

Tutorial Letter 201/2/2016

Education Law LCP4809

Semester 2

DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL LAW

IMPORTANT INFORMATION

This tutorial letter contains important information about
your module.

BAR CODE

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1 INTRODUCTION

Dear Student

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 101/3/2016 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

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

- (1) a parent may appeal to the Member of the Executive Council against a decision of a governing body regarding the exemption of such parent from payment of school fees.
- (2) a public school may attach the dwelling in which a parent resides to enforce the payment of school fees after it has ascertained that:
 - (a) the parent does not qualify for exemption from payment of school fees in terms of the Schools Act;
 - (b) no deductions have been made in terms of regulations contemplated in section 39(4), for a parent who qualifies for partial exemption; and
 - (c) the parent has completed and signed the form prescribed in the regulations contemplated in section 39(4).
- (3) the Minister must by notice in the *Government Gazette* annually determine the national quintiles for public schools or part of such quintiles which must be used by the Member of the Executive Council to identify schools that may not charge school fees.
- (4) a learner may be deprived of his or her right to participate in all aspects of the programme of a public school for the non-payment of school fees by his or her parent and may also be victimised in any manner, including but not limited to the following conduct:
 - (a) suspension from classes;
 - (b) verbal or non-verbal abuse;
 - (c) denial of access to
 - (i) cultural, sporting or social activities of the school; or
 - (ii) the nutrition programme of the school for those learners who qualify in terms of the applicable policy; or
 - (d) denial of a school report or transfer certificate.

Answer:

Only statement (3) is correct. See sections 39(7), 40(2), 41(6), 41(4) and 41(7) of the South African Schools Act 84 of 1996.

Question 2

Indicate which statement is NOT correct. According to Bray E “The constitutional concept of co-operative government and its application in education” (2002) *Journal for Contemporary Roman-Dutch Law* 516, co-operative government is not working properly because ...

- (1) people are used to doing things independently and without the interference (and frustration) of working together with others or in teams.
- (2) government in South Africa has traditionally been centralised in a unitary system with distinct and rigid hierarchical lines reflecting “top-down” power.

- (3) it offers many opportunities for the sharing of expertise and improving government to deliver better education services.
- (4) "law" with its supporting enforcement mechanisms (esp. the courts of law) traditionally and inherently sets boundaries and sets parties up against each other.

Answer:

Only statement (3) is incorrect. See Bray E "The constitutional concept of co-operative government and its application in education" (2002) *Journal for Contemporary Roman-Dutch Law* 516.

Question 3

Fill in the missing case name: In ... it was bluntly asserted that education "is the very foundation of good citizenship".

- (1) *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T)
- (2) *Brown v Board of Education* 347 US 483 (1954)
- (3) *Seodin Primary School and Others v MEC of Education Northern Cape and Others* 2006 (4) BCLR 542 (NC)
- (4) *Mahe v Alberta* 1 SCR 342 (1990)

Answer:

Only statement (2) is correct. See Malherbe R "The constitutional framework for pursuing equal opportunities in education" (2004) *Perspectives in Education* 10.

Question 4

Fill in the missing words: The ... must ensure that there are enough school places so that every child who lives in his or her province can attend school.

- (1) Minister of Basic Education
- (2) Council of Education Ministers
- (3) Head of Department (HoD)
- (4) Member of the Executive Council (MEC)

Answer:

Only statement (4) is correct. See section 3(3) of the South African Schools Act 84 of 1996.

Question 5

The right of everyone to education in the official language or languages of their choice in public educational institutions ...

- (1) is subject to the condition that provision of education in the preferred language must be reasonably practicable.
- (2) applies to basic education alone.
- (3) extends to all languages used in South Africa and not just the official languages.
- (4) provides for an unqualified right to mother-tongue education.

Answer:

Only statement (1) is correct. See Malherbe R "The constitutional framework for pursuing equal opportunities in education" (2004) *Perspectives in Education* 21.

Question 6

Fill in the missing word/words: In *Dhlamini v Minister of Education* 1984 (3) SA 255 (NDP), the application of the rules of ... was reaffirmed when dealing with student misconduct unless it is “expressly or by implication excluded by legislation or if circumstances are so exceptional as to justify a departure from the principle”.

- (1) administrative action
- (2) equality
- (3) natural justice
- (4) human dignity

Answer:

Only statement (3) 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 Association* 363.

Question 7

Indicate which statement is NOT correct. The Constitution ...

