

21 September 2009

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COMMENT

ON REGULATIONS RELATING TO THE PROHIBITION OF THE PAYMENT OF UNAUTHORISED
REMUNERATION OF THE GIVING OF FINANCIAL BENEFIT OR BENEFIT IN KIND TO CERTAIN STATE
EMPLOYEES

(RE: DRAFT REGULATIONS PUBLISHED AS GENERAL NOTICE NUMBER 1164)

INTRODUCTION

1. Equal Education [EE] is a movement of learners, parents, teachers and community members working for quality and equality in South African education through analysis and activism.
2. EE is sympathetic to the Minister's need to regulate education in general and the teaching profession in particular.
3. We strongly support moves towards distributing resources in a manner which will promote greater equality in our education system.
4. It is nevertheless the case that the proposed regulations are beset by a number of problems which we outline below
5. We thereafter suggest an alternative approach open to the Minister.
6. We would welcome the opportunity to make a more detailed oral presentation on these important questions.



POWER/AUTHORITY TO MAKE REGULATIONS

7. The Minister Of Basic Education, Mrs Angie Motshekga, states (in general notice no. 1164 of 2009) that in creating these regulations she is acting in terms of s 5A (2)(b) read with S 38A and S 61 (i) of the South African Schools Act No. 84 of 1996.

8. For various reasons the Minister appears to lack the authority to make these regulations.

9. **Section 5A (2)(b)**

9.1. S 5A states that: “The Minister may, after consultation with the Council of Education Ministers, by regulation prescribe the minimum uniform norms and standards...” The section then lists the areas in regards to which the Minister may prescribe such “minimum uniform norms and standards”.

9.2. S 5A provides that the Minister may prescribe “minimum standards” not *maximum standards*. An example of a maximum standard is the restriction of the number of additional hours that an employee may work.

9.3. Further, although S5A (2)(b) refers to “the number of teachers and class size” it makes no reference to additional work done by state employees, nor to additional teachers employed by a school governing body (SGB).

10. **Section 61 (i)**

10.1. S 61(i) reads as follows: “The Minister may make regulations on any matter which is necessary or expedient to prescribe in order to achieve the objects of the Act.”

10.2. This gives the Minister wide power, which would include the propose regulations. But the breadth of this power is problematic. By giving the Minister the power to make any regulations it arrogates to a member of the Executive the power to legislate, which is the constitutional preserve of Parliament and the provincial legislatures. This contradicts the separation of powers principle. The Constitution mandates the legislature to make law and the executive to implement the laws. This section is therefore overbroad in that it sets no limits on what matters the Minister may make regulations and this allows the Minister to move beyond her powers mandated in the Constitution. Therefore, although this section does empower the Minister, it may in fact be open to a constitutional challenge and is therefore not a strong basis for grounding the Minister’s authority in this instance.

11. **Section 38A**

11.1. S 38A restricts the SGB from paying state employees unauthorised remuneration, financial benefit and benefit in kind. This legislation does not prohibit such remuneration, but rather stipulates a procedure and control mechanism by which SGB’s may apply to pay such remuneration. In addition, according to S38A(6) the Department (being the employer) “must not unreasonably refuse an application contemplated in subsection 2”.

11.2. However, Regulation 8(f) of the proposed regulations prohibits an SGB from making an application to the Department to remunerate a state employee for additional work done that is already paid for by the state. This is an outright prohibition.



- 11.3. As such, Regulation 8(f) goes beyond the scope of the enabling legislation. As such the proposed regulations subvert S38A which does not ban additional remuneration, but regulates it.
- 11.4. Furthermore, S38A refers explicitly to “state employees”. However, Regulation 4 of the proposed regulations goes beyond restricting the making of unauthorised payments to state employees (or state paid teachers) by also prohibiting SGB’s from employing their own teachers or employees. Regulation 4 prohibits an SGB from hiring an employee for more than two hours per ordinary school day, or six hours per day on any other day. The definition of “employee” in the regulations restricts the word employee to a person employed by the state in terms of the Employment of Educators Act and Public Service Act, whose services are used by the school governing body.

THE PURPOSE OF THE PROPOSED REGULATIONS IS NOT CLEAR

12. The purpose of the regulations is not clear. We recommend that the purpose be made clear.
13. In the discussion that follows, we assume that the purposes of the proposed regulations include:
 - 13.1. The legitimate need of the employer, the Department, to exercise some control over its own employees, and thereby to stabilise labour relations within the teaching profession. Specifically, we recognise the Department’s interest in closing ‘loopholes’ in S38A of the South African Schools Act which have been opened through the payment of overtime and various other benefits.
 - 13.2. The urgent need to reduce inequality in the South African education system.

