

Tutorial Letter 201/1/2018

Education Law

LCP4809

Semester 1

Public, Constitutional and International Law

This tutorial letter contains important information
about your module.

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Dear Student

1 INTRODUCTION

This is the last tutorial letter that you will receive for this semester. By this time, you should have received all your tutorial material, namely a study guide (containing the content of the module) and Tutorial Letter 101.

At this stage you should also be in possession of the prescribed literature for this module. Tutorial Letter 101/3/2018 contains a list of the prescribed study material for this module. **All prescribed study material is compulsory** and constitutes an indispensable and integral part of this research module. Note that the onus is solely on you to access or order this material as soon as possible.

2 FEEDBACK ON ASSIGNMENT 01

Question 1

Fill in the missing word or words: ONE of the characteristics of the law is that it must be obeyed by all members of ... including the state, and, when it is disobeyed, the state should restore the (legal) balance.

- (1) staff
- (2) society
- (3) the governing body
- (4) the organised teaching profession

Answer:

Only statement (2) is correct. See section 1.4.1.1 in Bray E, Moodley I & Mienie CA *Education law: Only study guide for LCP4809 3*.

Question 2

Who is responsible for determining the norms and standards for language policy in public schools?

- (1) Minister of Basic Education
- (2) Head of Department
- (3) Member of the Executive Council (MEC)
- (4) The school governing body

Answer:

Only statement (1) is correct. See section 6(1) of the South African Schools Act 84 of 1996.

Question 3

Indicate which statement is **NOT** correct: According to the South African Schools Act 84 of 1996...

- (1) a public school may be— (i) an ordinary public school; (ii) a public school for learners with special education needs; or (iii) a public school that provides education with a specialised focus on talent, including sport, performing arts or creative arts.
- (2) the Head of Department may close a public school temporarily in the case of an emergency if he or she believes on reasonable grounds that the lives of learners and staff are endangered or that there is a real danger of bodily injury to them or of damage to property.
- (3) subject to section 20(1)(k), a public school which occupies immovable property owned by the State has the right, for the duration of the school's existence, to occupy and use the immovable property for the benefit of the school for educational purposes at or in connection with the school.
- (4) the Council of Education Ministers must, where reasonably practicable, provide education for learners with special education needs at ordinary public schools and provide relevant educational support services for such learners.

Answer:

Only statement (4) is incorrect. See sections 12(3)(a), 16(4), 13(2) and 12(4) of the South African Schools Act 84 of 1996.

Question 4

In *The Western Cape Minister of Education v The Governing Body of Mikro Primary School 2005 (10) BCLR 973 (SCA)*, the Court concluded that ...

- (1) the public school is an organ of state and, in relation to its functions of determining its language and admission policy, is subject to national and provincial executive control.
- (2) the right to receive education in the official language of choice where it is reasonably practicable means that the right extends to each and every public educational institution.
- (3) the school's language policy and admission policy were not contrary to any provision of the Constitution of the Republic of South Africa, 1996, the South African Schools Act 84 of 1996, the Western Cape Provincial School Education Act 12 of 1997 or the Norms and Standards for Language Policy in Public Schools.
- (4) the Member of the Executive Council (MEC) may withdraw on reasonable grounds a function which the governing body has failed or ceased to perform. This power of withdrawal extends to functions allocated in both section 16 and 16A of the South African Schools Act 84 of 1996.

Answer:

Only statement (3) is correct. See Bray E "Macro issues of Mikro Primary School" (2007) *PER* 6, 8 and 9.

Question 5

Fill in the missing word or words: According to section 41(3) of the Constitution of the Republic of South Africa, 1996 ... involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

- (1) a natural person
- (2) an agent of the state
- (3) a juristic person
- (4) an organ of state

Answer:

Only statement (4) is correct. See section 41(3) of the Constitution of the Republic of South Africa, 1996.

Question 6

National education policy shall be directed toward ...

- (1) achieving equitable education opportunities and the redress of past inequality in education provision, including the promotion of gender equality and the advancement of the status of women.
- (2) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 5 of the Constitution, and in terms of international conventions ratified by Parliament.
- (3) achieving a divided approach to education and training within a national qualifications framework.
- (4) promoting a culture of disrespect for teaching and learning in education institutions; and encouraging dependent and uncritical thought.

Answer:

Only statement (1) is correct. See sections 4(a), (c), (f), (i) and (j) of the National Education Policy Act 27 of 1996.

Question 7

According to Squelch J “The right to administrative justice: the implications for school governing bodies” (2000) *A critical chronicle of the South African Education Law and Policy Association* (Edited by Johan Beckmann SAELPA) ...

