

CHAPTER 6

**THE RIGHT
TO BASIC
EDUCATION FOR
CHILDREN WITH
DISABILITIES**



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This chapter is an update of an earlier version authored by Silomo Khumalo and Tim Fish Hodgson.



INTRODUCTION

The apartheid government created a racially segregated education system that offered black children poor-quality education in urban townships or designated ‘homelands’. Education for children with disabilities followed a similarly racialised trend.

White learners with disabilities had the potential benefit of higher-quality education in special schools designed for specific disabilities, with adequate resources and well-trained teachers.

By contrast, for decades after special schools were opened for white children, black, Indian and coloured children with disabilities were left without any schooling at all. When ‘special schools’ were eventually established, it was often by faith-based missions and charities with inadequate resources and poorly-trained teachers.

All in all, the Department of Basic Education (DBE) estimates that only

20% of children with disabilities accessed education during the apartheid era. After the transition to democracy there was a double apartheid that needed to be resolved in the education system: a racial apartheid, and an interconnected disability apartheid.

Education White Paper 6, titled ‘Special Needs Education – Building an Inclusive Education and Training System (WP6)’, was a move towards resolving this dual discrimination in education. White Paper 6 is a policy developed by the Department of Basic Education in 2001 that envisaged an inclusive education system premised on the principles of

non-discrimination and the human dignity of all children. It has since been operationalised through a range of other policies and guidelines including the DBE’s Policy on Screening, Identification, Assessment and Support (SIAS Policy).

Despite this, progress implementing an inclusive education system has been incremental at best. The government’s own estimates have indicated that there are approximately 600 000 children with disabilities who are out of school; more than double the 280 000 estimated by WP6 in 2001. This high number reflects a crisis in the provision of basic education for children with disabilities.

THE OBVIOUS QUESTION IS: WHAT HAS GONE WRONG?

The purpose of this chapter is to try to answer this question, and to provide the necessary information for disability rights advocacy groups and communities to effect the right to basic education for children with disabilities.

The chapter provides a brief overview of the right to equitable access to quality basic education for children with disabilities in South Africa. It considers the inclusive education policy framework adopted in South Africa, and the problems encountered and successes achieved in implementing it. How can the law and human rights standards assist and change this reality? The chapter discusses some of the cases and legal processes that may help pave the way towards realising the right to basic education to which children with disabilities are entitled.

Like all children in South Africa, children with disabilities are vulnerable to all of the general challenges in South Africa’s education system described in this handbook, including those

of infrastructure, access to learning materials, post provisioning, threats of violence, and lack of transport.

Every chapter in the handbook attempts where possible to view the topic under consideration through an inclusive lens. This means taking into account the particular challenges faced by marginalised and excluded learners, including learners with disabilities. This chapter should therefore be read with the rest of the handbook, in order to develop a full understanding of the specific and acute challenges faced by children with disabilities in receiving an equal education. It is hoped that this chapter will give the reader the tools for understanding disability and inclusive education when reading the rest of the handbook.

INCLUSIVE EDUCATION

‘Inclusive education’ refers to the capacity of all schools, including ordinary schools in each and every community, to create a learning environment that promotes the full personal, academic and professional development of all learners irrespective of race, class, gender identity or expression, disability, religion, culture, sexual orientation, learning style and language. A system of inclusive education challenges exclusionary education policies and practices, and ensures that every child is supported to reach their full learning potential. For the purposes of this chapter, we will be focusing on realising the right to inclusive education for children with disabilities within an inclusive education system; but it is important to understand that inclusive education is a broader concept applicable to all children, in all schools.



KEYWORDS: WHAT IS DISABILITY?

Correct and accurate terminology is particularly important to disability rights activism. Incorrect terminology can be alienating for and hurtful to people with disabilities. Though people with disabilities do vary in their opinions, in the South African context there is a general preference not to be referred to as 'handicapped' or 'disabled' people, but rather as 'persons with disabilities'.

The following definitions may be useful to the reader, in the context of this chapter and of the handbook more broadly:

- **Disability** The UN Convention on the Rights of Persons with Disabilities (CRPD) recognises disability as an evolving concept and describes disability as "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder full and effective participation in society on an equal basis with others". Disability, therefore, results from the interaction between persons with impairments and attitudinal, policy and environmental barriers that prevent persons with disabilities from participating in society in the same way as others.
- **Medical model of disability** The medical model followed by the apartheid government assumed that disability is caused by the physical or intellectual impairment of an individual. It regarded people with disabilities as suffering from an inherent deficiency that requires, or is capable of, a medical cure or treatment. The medical model of disability has contributed to widespread stigma about people with disabilities as somehow sub- or inhuman, and in the context of education, as 'ineducable'. Under the medical model of disability, people are often isolated in specialised institutions such as 'special schools', away from 'normal' children.
- **Social model of disability** According to the social model, disability is not a uniform problem caused entirely by an individual's impairment.