- (1) is the supreme law of the Republic.
- (2) entrenches constitutional communism.
- (3) enshrines democratic values and norms.
- (4) incorporates a justiciable Bill of Rights.

Answer:

Only statement (2) is incorrect. See Bray E “The constitutional concept of co-operative government and its application in education” (2002) *Journal for Contemporary Roman-Dutch Law* 517.

Question 8

Fill in the missing words: The governance of a public school is vested in ...

- (1) the school principal.
- (2) its governing body.
- (3) the Head of Department.
- (4) its learners.

Answer:

Only statement (2) is correct. See Bray E “The legal status of schools in the new South African education system” (2000) *A critical chronicle of the South African Education Law and Policy Association* 98 and section 16(1) of the South African Schools Act 84 of 1996.

Question 9

When applying due process in practice, governing bodies will need to comply with the following basic elements of procedural fairness, which are found in common law and statute and protected by the 1996 Constitution:

- (1) hearing and notice, partial tribunal, right to information, right to representation, reasons for the decision and right to appeal.
- (2) inadequate notice of the hearing, impartial tribunal, right to information, right to representation, reasons for the decision and no right to appeal.
- (3) hearing and notice, impartial tribunal, no right to information, right to representation, reasons for the decision and right to appeal.

- (4) hearing and notice, impartial tribunal, right to information, right to representation, reasons for the decision and right to appeal.

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 Association* 367-368.

Question 10

Fill in the missing words: In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC), the Head of Department, acting under ss 22(1) and (3) and 25(1) of the South African Schools Act 84 of 1996, purported to revoke the power of the school's governing body to set the school's ..., and appointed a committee to attend to this function.

- (1) language policy
- (2) admission policy
- (3) uniform policy
- (4) attendance policy

Answer:

Only statement (1) is correct. See *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para. 21.

Question 11

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

- (1) the principal or his or her delegate may at random administer a urine or other non-invasive test to any group of learners that is on fair and reasonable grounds suspected of using illegal drugs.
- (2) the principal or his or her delegate must within three working days, if practicable, inform the parent that a random test or search and seizure was done in respect of his or her child.
- (3) the principal or his or her delegate must inform the learner and his or her parent of the result of the test immediately after it becomes available.
- (4) a learner may be subjected to disciplinary proceedings if a dangerous object or illegal drug is found in his or her possession; or his or her sample tested positive for an illegal drug.

Answer:

Only statement (2) is incorrect. See sections 8A(8), (10)(a), (10)(b) and (12)(a) & (b) of the South African Schools Act 84 of 1996.

Question 12

Independent schools ...

- (1) may be registered by the Minister of Basic Education.
- (2) may be registered by the Minister if he or she is satisfied that the standards maintained in the independent school are inferior to those of comparable public schools.
- (3) can never be converted into public schools.
- (4) must be registered by the HoD if he or she is satisfied that their admission policy does not discriminate on the ground of race.

Answer:

Only statement (4) is correct. See Bray E "The legal status of schools in the new South African education system" (2000) *A critical chronicle of the South African Education Law and Policy Association* 107-108 and sections 49 and 46(1) of the South African Schools Act 84 of 1996.

Question 13

In which **ONE** of the following cases did the Court decide that the judicially ordered corporal punishment of juvenile offenders was in conflict with the Bill of Rights?

- (1) *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC)
- (2) *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC)
- (3) *S v Williams* 1995 (3) SA 632 (CC)
- (4) *Brink v Kitshoff* 1996 (6) BCLR 759 (CC)

Answer:

Only statement (3) is correct. See *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para. 44.

Question 14

Indicate which statement is **NOT** correct. A juristic person ...

- (1) has perpetual succession and will continue to exist as an entity despite any change that may take place in its constituent parts.
- (2) like a public school, has the capacity to take part in legal actions on its own.
- (3) exists until it is dissolved or terminated in terms of the law.
- (4) is a legal subject and has the capacity to be a bearer of rights and obligations.

Answer:

Only statement (2) is incorrect. See Bray E "The legal status of schools in the new South African education system" (2000) *A critical chronicle of the South African Education Law and Policy Association* 96-98.

Question 15

Who may suspend learners from a public school?

- (1) the governing body of the school.
- (2) the principal of the school.
- (3) the educators at the school.
- (4) the Head of Department.

Answer:

Only statement (1) is correct. See section 9(1) of the South African Schools Act 84 of 1996.