- (1) an organ that has a personal interest in a matter in which it must exercise a discretion is regarded as impartial.
- (2) where an administrative body makes a decision that affects the rights of the person concerned, it is required to provide the person concerned with written reasons for its decision. Reasons must be unfair, unjust and based on irrelevant information. Reasons that are clear, appropriate and substantial are likely to be challenged and set aside.
- (3) at common law, the *nemo iudex in sua causa* rule requires that all relevant information be communicated to the person who may be affected by an administrative decision.

- (4) due process includes both procedural due process, which refers to fair procedures that are used, and substantive due process, which refers to the appropriateness and fairness of rules.

Answer:

Only statement (4) is correct. See Squelch J “The right to administrative justice: The implications for school governing bodies” (2000) *A critical chronicle of the South African Education Law and Policy* (edited by Johan Beckmann SAELPA) 367, 368, and 366.

Question 8

According to the South African Schools Act 84 of 1996 ...

- (1) any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the school governing body.
- (2) the curriculum and the process for the assessment of learner achievement must be applicable to public schools only.
- (3) a representative council of learners at the school must be established at every public school enrolling learners in the eighth grade or higher, and such council is the only recognised and legitimate representative learner body at the school.
- (4) a learner may be subjected to disciplinary proceedings if– (a) a dangerous object or illegal drug is found in his or her possession; or (b) his or her sample tested negative for an illegal drug.

Answer:

Only statement (3) is correct. See sections 5(9), 6A(2), 11(1) and 8A(12) of the South African Schools Act 84 of 1996.

Question 9

Fill in the missing words: According to the Admission Policy for Ordinary Public Schools Notice 2432 of 1998, a parent must complete an application form for admission, which should be made available to him or her by the principal of the school together with the admission policy and the ... for learners of the school.

- (1) school fees
- (2) mission statement
- (3) code of conduct
- (4) language policy

Answer:

Only statement (3) is correct. See section 14 of the Admission Policy for Ordinary Public Schools Notice 2432 of 1998.

Question 10

In *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 (C) ...

- (1) the applicant decided to embrace the principles of the Hindu/Tamil religion.
- (2) the applicant's suspension was set aside.
- (3) the Court noted that the school's code of conduct made specific mention to dreadlocks under the heading of 'hair'.
- (4) the Court referred to the Guidelines for a Code of Conduct for Learners Notice 776 of 1998, and stated that according to paragraph 4.5.1, "freedom of expression" has a restricted meaning and is limited to freedom of speech alone.

Answer:

Only statement (2) is correct. See *Antonie v Governing Body, Settlers High School and Others* 2002 (4) SA 738 (C) at paras. 3, 11, 15 and 20.

Question 11

Who is responsible for establishing a school fund and administering it in accordance with directions issued by the Head of Department?

- (1) The parents of learners at a public school
- (2) The school governing body
- (3) The educators at a public school
- (4) The school principal

Answer:

Only statement (2) is correct. See section 37(1) of the South African Schools Act 84 of 1996.

Question 12

ONE of the premises on which the National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions is based is:

- (1) Intravenous drug abuse is not a source of HIV transmission among learners and students.
- (2) Testing for HIV/AIDS for employment or attendance at schools is permitted.
- (3) Compulsory disclosure of a learner's, student's or educator's HIV/AIDS status to school or institution authorities is always advocated.
- (4) Because of the increasing prevalence of HIV/AIDS in schools, it is imperative that each school must have a planned strategy to cope with the epidemic.

Answer:

Only statement (4) is correct. See paras. 2.3, 2.4 and 2.5 of National Policy on HIV/AIDS, for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions.

Question 13

Fill in the missing word: According to Bray E “The constitutional concept of co-operative government and its application in education” (2002) *Journal for Contemporary Roman-Dutch Law* ... is vitally important for meaningful human existence: it enables individuals to develop whole and mature personalities, and empowers them to fulfil roles that are self-enriching and beneficial to society.

- (1) money
- (2) education
- (3) food
- (4) oxygen

Answer:

Only statement (2) is correct. See Bray E “The constitutional concept of co-operative government and its application in education” (2002) *Journal for Contemporary Roman-Dutch Law* 514.

Question 14

In which ONE of the following cases was the following argument presented to the Court by a school defending itself for refusing to admit black learners? “The Afrikaner people constitute a minority. By virtue, for instance, of the United Nations’ Charter on Human and Peoples’ Rights (articles 20 and 22) the Afrikaner people, as a minority have an unquestionable and inalienable right to self-determination.”

- (1) *Seodin Primary School and Others v MEC, Northern Cape and Others* 2006 (4) BCLR 542 (NC)
- (2) *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)
- (3) *The Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA)
- (4) *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T)

Answer:

Only statement (4) is correct. See *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) at 233B-C.