Rather, disability results when the physical and social environment poses limitations to a person with an impairment. Disability is a complicated social phenomenon that requires political, social and at times medical interventions to enable an individual to participate meaningfully in society. The social model came about in the 1970s, as a result of people with disabilities rising up against their exclusion and marginalisation in society. The disability rights movement used the expression or slogan 'Nothing about Us without Us' to demand the inclusion of people with disabilities in all aspects of society.

- **Multiple/complex disabilities** Children may have more than one disability, as the example of Tabane shows. These can vary in combination, and make the accommodation needed to ensure that their schooling is effective more complex. It is possible for a child with a learning difficulty such as dyslexia to also be hearing impaired, for example; or for a child with a severe intellectual disability also to need a wheelchair to be able to move around.
- **Severity of disability** Most impairments vary in the extent to which they impact different individuals' lives. Not everyone experiences what may seem to be, or may be described as, the same

impairments in the same ways. For example, a totally deaf child is not able to hear at all. Another child might need only a hearing aid and for the teacher to stand closer to her in order to hear properly. The SIAS Policy categorises the varying degrees of support a learner may need, and refers to 'high', 'moderate' and 'low' levels of support needed to address a 'barrier to learning'.

The most important thing to remember is that children with disabilities have the same rights as all children. They are children first and have the right to access education institutions, facilities and services, to make decisions about their futures and to live full and independent lives.

The inclusive education approach followed today in South Africa is based on the social model of disability, and seeks to remove the barriers to learning that are created by a one-size-fits-all approach to teaching and learning and have a discriminatory impact.

Inclusive education recognises the importance of including children with disabilities in schools and classes with children who do not have disabilities. Inclusive education requires that the necessary support be provided to a learner in an 'ordinary' school, and that the teaching and learning environment is adapted as far as reasonably possible to ensure all learners can meaningfully participate in learning.

The inclusive education approach attempts to move away from the isolation of learners with disabilities in 'special' schools towards their inclusion in neighbourhood 'ordinary' or 'mainstream' schools.

EXAMPLES OF THE SOCIAL MODEL OF DISABILITY

Yoliswa developed an eye condition called glaucoma. This condition damaged her optic nerve, resulting in a total loss of her sight. According to the social model, the medical condition which caused Yoliswa to become blind has combined with the lack of reading material in Braille (text specially modified to be read by a blind person) at her school, resulting in her apparent 'disability'.

Zweli lives in a rural area in KwaZulu-Natal. As a result of a car accident he is paralysed, and cannot walk. He therefore moves around using a wheelchair he received from his local hospital. Zweli's local primary school does not have ramps that he can use to access classrooms or toilets. In addition, he lives three kilometres from school, there is no public transport system, and the roads are made of soft sand, which makes it difficult for him to use his wheelchair. These circumstances, in addition to his inability to walk, result in his disability.

Tabane lives in Tshwane and has always attended her local school. Her teacher says that she is a 'slow learner' and that she struggles with reading, writing and counting, and cannot cope at school. Doctors say that Tabane has two conditions: dyslexia and dyscalculia. Both are sometimes called 'learning difficulties' or 'learning disabilities' and may be caused by a combination of genetic and environmental reasons. Neither condition means that Tabane is any less clever or capable of learning – she just needs teachers who understand her conditions and adapt their teaching to suit her needs. It is both the circumstances Tabane faces in class and her difficulty with reading, writing and counting that make up her disability.

Ultimately, a child has the right to attend a mainstream school in his or her neighbourhood, and must be reasonably accommodated to do so.



OVERVIEW

The segregated apartheid education system has had a major impact on what South Africa's inclusive education looks like today.

At the end of apartheid there were about 380 special schools, which segregated learners with disabilities from the mainstream schooling system almost entirely. The current inclusive education framework seeks to convert these special schools to 'resource centres', intended to support the ordinary schools around them with expertise and resources, so they can reasonably accommodate learners with disabilities.

To ensure that children with disabilities do not remain isolated in

special schools, South Africa's early inclusive education policy advocated for the gradual conversion of ordinary schools into inclusive schools. To achieve this, the policy looked at piloting the concept of 'full-service' schools. On paper, these schools are specially resourced ordinary schools that can more easily accommodate children with disabilities. In reality, the resourcing that was provided to these schools has often been severely inadequate, and these schools have not functioned adequately.

Finally, inclusive education policy and the Schools Act are clear that ultimately, a child has the right to attend a mainstream school in his or her neighbourhood, and must be reasonably accommodated to do so. Only if a child requires highly specialised support that can only be provided in a specialised environment can placement in a special school be considered. Parents of children with disabilities have the option to choose the type of school they want their children to attend.

