

IMPLEMENTATION PLAN FOR SECTION 38A OF THE SOUTH AFRICAN SCHOOLS ACT 84 OF 1996

1. BACKGROUND

- 1.1 After a process of consultation with provincial school governing body associations and unions the Western Cape Education Department will implement the provisions of Section 38A of the South African Schools Act¹ as detailed in what follows.
- 1.2 The purpose of Section 38A is to regulate payments made by school governing bodies to state employees at public ordinary schools.

2. SECTION 38A OF THE SOUTH AFRICAN SCHOOLS ACT

- 2.1 Section 38A reads as follows:

Prohibition of payment of unauthorised remuneration, or giving of financial benefit or benefit in kind to certain employees

- 38A. (1) Subject to subsection (2), a governing body may not pay or give to a state employee employed in terms of the Employment of Educators Act, 1998 (Act No. 76 of 1998), or the Public Service Act, 1994 (Proclamation No. 103 of 1994), any unauthorised—
- (a) remuneration;
 - (b) other financial benefit; or
 - (c) benefit in kind.
- (2) A governing body may apply to the employer for approval to pay a state employee any payment contemplated in subsection (1).
- (3) Such application must be lodged in writing in the office of the employer and must state—
- (a) full details of the nature and extent of the payment;
 - (b) the process and resources that will be used to compensate or remunerate the state employee; and
 - (c) the extent of compliance with section 20(5) to (9).
- (4) The governing body must make the application contemplated in subsection (2) at least four months prior to the finalisation of the school's budget.
- (5) Despite subsection (1), a governing body may pay travel and subsistence expenses relating to official school activities but such expenses may not be greater than those that would be payable to a public servant in similar circumstances.
- (6) An employer must not unreasonably refuse an application contemplated in subsection (2).
- (7) In considering the application, the employer must take into account—
- (a) the implications for the employer in terms of the employment contract and labour law;
 - (b) whether the service concerned in the application will interfere with the normal service delivery of the employee;
 - (c) whether the service concerned in the application has already been paid for by the employer; and
 - (d) whether the additional remuneration, other benefits or benefits in kind support the core activities and functions of the school.
- (8) The payment contemplated in subsection (1) must be reflected in the school's budget, as presented to the general meeting of parents as contemplated in section 38(2).
- (9) If a governing body pays remuneration or gives any financial benefit or benefit in kind contemplated in subsection (1) to an employee without prior approval of the employer, the amount of money paid or benefit given must be recovered by the employer on behalf of the school from members of the governing body who took that decision, excluding a member of the governing body who is a minor.

- (10) A governing body may appeal to the Member of the Executive Council against—
- (a) the refusal by the employer of an application contemplated in subsection (2); or
 - (b) the failure of the employer to provide a decision on an application contemplated in subsection (2) within three months after the lodging of the application in the office of the employer".

2.2 There are a number of terms used in section 38A that are not defined in the South African Schools Act 84/96. These terms are state employee, remuneration, other financial benefit and benefit in kind, employer, application, core activities and functions of a school, service delivery of the employee.

2.3 In order to give effect to the implementation of section 38A it is suggested that these terms are understood as follows:

2.3.1 **State employee**² shall mean a member of staff employed at a school in terms of the Employment of Educators Act 76/98 and the Public Service Act 103/94.

2.3.2 **Remuneration**³ shall mean any payment in money or in kind, or both in money and in kind, made or owing to any state employee in return for that state employee working for the school governing body for the purposes of Section 38A.

2.3.3 **Other financial benefit and benefit in kind**⁴ shall have a corresponding meaning to remuneration.

2.3.4 **Employer**⁵ shall mean the Head of Department for the Western Cape Education Department.

2.3.5 **Application**⁶ shall mean a written request from the school governing body for the purposes of section 38A(2) in a manner and form prescribed by the Head of Department.

2.3.6 **Normal service delivery of the employee**⁷ shall mean the duties and responsibilities prescribed by the employer.