THE PROPOSED REGULATIONS DO NOT TACKLE INEQUALITY EFFECTIVELY

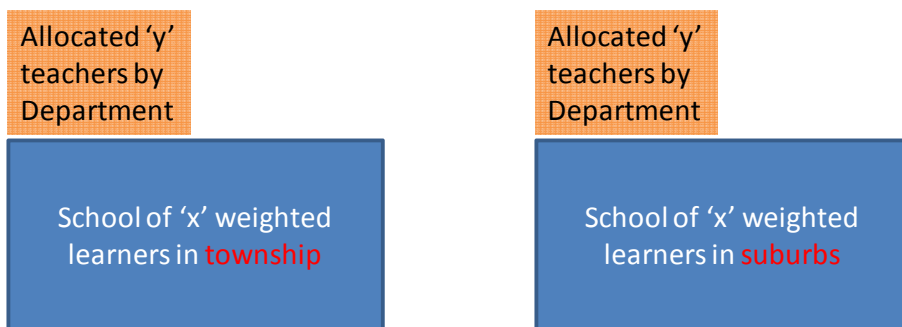
14. The ability of the private sector to raise funds and thereby employ additional teachers, and pay teachers more, does indeed currently contribute to the inequality dynamic.
15. It is of vital importance to cut across inequality and to build an equal education system. This is the object and purpose of our movement, Equal Education.
16. This can and must be done without damaging the sector of schools where good quality education is provided.
17. We therefore recommend that this happens according to the following organising principles
 - 17.1. Public resources are devoted mainly to the disadvantaged.
 - 17.2. The addition of private resources to the education system, by the privileged, is not discouraged.
 - 17.3. Private resources, while encouraged, are managed in a way conducive to the upliftment of the whole education system.
18. The proposed regulations appear to contradict these principles. This will be further developed through the proposal of an alternative measure.



THE MOST IMPORTANT REGULATORY REFORM NEEDED TO EFFECT GREATER EQUALITY IN EDUCATION, AND IN THE TEACHING PROFESSION IN PARTICULAR, IS BEING IGNORED

19. We propose that the following be considered:

- 19.1. The proposed regulations do not address the primary mechanism by which the current regulatory framework perpetuates inequality; this being the “post provisioning model” for the provisioning of educator posts to schools.
- 19.2. This “post provisioning model” is contained in Annexure 1¹ to the Government Notice R 1676 (of 18 December 1998) entitled: “REGULATIONS FOR THE CREATION OF EDUCATOR POSTS IN A PROVINCIAL DEPARTMENT OF EDUCATION AND THE DISTRIBUTION OF SUCH POSTS TO THE EDUCATIONAL INSTITUTIONS OF SUCH A DEPARTMENT.”
- 19.3. The importance of these Regulations and their Annexure 1, in particular, cannot be overstated. It is absolutely vital that everyone committed to reducing inequality in education gets to grips with these Regulations and understands fully their implications.
- 19.4. The “post-provisioning model” allocates posts to schools based on various “weighting norms”.² The number of learners is calculated and every learner is “weighted”. Once the number of “weighted learners” has been determined an allocation of posts is made to a school.
- 19.5. Below is a graphical and written illustration of how the current “post-provisioning model” not only fails to deal with inequality but actually generates inequality.
- 19.6. There are two schools. One is a “former Model-C type” school and one is a typical “township” school. They each have ‘x’ weighted learners. (This is simply an illustrative example.)
- 19.7. **STEP 1:** According the “post-provisioning model” each school is allocated ‘y’ number of educator posts.

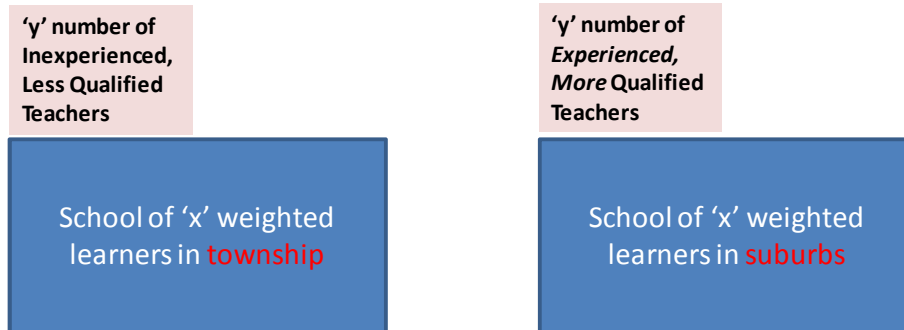


¹ Annexure 1 is entitled “ALLOCATION OF EDUCATOR POSTS TO EDUCATIONAL INSTITUTIONS”.