CURRENT PROBLEMS IN THE PROVISION OF QUALITY, EQUITABLE AND INCLUSIVE EDUCATION FOR CHILDREN WITH DISABILITIES

The implementation of WP6 has been too slow. This White Paper was first introduced in 2001, with a 20-year implementation plan that envisaged an inclusive education system in place and functional by 2021. Little progress has been made.

Hundreds of thousands of children with disabilities remain out of school, and those who do attend schools commonly complain about serious problems relating to the quality of education that they receive in many – if not most – special, full-service and ordinary schools throughout the country.

The education system for children with disabilities is very reliant on special schools. Children with disabilities are required to leave their families and communities to attend faraway special schools and live in hostels under poor conditions.

Families are often required to pay school fees, hostel or other accommodation fees and transport fees that they cannot afford for their children to attend faraway special or full-service schools. They complain bitterly about only seeing their children during school holidays, and miss them dearly. They worry about their children's safety, and the quality of education and care they are receiving.

The DBE has published regular progress reports on the implementation of WP6, and these detail serious problems with efforts to provide inclusive education for children with disabilities. It has honestly and

bluntly identified a situation which many activists working on inclusive education and disability rights describe as 'a crisis'.

SOME OF THE MOST SIGNIFICANT PROBLEMS INCLUDE THE FOLLOWING:

- The prevailing attitude within the South African education system and society at large remains that **children with disabilities are best taught in segregated schools, despite global and local evidence to the contrary**. This has resulted in long waiting lists at special schools.
- Designated full-service schools have been **designated in name only**, without the resources required to function optimally.
- Ordinary schools **simply refuse to admit learners with disabilities** without first attempting to provide reasonable accommodations. Where attempts to provide accommodations occur, they are most often only in respect of learners with very high barriers to learning, leaving many learners with significant but not severe challenges uncatered for.
- Many special schools are simply 'day-care centres'. **The national curriculum is not being taught to learners**

effectively, in an appropriate manner.

- Special-school hostels, especially in rural and township schools, remain **understaffed and in an extremely poor condition**.
- There is a high rate of **sexual and physical abuse** in the hostels.
- There **aren't enough qualified teachers and support staff** in special schools, full-service schools and ordinary schools to ensure the provision of inclusive education.
- While ordinary schools may be designated no-fee schools, **no special schools are designated as no-fee schools**, including those which are in the poorest communities or cater for learners from poor communities.

These problems point to the systemic failure of the DBE to realise the right to access quality basic education for children with disabilities in South Africa. The national, provincial and district departments of education also appear to lack the expertise and resources required to change this, even though the Constitution guarantees the right to basic education for all children, including children with disabilities.

THE LEGAL FRAMEWORK

In addition to WP6, the DBE has formulated various other guidelines and policies to explain how schools must operate in an inclusive education system. A list of these documents is provided at the end of this chapter. Below we will discuss some of the international and regional obligations binding on the South African government, as well as our own Constitution, Schools Act, Equality Act, WP6, and the Screening, Identification, Assessment and Support Policy (SIAS).

THE CONSTITUTION

THE RIGHT TO EDUCATION

The Constitution gives **everyone** the right to basic education (Section 29). The reference to ‘everyone’ in the section means that every single person – including people with disabilities – has a right to basic education.

Importantly, the right to basic education is not qualified by the ‘availability of resources’ or ‘progressive realisation’, as the rights to adequate housing and access to healthcare services are. The fact that the right to basic education is not qualified means that the government has the obligation to ‘immediately realise’ the right. This requires the government to provide access to education for children with disabilities on the same basis as with other children, regardless of how expensive that might be. And it must do so immediately.

RIGHTS TO EQUALITY, DIGNITY AND FREEDOM FROM ABUSE AND NEGLECT

The failure of the government to provide access to education for children with disabilities amounts to discrimination on the basis of disability (Section 9).

The terrible conditions and lack of reasonable accommodation at special,

full-service and mainstream schools are a violation of the rights to dignity of children with disabilities (Section 10). Widespread abuse faced by children staying in special-school hostels violates their right to be free from abuse and neglect, and their right to freedom and security of person (Section 12).

INTERNATIONAL LAW

Many international human rights conventions outlaw discrimination against people with disabilities. Many conventions include provisions protecting people with disabilities specifically, or ‘vulnerable persons’ in general. The United Nations Convention on the Rights of Persons with Disabilities (CRPD), which came into operation in 2007, sets out specific protections for persons with disabilities, as does the African Disability Protocol, which South Africa has signed. While we focus on the CRPD here, both the Committee on the Economic, Social and Cultural Rights and the Committee on the Rights of the Child have made recommendations to South Africa relating to the provision of education for children with disabilities in South Africa.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Article 24 of the CRPD deals specifically with education for children with disabilities, and for the first time entrenches in international law the right to an ‘inclusive education system’. This right must be realised ‘without discrimination and on the basis of equal opportunity’. A similar provision is included in Article 16 of the Africa Disability Protocol.