Question 16

Fill in the missing word/words: In *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T) the school was an ... medium school.

- (1) Afrikaans
- (2) Afrikaans/Sepedi parallel

- (3) English
- (4) Afrikaans/English parallel

Answer:

Only statement (4) is correct. See *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T) at 225H.

Question 17

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

- (1) religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is compulsory.
- (2) the Member of the Executive Council may determine that the governance of two or more public schools must vest in a single governing body if it is in the best interests of education at the schools in question.
- (3) a member of a governing body need not withdraw from a meeting of the governing body for the duration of the discussion and decision-making on any issue in which the member has a personal interest.
- (4) all members of a governing body must be remunerated for the performance of their duties and necessary expenses incurred by a member of a governing body in the performance of his or her duties may be reimbursed by the governing body.

Answer:

Only statement (2) is correct. See sections 7, 17(1), 26 and 27(1) & (2) of the South African Schools Act 84 of 1996.

Question 18

In which ONE of the following cases did the Court decide that education regulations that restricted the permanent appointment of teachers of South African citizens to the exclusion of foreigners permanently resident in South Africa were unconstitutional?

- (1) *Minister of Education v Harris* 2001 (11) BCLR 1157 (CC)
- (2) *Larbi-Odam v MEC for Education (North-West Province)* 1997 (12) BCLR 1655 (CC)
- (3) *Motala v University of Natal* 1995 (3) BCLR 374 (D)
- (4) *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B)

Answer:

Only statement (2) is correct. See Malherbe R "The constitutional framework for pursuing equal opportunities in education" (2004) *Perspectives in Education* 25.

Question 19

According to the National Education Policy Act 27 of 1996 ...

- (1) subject to the Constitution, national policy shall prevail over the whole or a part of any provincial policy on education if there is a conflict between the national and provincial policies.
- (2) the Minister shall determine national education policy in accordance with the provisions of the South African Schools Act 84 of 1996.
- (3) in determining national policy for education at education institutions, the Minister shall take into account the competence of the national assembly in terms of section 146 of the Constitution, and the relevant provisions of any national law relating to education.
- (4) the Member of the Executive Council shall determine national policy for the planning, provision, financing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system.

Answer:

Only statement (1) is correct. See sections 3(1) - 3(4) of the National Education Policy Act 27 of 1996.

Question 20

In *Seodin Primary School and Others v MEC of Education Northern Cape and Others* 2006 (4) BCLR 542 (NC) one of the norms and standards published by the Minister of Education in terms of section 6(1) of the South African Schools Act 84 of 1996 is that ...

- (1) the national department of education must keep a register of requests by learners for teaching in a language medium which cannot be accommodated by schools.
- (2) the provincial department must explore ways and means of sharing scarce human resources. It must also explore ways and means of providing alternative language maintenance programmes in schools and or school districts which cannot be provided with and or offer additional languages of teaching in the home language(s) of learners.
- (3) in the case of a new school, the Minister of Basic Education in consultation with the relevant provincial authority determines the language policy of the new school in accordance with the regulations promulgated in terms of section 6(1) of the South African Schools Act 84 of 1996.
- (4) it is reasonably practicable to provide education in a particular language of learning and teaching if at least 35 learners in Grades 1 to 6 or 30 learners in Grades 7 to 12 in a particular grade request it in a particular school.

Answer:

Only statement (2) is correct. See *Seodin Primary School and Others v MEC of Education Northern Cape and Others* 2006 (4) BCLR 542 (NC) at para. 8.

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 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

¹ Section 40(1).

² Chapter 3.

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.

4 FORMAT OF THE OCTOBER/NOVEMBER 2016 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 October/November 2016 examination. We hope that you will find it useful when preparing for the forthcoming examination.

Question 1

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

Question 2

Question 2 consists of one question only and carries a total of **20 marks**.

Question 3

Question 3 comprises three questions and carries a total of **30 marks**.

- | | |
|----------------------------|-------------------|
| (a) a short question | (5 marks) |
| (b) a short question | (5 marks) |
| (c) an essay-type question | (20 marks) |

Question 4

Question 4 comprises two questions and is based on a set of hypothetical facts. It carries a total of **30 marks**.

- | | |
|----------------------------|-------------------|
| (a) an essay-type question | (18 marks) |
| (b) an essay-type question | (12 marks) |

Please study Tutorial Letter 101/3/2016 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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