2.3.7 **Core activities and functions of a school**⁸ shall mean the management, administration, teaching and learning functions and shall include the extra curricula and income generating activities of a school.

3. APPLICABILITY

3.1 Section 38A is only applicable to school governing bodies, educators and public service personnel (state employees) employed at public schools in terms of the Employment of Educators Act 76/98 and Public Service Act 103/94, respectively, who are on the staff establishments of provincial departments of education and who are remunerated by the state.

3.2 The implementation of this section does not absolve state employees from their statutory obligations towards their employers. In this regard state employees must still obtain the necessary approval from their employer to receive additional remuneration, other financial benefits or benefits in kind from the school governing bodies.

² See Section 38A(1) of Act 84 of 1996.

³ See Section 38(A)(1)(a). This definition has been imported from the Basic Conditions of Employment Act 75 of 1997 and has been adapted slightly for purposes of section 38A.

⁴ See Section 38A(b) & (c).

⁵ See Section 38A(2) & (3).

⁶ See Section 38A(3).

⁷ See Section 38A(7)(b).

⁸ See Section 38A(7)(d).

4. THE APPLICATION PROCEDURE

4.1 Section 38A was published as law on 26 April 2004. The legislators have made provision for a transitional period of twelve months, which will end on or about the 26 April 2005. The intention of the transitional period is to afford provincial education departments a reasonable period to give effect to the provisions of section 38A. The employer cannot, during the transitional period take any disciplinary steps against employees who are receiving unauthorised remuneration nor can it take steps to recover such unauthorised remuneration.

4.2 The department intends aligning the application procedure detailed in section 38A with the annual budgetary cycle of schools. In order to do this the department proposes an abbreviated application procedure for the 2005 financial year that will run from the beginning of August 2004 to the end of November 2004. This process will ensure compliance with section 38A for 2005 and will align the 'annual application process for the purposes of section 38A' with the annual budgetary cycle of schools for 2006 and each year thereafter.

4.3 SECTION 38A APPLICATIONS FOR 2005

4.3.1 All applications for 2005 must reach the department by no later than 30 November 2004.

4.3.2 The applications must be submitted in the format detailed in the attached document marked **annexures A1, A2 and A3 respectively**.

4.3.3 The applications for educators must be marked for the attention of the **Director, Directorate: Personnel Management (Educators)** and the applications for public service staff must be marked for the attention of the **Director, Directorate: Personnel Management (Public Service Staff)**. All the applications must be addressed to:

THE HEAD: EDUCATION

Western Cape Education Department
Private Bag X9114
CAPE TOWN
8000

4.3.4 As long as the application contains the information and supporting documentation requested, the Head of Department will, after considering the application grant conditional approval for the payment and receipt of such additional remuneration for the 2005 financial year. His approval for the payment and receipt of such payment will be valid only for the 2005 year.

4.4 SECTION 38A APPLICATIONS FOR 2006 AND EACH YEAR THEREAFTER

4.4.1 **1 December 2004 – 30 April 2005: SGB Application Period**

School governing bodies (SGB) must apply to the department for approval to pay additional remuneration to state employees in the manner and form determined by the Head of Department (HOD).

The application from the SGB will comprise the following:

- the information requested by the HOD as detailed in **Annexure A1 & A2**;
- a copy of the school's budget approved (approved budget) by a general meeting of parents reflecting the annual allocation for additional remuneration and how such allocation is intended to be disbursed to the respective state employee(s). If the approved budget is not available when

making application for the 2006 financial year or any financial year thereafter, the SGB's application must be supported by attaching the approved budget for the current financial year with a projection for the next financial year, until such time as the budget is approved; and

- a written application from the individual state employee/s to the employer requesting the employer's approval to receive such additional remuneration. This application must be submitted in the format detailed in **Annexure A3**.

4.4.2 **1 December 2004 – 31 July 2005: Communication of HOD's Decision**

The HOD must communicate his decision to the SGB's within three (3) months of receipt of the application. This means that for applications received on 30 his decision will be received by no later than 31 July.