The CRPD echoes other international conventions indicating that the purpose of education for children with disabilities is to fully develop human potential and allow people with disabilities to participate effectively in society. It makes clear that ‘persons with disabilities are not excluded from the general education system’, and must accordingly receive appropriate support within the general education system.

Children with disabilities therefore have the same right to quality education as other children, as well as the right to access this education in the communities in which they live. This level of support must put children with disabilities on an equal footing with other learners, both academically and socially, and may require ‘individualised support’.



In the words of the CRPD

Effective individualised support measures are provided in environments that maximise academic and social development, consistent with the goal of full inclusion.

The CRPD also emphasises that any ‘reasonable accommodation’ of an ‘individual’s requirements’ must be made to ensure that each and every child with a disability is effectively educated.

We discuss ‘reasonable accommodation’ for children with disabilities in terms of South African law below, in our discussion of the Oortman case.

The convention also places special emphasis on children with disabilities being equipped with the ability to read, write and communicate, and develop other ‘life and social-development skills’. It specifically highlights that for some children, this will require the learning of Braille and orientation and mobility skills, while for others, it could mean learning sign language. The convention also stipulates that the schools these learners attend must employ teachers who are qualified in sign language and Braille.

According to the Convention, teachers, professionals and staff who

work at all levels of education must be trained comprehensively, not only in skills such as Braille and sign language, but also, for example, on ‘disability awareness’ and ‘educational techniques and materials to support persons with disabilities’.

Finally, the CRPD and Africa Disability Protocol also include a range of other rights which are directly relevant in the context of education – including, importantly, a right to accessibility of all infrastructure, goods and services. In terms of the rights, governments are required to proactively eliminate obstacles and barriers to accessibility across society, including within educational institutions. This generalised obligation is in addition to the obligation to provide reasonable accommodations on a case by case basis.

When courts and other branches of government interpret the right to basic education in relation to persons with disabilities, Article 24 of the CRPD is the most relevant and comprehensive standard of international law to consider.

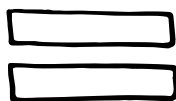
The Constitutional Court has already emphasised the importance of the CRPD in the promotion of the rights of persons with disabilities and interpreting South African law.

THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

The CRPD sets up a Committee of 18 experts from around the world tasked with assisting member states in ensuring they comply with their obligations. The Committee does so by publishing ‘General Comments’ to specify states’ obligations and by evaluating reports submitted by governments every four years.

In 2016, the Committee issued a detailed General Comment on the right to inclusive education. The contents of this General Comment should be used by the executive, legislature and judiciary in South Africa when interpreting and applying the right to education. In August 2018, the Committee evaluated South Africa’s first report on its implementation of its CRPD obligations; and in October 2018, it issued recommendations to South Africa on how it could improve on its performance. These recommendations include the following in regard to the right to inclusive education:

- Enact legislation: Adopt and implement specific legislation to give full effect to the right to inclusive education.
- Review WP6: Review Education WP6 to improve inclusion and the policy framework for inclusive education.
- Inclusivity of Local Schools: Ensure that inclusive education is a guiding principle throughout the education system, and in particular ensure children can go to local schools and not be removed from their families to live in hostels.
- Resourcing: Allocate sufficient financial and human resources for reasonable accommodations for all children with disabilities.
- Abuse: Adopt a time-bound plan to address sexual, verbal and emotional abuse in special schools, including special-school hostels, and revise the Children’s Act to ensure effective regulation of special-school hostels.
- Early Identification: Develop and adopt effective implementation plans for prevention and early intervention programmes in communities, to enable early identification of and support for children and adults with disabilities
- Teacher Training: Establish permanent and effective programmes for training teachers on inclusive education and other relevant skills for teaching children with disabilities.



THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (EQUALITY ACT)

The Equality Act is an important law passed by Parliament in order to combat discrimination and eliminate poverty. It says that not supporting people with disabilities, or not giving them the facilities they need to function equally in society, is a form of unfair discrimination. If people with disabilities can't enjoy equal opportunities – because the obstacles that restrict or limit them have not been removed – that is also unfair discrimination.

For example, a court deciding whether there has been unfair discrimination against a child because of the conditions at and actions of a school will have to decide whether the school failed to take 'steps to reasonably accommodate the needs' of the child or children with disabilities. These considerations were explored in the Oortman case discussed in the case law section below.

THE SOUTH AFRICAN SCHOOLS ACT (SCHOOLS ACT)

The Schools Act is the law passed by Parliament to give effect to the right to basic education. It establishes an

education system that, in practice, makes education compulsory for all children between the ages of 7 and 15, which generally means from Grade R until Grade 9. However, if a learner turns 15 before they finish Grade 9, they can still legally leave school; because the Schools Act says that children must be in school until they finish grade 9 or until they turn 15, "which[ever] occurs first". This requirement for compulsory education applies equally to children with disabilities.