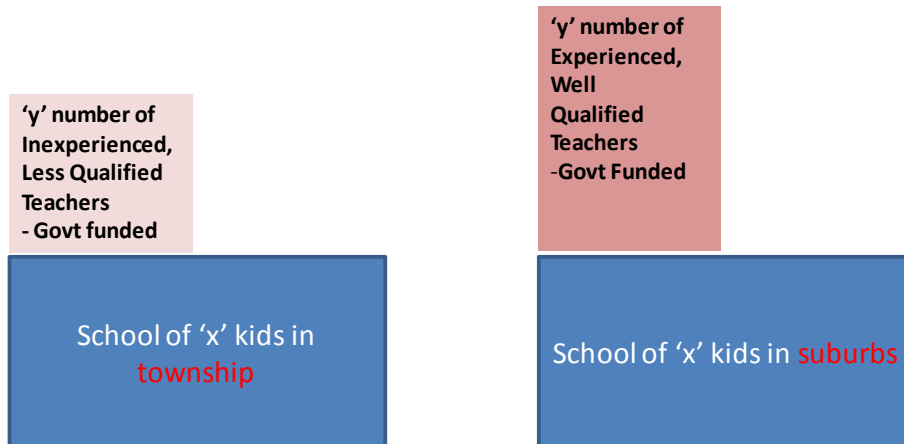
² In other words, each learner is weighted according to their grade, study fields or subjects, language of instruction, and disability. The idea of “weighting” the learners, is that a school with a greater proliferation of subjects or languages, for example, will need more teachers than a school with less subjects or languages even if the number of learners is equal. To use the Regulation’s own words, “advantaged schools” benefit unfairly because the level of sophistication in their subject offerings is often based on (what the Regulations call) “historical imbalances”, but “these inequities... are not taken into account by the model”. This is worth noting, but it is not the most serious problem with the model. See Annexure 1, para 5.



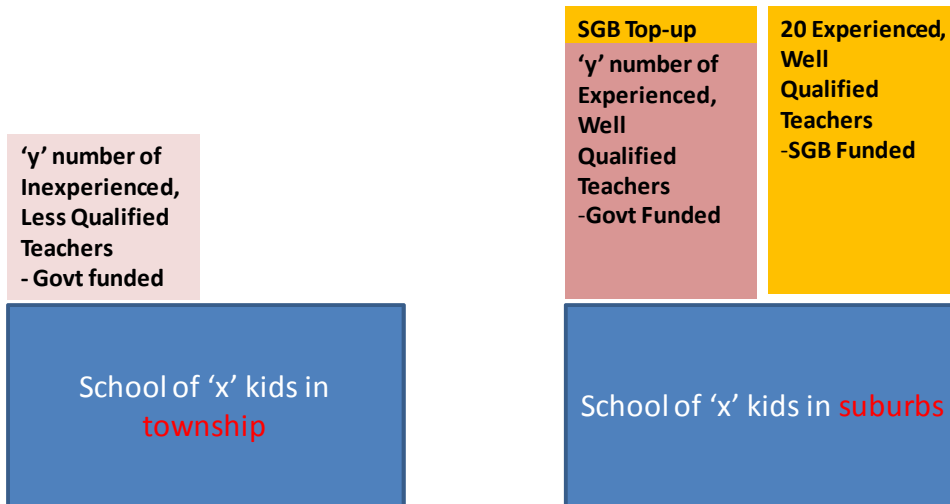
19.8. **STEP 2:** Each school, with the assistance of the provincial department of education, finds 'y' number of teachers to fill the posts. For various reasons the school in the suburbs will attract more experienced, more qualified teachers. These reasons include safety, transport, class size, and job satisfaction. Another major reason are salary differentials, as we shall see.



19.9. **STEP 3:** According the Occupation Specific Dispensation (OSD), the experienced, more highly qualified teachers in the suburban school will command higher salaries. This is illustrated in the diagram below. This means that, *when it comes to teachers, government spends more per child in the suburban school than it does in the township school*. This may seem hard to believe, but it is true. This is the opposite of a pro-poor plan for education; it has no chance of reducing inequality. It vitally important to note that this unequal situation is already generated before any additional remuneration is paid. See 19.11 for more explanation.



19.10. **STEP 4:** The suburban school, through its own resources, mainly collected as school fees, tops-up salaries of its teachers, and employs additional teachers. This further reduces class sizes, improves working conditions and makes it impossible for the township school to compete in attracting the best teachers. The school in the suburbs is now in a position to offer an incomparably better education to its learners.