4.4.3 **Appeals to the Member of the Executive Council**

The SGB may appeal to the Member of the Executive Council (MEC) within one (1) month of receipt of the HOD's decision or within three (3) months after lodging the application in the office of the employer, if the employer has failed to take a decision on the application.

4.4.4 **Response from the Member of the Executive Council**

The MEC must consider the appeal and respond within one (1) month of receipt of the appeal from the SGB.

4.4.5 **Applications for 2006 and each year thereafter**

All applications must be addressed to the HOD as stated in paragraph 4.3.3 above.

5. EMPLOYER'S CONSIDERATIONS

5.1 When considering an application the employer must act:

- 5.1.1 with procedural fairness and within the provisions of section 38A;
- 5.1.2 in an unbiased and reasonable manner;
- 5.1.3 without ulterior purpose or motive;
- 5.1.4 in good faith and not arbitrarily or capriciously; and
- 5.1.5 without influence from another person or body.

5.2 In addition the employer's deliberations must disregard irrelevant considerations and take into account all relevant considerations including:

- 5.2.1 the implications for the employer in terms of the employment contract and labour law;
- 5.2.2 whether the service/duties rendered by the employee for the additional remuneration will interfere with the primary duties of the employee towards his/her employer;
- 5.2.3 whether the employee is already being paid by the employer for the services/duties rendered for the additional remuneration; and
- 5.2.4 whether the remuneration supports the core activities and functions of the school.

5.3 An employer cannot unreasonably deny the application of a school governing body in terms of section 38A(2).

5.4 The employer must approve or deny with written reasons the school governing body's application.

6. PAYMENT OF TRAVEL AND SUBSISTENCE EXPENSES

- 6.1 SGB's may pay travel and subsistence expenses relating to official school activities, but such expenses may not be greater than those that would be payable to a public servant in similar circumstances.
- 6.2 The approval from the employer to make these payments is not required.
- 6.3 The travel and subsistence tariffs applicable to state employees will be sent to schools from the Department on a regular basis, as and when the tariffs are updated.
- 6.4 SGBs must keep a detailed account of all travel and subsistence payments to state employees.
- 6.5 These payments must be included in the audited or examined annual financial statements of the school, which are submitted to the HOD within six months after the end of each financial year⁹.

⁹ Refer to section 43(5) of Act 84 of 1996.

SCHOOL GOVERNING BODY APPLICATION IN TERMS OF SECTION 38A OF THE SOUTH AFRICAN SCHOOLS ACT 84 OF 1996 TO PAY ADDITIONAL REMUNERATION¹⁰ TO STATE EMPLOYEES IN 2005

1. Particulars of School

Name of School: _____

Address: _____

Telephone no: _____ Fax no: _____

Name of Chairperson of Governing Body: _____

2. Funding the additional remuneration, other financial benefit or benefit in kind

2.1 How will the payments for additional remuneration for the next year be funded? (Tick applicable box)

- School Fees Donations Investments
 Bequests from Trusts Other income (specify)

2.2 The total allocated budget to be spent on additional remuneration for 2005: R.....

3. The information required in respect of each state employee in support of this application is contained in the attached 'Annexure A2'.

3.1 Employee's name(s) and persal number(s) or post designation.

3.2 The rank(s) of the employee(s).

3.3 The additional duties and/or activities and/or responsibilities for which the school governing body will remunerate the state employee(s) or which are attached to the post.

3.4 The annual value of the additional service rendered by the state employee(s) or allocated to the post.

3.5 The exact nature of the payment. (Please specify whether it is 'remuneration', 'other financial benefit' or 'benefit in kind' or a combination of these benefits.)

3.6 If the payment is 'remuneration', its annual value and when payment is to be effected.

¹⁰ 'Additional remuneration' refers to remuneration, other financial benefit, or benefit in kind for the purpose of this application.