Moreover, this requirement does not mean that children over 15 years of age or who have completed Grade 9 no longer have a right to continue with their schooling if they choose to do so. Importantly, for various social and systemic reasons, children with disabilities and barriers to learning in particular are often 'over age' for their grade, and these children should also be allowed to continue to attend school, despite being older than 15. Children with disabilities also have a right to basic education beyond the compulsory ages and grades of schooling, including being afforded the opportunity to complete their matriculation qualification.

The Schools Act applies equally to children with disabilities, and has various sections dealing with disability directly. Where it is necessary to distinguish between children with disabilities and

other children, the Act refers to learners with "special educational needs". For example, the Act indicates that a public school may be an "ordinary" mainstream school, or a school for learners with special educational needs.

The Schools Act specifically empowers the Minister of Basic Education to issue a notice to determine the "ages of compulsory attendance at school for learners with special education needs" (Section 3(2)). No notice of this kind has been issued, but it can be argued that this power could be used to make provision for the fact that children with disabilities may need to continue schooling for a different number of years and at different ages to the generally applicable standard for compulsory education between 7 and 15.

ADMISSIONS

The Schools Act says that "a public school must admit learners and serve their educational requirements without unfairly discriminating in any way" (Section 5). In keeping with the spirit of affording children with disabilities an education on the same basis as other children, the Act also indicates that



when deciding where to place a child with special education needs, "the rights and wishes" of their parents must be considered (Section 6).

INCLUSIVE EDUCATION – TO WHAT SCHOOLS SHOULD CHILDREN WITH DISABILITIES GO?

Attempting to keep up with the principles of equality and non-discrimination, the Act shifts focus away from the provision of education that divides the learner population.

The Schools Act, Section 12(4) states:

The Member of the Executive Council 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.

This means that as early as 1996, when the Schools Act came into force, provincial ministers of education had a responsibility to take all reasonable steps within their power to make sure that children with disabilities could be included and provided for in mainstream schools. The Schools Act therefore required an inclusive education system years before the

publication of an inclusive education policy in the form of WP6.

ACCESSIBLE FACILITIES

The Act also requires that all "physical facilities" at mainstream schools are "accessible" to people with disabilities. For more about the law on school infrastructure and the effect of inadequate infrastructure on children with disabilities, see Chapter 14.

SCHOOL GOVERNANCE

The Act sets out some special rules for Representative Councils of Learners (RCL) and School Governing Bodies (SGB) at special schools.

A provincial minister may exempt a school from having an RCL by public notice if it is "not practically possible" as a special school (Section 11). At special schools, unlike at mainstream schools, learners are only required by the Act to participate as members of the SGB where "reasonably practicable". It is important to note that these recommendations could potentially limit the rights of learners with disabilities, and should only be implemented cautiously.

SCHOOL GOVERNING BODY MEMBERSHIP AND CHILDREN WITH DISABILITIES

ORDINARY AND FULL-SERVICE SCHOOLS

In terms of the Schools Act, a governing body at an ordinary school that provides education to children with disabilities must "co-opt a person or persons with expertise regarding the special education needs of such learners".

SPECIAL SCHOOLS

The Schools Act says that in addition to the standard membership of SGBs at mainstream schools, the governing body at a special school must include representation from:

- Organisations of parents of learners with special education needs
- Organisations of persons with disabilities
- People with disabilities, and
- Experts in appropriate fields of education for children with disabilities.

LEFT IN THE DARK

Justice Zakeria Yacoob, himself a blind man, wrote a foreword to a 2015 report written by SECTION27 on system failures in the education system:

I have had the privilege and the benefit of being educated at a school where the necessary facilities were largely available. I am pained to say that if the facilities at the school at which I was a pupil had been as paltry as in most of the schools described in the report, I would never even have completed school successfully. I therefore make a humble personal appeal to all the concerned authorities to treat this matter as one of urgency, and not to let the lives of a whole generation of blind children, mainly African and poor blind children, go to waste.

Strengthening special schools so that they can act as resource centres and support the entire inclusive education system means training staff on curriculum differentiation, assessment and instruction; as well as improving already-existing facilities, to bring them in line with the inclusive education approach.

Unfortunately, many special schools report serious problems that have not been adequately addressed since the publication of WP6. Common problems include:

- Inadequate teaching and support staff
- Insufficiently flexible curricula
- Inappropriate infrastructure
- Poor living conditions and abuse of children in hostels
- Lack of access to learning and teaching resources and assistive devices
- Chronic underfunding
- Abuse, corporal punishment and neglect in special-school hostels, and
- Long waiting lists to get into special schools.