Question 15

Indicate which statement is NOT correct: The Language in Education Policy in terms of section 3(4)(m) of the National Education Policy Act 27 of 1996 ...

- (1) aims to pursue the language policy most supportive of general conceptual growth amongst learners, and hence to establish additive multilingualism as an approach to language in education.
- (2) aims to support the teaching and learning of all other languages required by learners or used by communities in South Africa, including languages used for religious purposes, languages which are important for international trade and communication, and South African Sign Language, as well as Alternative and Augmentative Communication.

- (3) provides that the language(s) of learning and teaching in a public school does not necessarily have to be (an) official language.
- (4) provides that all language subjects shall receive equitable time and resource allocation.

Answer:

Only statement (3) is incorrect. See paras. C(2), C(4), D(3) and E of the Language in Education Policy in terms of section 3(4)(m) of the National Education Policy Act 27 of 1996.

Question 16

The governing body of a public school ...

- (1) may have any of their functions withdrawn by the Head of Department (HoD), on reasonable grounds, and provided the correct procedures have been followed.
- (2) comprises representatives of all stakeholders (i.e. parents, educators, staff and learners) and although the number of governors will vary, educators must comprise the majority vote.
- (3) elects its own office bearers (chair, treasurer and secretary) and the chairperson must be a parent employed at the school.
- (4) may never establish committees to assist them in their work and may never co-opt persons who are not on the governing body.

Answer:

Only statement (1) is correct. See Bray E "The legal status of schools in the new South African education system" 98 and 101 or sections 23(9), 29(2), 23(1)(c), 23(6), 22(1) and (2) of the South African Schools Act 84 of 1996.

Question 17

Indicate which statement is NOT correct. In *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) the Court held that ...

- (1) the evidence showed that the nose stud was a mandatory tenet of Sunali's religion or culture and an involuntary expression of South Indian/Tamil/Hindu culture, a culture that was intimately intertwined with Hindu religion, and that Sunali regarded it as such.
- (2) under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (i.e. the Equality Act), failure to take steps to reasonably accommodate the needs of people on the basis of race, gender or disability amounted to discrimination.
- (3) it would be perfectly correct for a school, through its code of conduct to set strict procedural requirements for exemption. It would also be appropriate for the parents and, depending on their age, the learners, to be required to explain in writing beforehand why they require an exemption.
- (4) the discrimination had a serious impact on Sunali and, although the evidence showed that uniforms serve an important purpose, it does not show that the purpose is significantly furthered by refusing Sunali her exemption. Allowing the nose stud would not have imposed an undue burden on the school.

Answer:

Only statement (1) is incorrect. See *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC) at paras. 72, 110, 112 and 60.

Question 18

Fill in the missing words: According to Joubert R & Bray E “Public school admission policy: theory and practice” (2007) *Public school governance in South Africa* ... zones are instituted to control learner numbers at school and to co-ordinate parental preferences.

- (1) school detention
- (2) school feeder
- (3) primary
- (4) secondary

Answer:

Only statement (2) is correct. See Joubert R & Bray E “Public school admission policy: theory and practice” (2007) *Public school governance in South Africa* 75.

Question 19

In which ONE of the following cases did the Director General of the Department of Education aver (on behalf of the Minister of Education) that “corporal punishment is inherently violent, and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered? South Africans have suffered, and continue to suffer, a surfeit of violence. The state has an obligation to ensure that the learner’s constitutional rights are protected. It has an interest in ensuring that education in all schools is conducted in accordance with the spirit, content and values of the Constitution”.

- (1) *S v Williams and Others* 1995 (7) BCLR 861 (CC)
- (2) *S v A Juvenile* 1990 (4) SA 151 (ZS)
- (3) *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS)
- (4) *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC)

Answer:

Only statement (4) is correct. See *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) at para. 12.

Question 20

Fill in the missing section number: Section ... of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

- (1) 29(1)(a)
- (2) 29(2)(a)
- (3) 29(1)(b)
- (4) 29(3)(b)

Answer:

Only statement (3) is correct. See section 29(1)(b) of the Constitution of the Republic of South Africa, 1996 or Malherbe R “The constitutional framework for pursuing equal educational opportunities in education” (2004) *Perspectives in Education* vol. 22(3) 13.

3 FEEDBACK ON ASSIGNMENT 02

For Assignment 02 for this module, you were asked to prepare the following essay:

Question:

Write an essay of about 1500 words (approximately four (4) typed pages in 1, 5 line spacing) in which you critically analyse Bray’s statement below in the context of education management in South Africa:

“Developing strong and effective spheres of government and ensuring that each one fulfils its constitutionally assigned role in a system of cooperative governance may be one of the greatest challenges facing government in South Africa” (2002:530).

