, for justifiable reasons, deviate from the breakdown in the school allocation provided by the PED. They do not have to “wait for an incentive”.

Monitoring, supporting, reporting and evaluation

The Schools Act clearly determines that a governing body only has to submit to the Head of the Department the schools audited financial statements once a year, within six months after the end of the financial year. The governing body, which administers and control LTSM, is under no obligation to submit a LTSM report.

In light of the above comments and the absolute illegality and unlawfulness of the proposed Policy, FEDSAS requests the Department to withdraw the draft Policy.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Suzaan Mellet', with a small dash at the end.

Suzaan Mellet

FEDSAS: Research and Policy Officer