THE POLICY FRAMEWORK

EDUCATION WHITE PAPER 6 (WP6)

WP6 is the policy framework that seeks to give effect to the Schools Act, and attempts to remedy the segregated education system inherited from the apartheid government. WP6 aimed to build an inclusive education system within 20 years of its implementation; in other words, by 2021. Although the 20-year implementation plan of WP6 ended in 2021, the policy remains in effect – but it has been criticised as being outdated, and repeated calls have been made for its review. In 2021, the DBE indicated its intention to begin the process to review WP6.

Central to WP6 is the concept of human rights, and the idea that all children can learn and that all children need support. The most important consideration is that every child – not just a child with disabilities – is different, and each child has different learning needs.

This was emphasised in a judgment of the Constitutional Court about school admissions policies.

...public schools are not rarefied spaces only for the bright, well mannered and financially well-heeled learners. They are public assets which must advance not only the parochial interest of its immediate learners but may, by law, also be required to help achieve universal and non-discriminatory access to education.'

WP6 also affirms the roles played and contributions made by communities and the home environment in the learning experience.

Below, we briefly discuss and assess six of the core parts of WP6's strategy to develop an inclusive education system:

1. Mobilisation of out-of-school children and youth with disabilities
2. Strengthening of special schools
3. Establishment of full-service schools
4. Establishment of District-Based Support Teams and School-Based Support Teams
5. Awareness and training
6. Funding for the establishment of an inclusive education and training system.



1. MOBILISATION OF OUT-OF-SCHOOL CHILDREN AND YOUTH WITH DISABILITIES

When WP6 was drawn up in 2001, it was estimated that around 280 000 children with disabilities were not in school. Since then (though DBE estimates vary), the number may have increased to nearly 600 000.

One reason for this increase is national and provincial departments' failure to conduct mobilisation campaigns, to ensure the enrolment of children with disabilities who are not in school at all. Mobilisation campaigns, which must be organised and run by government departments, are described by WP6 as a "central feature" of the policy, and a "key strategy" in building an inclusive education system.

The DBE and the Department of Social Development established a protocol that plans to use social-grant processes as a point for early identification of children with disabilities who are out of school. It is hoped that this will help; but it cannot replace the need for big, government-run public campaigns using

community radio, television, billboards and community meetings to raise awareness about disability and inclusive education.

2. STRENGTHENING OF SPECIAL SCHOOLS

Special schools are schools traditionally designed and designated to cater for the educational needs of learners with specific disabilities. In 2014, the DBE developed guidelines for special schools regarding how they should operate, and to what additional resources they should have access.

Special schools provide critical education services to learners who require intensive or high levels of support that mainstream and full-service schools cannot currently provide. WP6 planned to strengthen special schools and convert them into resource centres, to support mainstream and full-service schools with expertise and resources. In 2005, the DBE published guidelines about the operation of special schools as resource centres.

But currently, the conditions in special schools do not meet the standards set

in the guidelines and required by WP6. The result – in the context of schools for visually impaired learners, for example – is a failing education system that is putting children's futures at risk.

3. ESTABLISHMENT OF FULL-SERVICE SCHOOLS

Full-service schools are ordinary schools equipped and capacitated to cater for the full range of learners' needs. They should receive support in the form of physical and material resources, professional development of staff, and special attention from the DBSTs.

The DBE has developed guidelines for full-service schools that detail how they should operate.

WP6 aimed to begin with 30 schools and 500 ordinary primary schools converted to full-service schools by 2021. During this time, it was hoped that the DBE would be able to develop models for system-wide application of full-service schools, so that it can realise its commitment to a fully inclusive education system.

ABUSE IN HOSTELS

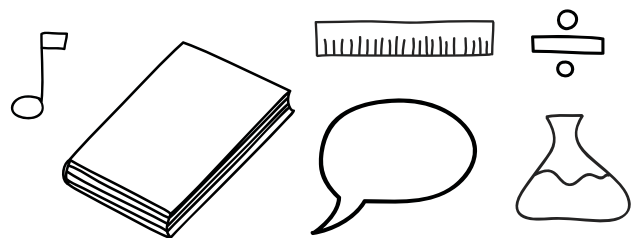
One of the most urgent problems caused by a failure to strengthen special schools consistently with WP6 is the high rate of child abuse in special-school hostels.

Because of the long distances between their homes and special schools, many children with disabilities who attend special schools are required to stay in special-school hostels during term time.

Media reports late in 2015 about two different special schools in two different districts in KwaZulu-Natal revealed that children face abuse and neglect in the hostels they live in during term time at these special schools. However, abuse appears to occur countrywide.

A DBE progress report published in 2015 notes that “there is a high rate of child abuse in special-school hostels. Especially learners who are Deaf or intellectually disabled are doubly vulnerable”. The report continues, describing the situation as “alarming”, and indicates that it is “critical” that a hostel policy for special schools is finalised.