Please note that the research outline/framework that follows for this assignment question is merely a guideline and **should not** be seen as a model answer, although it is more or less the kind of answer we expected.

Answer:

The assignment question involves a critical analysis of the challenges facing the South African government in developing strong and effective spheres of government and ensuring that each one fulfils its constitutionally assigned role in a system of co-operative government. We will be examining the following in the essay:

- What is co-operative government and how does it affect the role of the different spheres of government?
- What spheres of government are responsible for education management in South Africa and what are their assigned roles in terms of the Constitution?
- Finally, we will be highlighting some of the ways in which we can improve the government’s ability to ensure effective co-operative government amongst the various spheres of government.

The Constitution provides that in the Republic, government is constituted as national, provincial and local spheres of government.¹ The Constitution also makes provision for the concept of co-operative government which essentially means that the national, provincial and local spheres of government are distinctive, interdependent and interrelated.²

Co-operative governance envisages co-operation, co-ordination and support among the spheres of government to promote and maintain effective government. It binds together the spheres of government

¹ Section 40(1).

² Chapter 3.

and forces them to work together in interrelated and interdependent relationships, showing mutual respect for each other's distinctive character.³

In terms of the constitutional imperative of co-operative government, education (except tertiary education) is a "concurrent functional" area for which both the national and provincial governments are responsible.⁴ In this regard, the national government is, for example "responsible for the education legislation that applies nationally and deals with national norms, standards and qualifications for education".⁵ The provincial government, on the other hand, "is in charge of school education and all public schools in the province according to the needs and priorities of the particular province, but subject to the overall national standards".⁶

When exercising authority over education as a concurrent functional area, both the national and provincial departments of education must comply with certain constitutional principles of co-operative government. For a full list of these constitutional principles, please see section 41 of the Constitution. In addition to complying with the principles of co-operative government, both the national and provincial departments of education must, when administering public education, adhere to the democratic principles and norms of the Constitution, especially those in Chapter 10.⁷

Unfortunately, however, when there is power sharing between the different spheres of government, there is always the possibility of conflict arising. Section 146 of the Constitution makes particular provision for dealing with irreconcilable conflict between national and provincial legislation on concurrent matters.

In conclusion, although the statement by Bray in the assignment question is indeed true, there are ways in which we can alleviate some of the challenges facing government in South Africa with regard to developing strong and effective spheres of government and ensuring that each one fulfils its constitutionally assigned role in a system of co-operative government. Some of these ways include:

- applying the principles of co-operative government correctly;
- using and exploiting (where appropriate) the degree of autonomy enjoyed by the provinces constitutionally;
- using and promoting the distinctiveness of a province to develop its autonomy.
- co-operative government offers many opportunities for the sharing of expertise and improving government to deliver better education services.⁸

4 FORMAT OF THE MAY/JUNE 2018 EXAMINATION PAPER

At the end of the semester, you will write **one two-hour paper** in Education Law (LCP4809). Please do not phone us for "tips for the examination" or "the scope" of the examination. We will not respond to such requests. Below you will find a proper outline of the format of the examination paper for the May/June 2018 examination. We hope that you will find it useful when preparing for the forthcoming examination.

³ Bray W "The constitutional concept of co-operative government and its application in education" (2002) *Journal for Contemporary Roman-Dutch Law* 527.

⁴ See Bray *op cit* 516.

⁵ Bray W "Macro issues of Mikro Primary School" (2007) *Potchefstroom Electronic Journal* 13. See also the National Education Policy Act 27 of 1996 and the South African Schools Act 84 of 1996.

⁶ *Ibid.* See also sections 40 and 41 of the Constitution read with Schedule 4.

⁷ Bray *op cit* 520-521.

⁸ See Bray *op cit* 528-530.

Question 1

Question 1 consists of 20 multiple-choice questions and carries a total of **20 marks** (1 mark for each question).

Question 2

- | | | |
|-----|------------------------|-------------------|
| 2.1 | an essay-type question | (20 marks) |
| 2.2 | a short question | (10 marks) |

Question 3

Question 3 comprises five (5) questions only and is based on a set of hypothetical facts. It carries a total of **50 marks**.

- | | | |
|-----|------------------------|-------------------|
| 3.1 | a short question | (5 marks) |
| 3.2 | an essay-type question | (10 marks) |
| 3.3 | a short question | (5 marks) |
| 3.4 | an essay-type question | (15 marks) |
| 3.5 | an essay-type question | (15 marks) |

Please study Tutorial Letter 101/3/2018 which contains the latest information on admission to the examination and the examination itself.

5 CONCLUSION

Please contact us if you experience any problems with the module. Remember, though, that a little bit of study every day is worth far more than cramming a week before the exam!

Good luck with your studies.

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