- 3.7 If the payment is 'other financial benefit', full details of this benefit must be provided, including the value of the benefit, how and when payment is effected.
- 3.8 If the payment is a 'benefit in kind', full details of this benefit must be provided, including the value of the benefit, how and when such benefit will be provided.
- 4. A copy of the **school's budget**, approved by a general meeting of parents, reflecting the annual allocation for additional remuneration and how such allocation is intended to be disbursed to the respective state employee(s) is attached as required.¹¹
- 5. **The written application(s) from the state employee(s)** to the employer requesting approval to receive the additional remuneration is/are attached as required. Please submit this application in the format provided as contained in '**Annexure A3**'.

I the undersigned certify that to the best of my knowledge and belief:

- 1. **The information provided in this application together with the relevant annexures is correct.**
- 2. **The additional service will not interfere with the normal responsibilities and duties of the state employee; and**
- 3. **The service(s) being rendered has /have NOT been paid for by the employer.**

.....
CHAIRPERSON OF GOVERNING BODY

.....
DATE:

¹¹ If the approved budget is not available when making application for the 2006 financial year or any financial year thereafter, the SGB's application must be supported by attaching the approved budget for the current financial year with a projection for the next financial year, until such time as the budget is approved.

WESTERN CAPE EDUCATION DEPARTMENT

APPLICATION TO REMUNERATE EMPLOYEES IN TERMS OF SECTION 38A OF ACT 84 OF 1996 (SASA) /

Note:

1. The governing body must attach a copy of the schools budget approved by a general meeting of parents reflecting the annual allocation for additional remuneration and how such allocation is intended to be disbursed to the respective state employees.¹²
2. The written application(s) from the state employee(s) requesting approval from the employer to receive the additional remuneration must be attached to this annexure.

No.	Name of employee or post designation	Persal no.	Rank of employee	Additional duties/ activities/ responsibilities of employee or post	Annual value of the additional service rendered or allocated to the post	Exact nature of payment. (Specify 'remuneration', 'other financial benefit' or 'benefit in kind' or a combination)	State annual value of 'remuneration' and when payment is to be effected	If payment is 'other financial benefit' provide full details of this benefit, including the value of the benefit, how and when payment is effected.	If payment is 'benefit in kind', provide full details of this benefit, including value of the benefit, how and when the benefit will be provided.	How does the additional service support the core activities and/or functions of the school?

¹² If the approved budget is not available when making application for the 2006 financial year or any financial year thereafter, the SGB's application must be supported by attaching the approved budget for the current financial year with a projection for the next financial year, until such time as the budget is approved.

No.	Name of employee or post designation	Persal no.	Rank of employee	Additional duties/ activities/ responsibilities of employee or post	Annual value of the additional service rendered or allocated to the post	Exact nature of payment. (Specify 'remuneration', 'other financial benefit' or 'benefit in kind' or a combination)	State annual value of 'remuneration' and when payment is to be effected	If payment is 'other financial benefit' provide full details of this benefit, including the value of the benefit, how and when payment is effected.	If payment is 'benefit in kind', provide full details of this benefit, including value of the benefit, how and when the benefit will be provided.	How does the additional service support the core activities and/or functions of the school?

INSERT ADDRESS OF STATE EMPLOYEE

ATTENTION: The Director

Directorate: Personnel Management (Educators)/(Public Service Staff) [delete if not applicable]

THE HEAD: EDUCATION

Western Cape Education Department
Private Bag X9114
CAPE TOWN
8000

Dear Sir

STATE EMPLOYEE APPLICATION TO RECEIVE ADDITIONAL REMUNATION FROM THE SCHOOL GOVERNING BODY FOR 2005

Name of employee: _____

Persal Number:

Rank of employee: _____

Name of School:

I kindly request approval to receive the additional remuneration allocated to me in the annual amount of **{insert annual amount}** as motivated by the School Governing Body's application in terms of Section 38A of the South African Schools Act 84 of 1996.

I confirm that my service to the school governing body for which this application is made will not interfere with, nor hinder, the performance of my primary responsibilities and duties to my employer.

I now await your decision.

Yours faithfully

[Insert signature and printed name of state employee]