Abuse and neglect, like corporal punishment, are violations of learners’ rights – and can often also be reported to the police, because they may be criminal. Parents, children, schools and activists looking to advocate for children’s rights can do so effectively by demanding that all levels of government investigate claims of abuse very seriously, and move swiftly towards the adoption of a hostel policy for special schools. Children in hostels should also be provided with food, beds and hygienic conditions to live in.



By 2018 the DBE reported that 848 ordinary schools had been designated as full-service schools, but the reality is that many of these full-service schools are not functioning in the way they should. The 2018/19 report by the Auditor General on full-service schools presented some harsh findings:

- **Resourcing and Planning:** 77% of education districts were not sufficiently resourced and/or did not properly plan to support full-service schools;
- **Training:** 64% of education districts failed to equip or to train staff at full-service schools to provide inclusive education. 51% of School-Based Support Teams (SBSTs) and educators at full-service schools did not receive adequate full-service school and inclusive education training;
- **Reporting:** 91% of education districts have not appropriately reported on the establishment and implementation of inclusive

education provisioning at full-service schools;

- **Accessibility:** 79% of full-service schools did not have the necessary resources to create a safe and accessible environment for effective learning to take place;
- **Class Size and Support:** 69% of full-service schools had class sizes in excess of the norm of 40 learners per class, and/or did not have inclusive education educators to provide additional support programmes. 78% of SBSTs at full-service schools audited were not established and/or did not adequately function to ensure that inclusive education is planned, implemented, recorded and reported; and
- **Screening, Identification and Assessment:** 90% of full-service schools did not adequately implement the required SIAS processes to screen learners, identify and assess learning barriers and provide the necessary support.

As a result of these findings the DBE issued a Circular in 2019 (Circular 4 of 2019) calling for the temporary suspension (for three years) of the designation of additional full-service schools, to allow time to improve the functioning of existing full-service schools.

4. ESTABLISHMENT OF DISTRICT-BASED SUPPORT TEAMS AND SCHOOL-BASED SUPPORT TEAMS

Recognising the difficulty that many schools would have in ensuring inclusivity, WP6 sets up support structures for the implementation of inclusive education. At school level, this includes ‘Institutional-Level Support Teams’ – now referred to as ‘School-Based Support Teams’ – and at district level, ‘District-Based Support Teams’ (DBST).

In 2005, the DBE produced guidelines indicating the roles and responsibilities of both the district and school support structures.

School-Based Support Teams

The School Based Support Team (SBST), previously known as the

Institutional Level support team (ILST), is responsible for coordinating the provision of support for the school, teachers and individual learners. The team should meet on a regular basis to fulfil these functions. Every public school is obliged to establish an SBST.

The principal of a school is ultimately responsible for the establishment, functioning and support of the SBST. Core members of the SBST are:

- A representative from the School Management Team (SMT)
- The SBST coordinator
- Representatives from each phase or Grade, and
- The learning support teacher, where applicable.

Additional people can also be brought into the SBST, including teachers with specialised skills, NGOs, support staff, specialists from full-service schools and special school resource centres, and members of the District-Based Support Team (DBST).

When individual support needs are being considered, the team must

include the teachers of the particular learner(s) for whom support is being considered, the learners’ parents or caregivers, and the learner(s) themselves, when appropriate.

District-Based Support Teams

District-Based Support Teams (DBSTs) are crucial to the implementation of inclusive education. They are made up of staff from district offices, and from special schools. WP6 says that DBSTs must provide a “full range of education support services” to both SBSTs and schools themselves.

They must work closely with SBSTs, in particular to identify and address learning needs and to accommodate a range of learning difficulties. The support that the DBST must provide to schools includes training of teachers, and as stated in SIAS, “direction in respect of any concessions, accommodations, additional strategies, programmes, services and resources that will enhance the school-based support plan”.

DIFFERENTIATING CURRICULA AND INDIVIDUALISED SUPPORT PLANS

Differentiating curricula is the process whereby teachers take the core curriculum and adapt it for children with a range of learning needs in their class, which is very important in all schools.

With the support of their school and District-Based Support Teams, teachers are also required by the SIAS policy to produce **individualised support plans** for each learner experiencing learning barriers, to show how the learner is being accommodated and is progressing. Parents can and should also be involved in this process.

5. AWARENESS AND TRAINING OF TEACHERS

WP6 emphasises the need for extensive training of teachers, so that they have the skills to teach inclusively. This means teachers should be able to adapt the classroom environment, the curriculum and the way it is taught in order to make sure each child is able to learn.

These skills include:

- Understanding how different disabilities and specific learning difficulties impact learning
- Understanding what policies about education for children with disabilities say, and the processes they set out
- Knowing how to differentiate the curriculum, and
- Knowing how to accommodate the learning needs of children with specific disabilities at their schools.