19.11. The Regulations recognise that there may be the need for “deviations for the purposes of redress”³ but “the department may deviate by not more than 5%”.⁴ It might be argued that redress is taken care of by the AMENDED NATIONAL NORMS AND STANDARDS FOR SCHOOL FUNDING, issued in August 2006,⁵ which provide at paragraph 109 for progressive and pro-poor allocations of funding. However, Norms and Standards Funding accounts for about 9% of what an average province spends on Public Ordinary School Education. This 9% is allocated on a progressive basis. Compensation of employees, the majority of which is teacher salaries, on the other hand, accounts for almost 90% of what an average province spends on Public Ordinary School Education. This is not allocated on a pro-poor basis, as explained above. The net result, using the Western Cape as an example, is that public expenditure on the poorest learners as a percentage of public expenditure on the least poor learners is 102,9%.⁶ In other words, for every Rand government spends on a child in a suburban school, government spends R1 and 3c on a child in a township or rural school. Clearly, this is no basis for reducing inequality in education. As the Constitutional Court has stated “[A]lthough the long-term goal of our constitutional order is equal treatment,

³ Annexure 1, para 5.

⁴ Annexure 1, para 6.

⁵ Government Notice R869.

⁶ See WCED, Annual Performance Plan, 2008/9 – 2010/11 at p 87.



insisting upon equal treatment in circumstance of established inequality may well result in the entrenchment of that inequality.”⁷ Unless the attempts to make education funding pro-poor are extended to include the allocation and payment of teachers, little progress can be made.

- 19.12. Without tackling the iniquitous consequences of the way teacher posts are allocated, as explained above, there is no chance of effectively building a united, quality and equal education system. Below we formulate an alternative.

AN ALTERNATIVE REGULATORY REFORM TO TACKLE INEQUALITY IN EDUCATION IN GENERAL, AND IN THE TEACHING PROFESSION IN PARTICULAR

20. The post-provisioning formula contained in Annexure 1 to Government Notice R 1676 must be amended.
21. The number of additional educator posts which are established and funded through SGB-collected funds, in a given school, must be taken into account when the Department allocates posts to a school.
22. The principle being argued here is that if a wealthy school can afford, for example, 20 additional teachers, the Department should reduce the allocation to that school and divert its resources to those schools unable to create any additional posts. (It must be remembered that no-fee schools are legally prevented from charging fees which might thereby be used to employ additional teachers, or pay top-ups.)
23. We are not suggesting, in this example, that the Department reduce the allocation of posts to the wealthy school by 20 posts (as this would eliminate the incentive for the school to create additional posts) but to reduce the allocation of posts by a smaller number. The school would then be challenged to raise additional resources to remain at its former level, and some of the Department-funded posts could be redistributed in a progressive manner to poor schools.
24. Similarly, if a school is topping up teacher salaries (paying additional remuneration) across the board, this should be taken into account by the post-provisioning formula which allocates teachers to schools. The ability to top-up salaries is an indication that the school can raise its own resources to supplement its allocation of teachers from the Department.
25. This would ensure that state resources are concentrated on the disadvantaged, and that the wealthy are not prevented from increasing the use of their own resources on education.

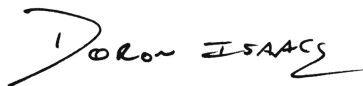
⁷ *President of the Republic of South Africa and Another v. Hugo* 1997 (4) SA 1 (CC).

A similar legal principle was developed by the Constitutional Court in the *Grootboom* case at para 44: “Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”

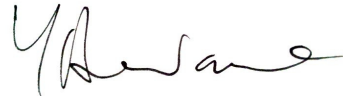


CONCLUSION

26. Equal Education reiterates its support for measures to bring order and equality to the distribution and remuneration of teachers.
27. However the proposed regulations are legally problematic, as shown above, and do not go to the root of the problem.
28. It might also be advisable to present such regulations as part of a comprehensive plan to increase educational quality and equality.
29. Five important elements of a comprehensive plan – not discussed in this comment – would be (1) increasing the supply of teachers through teacher-training facilities, (2) improving the quality of teaching through additional support, (3) reducing the present administrative burden teachers face, (4) considering a national community service program whereby all university graduates are eligible to work in schools for a period of two years in exchange for a reduction in student-loans, or moderate remuneration, and (5) offering financial incentives to attract teachers to poorer schools in urban and rural areas.
30. In this comment we have focused on one particular element of a comprehensive plan: Revising the post-provisioning formula, such that it is more equitable, as proposed in paragraphs 21 and 22 above.



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