Practical examples

The DBE reports that many teachers who teach visually impaired children cannot read or write Braille to an acceptable standard, and many teachers who teach learners with hearing impairments cannot communicate in sign language.

Schools for children with intellectual disabilities also report that teachers often do not have the skills to teach the academic curriculum to children who have the range of disabilities seen at their schools.

Often they also don't know how to teach children practical skills such as woodworking, dressmaking, bricklaying and art – subjects that would allow children who struggle with the academic curriculum to be self-sufficient when leaving school.

Teachers at full-service and special schools report that their training is often overly theoretical and insufficiently frequent. Their training doesn't show them how to differentiate curricula or develop individualised support plans, so despite their best efforts, they don't actually know how to teach children with disabilities. (See 'Differentiating Curricula', left.)

6. FUNDING AND NORMS AND STANDARDS

An inclusive education system that seeks to address the continued marginalisation of children with disabilities requires adequate funding. The UN Committee on the Rights of Persons With Disabilities has emphasised that states must commit sufficient financial and human resources to support the implementation of inclusive education including by the “transfer of resources from segregated to inclusive environments”.

An analysis of historic and current spending in South Africa shows that the funding for inclusive education has been haphazard, inconsistent and channelled predominantly to special schools. The conditional grant proposed in WP6 to fund an inclusive education system was never set up. Norms and standards for resourcing inclusive education, as envisaged under the 2014 SIAS Policy, have only been drafted as guidelines in 2018 and have still not been finalised. Apart from a conditional grant to support inclusion of children with severe to profound intellectual disability, and the development of norms for staffing of District-Based Support Teams, there has been no formal change in the overall funding strategy since 2001.

This has resulted in a serious challenge to the implementation of inclusive education, particularly in poorer provinces. If ordinary schools are not provided with any additional funding to transform educational systems and institutions, ensure accessibility and implement reasonable accommodations, there is little incentive to include learners with disabilities, especially in no-fee schools. Learners with disabilities are likely to suffer either through exclusion, or from being included but with very little (if any) support. Alternatively, parents will continue to unfairly absorb the costs of providing additional support.

POLICY ON SCREENING, IDENTIFICATION, ASSESSMENT AND SUPPORT (SIAS): PLACEMENT OF LEARNERS

The Department of Basic Education's revised Screening, Identification, Assessment and Support (SIAS) policy was approved and adopted on 19 December 2014. Its purpose is to provide for the standardisation of procedures and processes to identify, and assess and coordinate support provision for, all learners who need extra support. The SIAS Policy applies to all schools in South Africa, and requires every school to have a SBST to coordinate support provision at the school. 'Support' is also widely defined in SIAS and does not only mean reasonable accommodation for learners with disabilities. For example, it could also relate to support for a learner who has been progressed from the previous grade (in other words, someone who has been moved up to a higher grade without having to complete the grade before), counselling support for a traumatised learner, behaviour interventions, and many other kinds of support.

QUESTION:

My child has a disability, and is approaching school-going age. What must I do to make sure they go to a school that can accommodate their learning needs?

ANSWER:

The SIAS policy requires that every child, irrespective of their disability, must be admitted to their neighbourhood, ordinary school. The screening and identification process will then take place at this school, and should be organised by the school itself.

WHAT HAPPENS NEXT?

SCREENING AND ASSESSMENT

It is the responsibility of every school to screen and assess learners to identify their specific learning and support needs, with the help of their School-Based Support Team and the District-Based Support Team. To do this, the school might need to call on the expertise of various professionals, including occupational therapists, psychologists and social workers.

Through a process spelled out in the SIAS policy, the appropriate support for each individual learner is determined by the school, in consultation with the parent and learner. The purpose of this process is to determine how the local neighbourhood school can make provision for the learning needs of a particular child.

ACCOMMODATION, PLACEMENT AND REFERRAL

It is only when a child's neighbourhood ordinary school – with the full support of the district – cannot provide the

appropriate support, that a learner may be considered for transfer to a special school.

The ordinary school should be able to indicate how it has attempted to accommodate a child or why it cannot do so before referring them to another school. If a referral is necessary, it should be explained to you as the parent or caregiver why your child is being referred to the school in question, what type of school it is (full-service or special school), and how it will be able to accommodate your child's learning needs better.

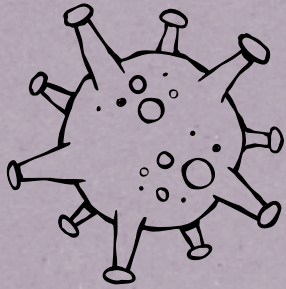
PARENT INVOLVEMENT IN THE PROCESS

It is also important to remember that as far as possible, both the parents or caregivers and the child should have a say in where the child goes to school. Parents should be able to make inputs into this process.

The SIAS policy must be followed by all schools. If a school does not do any formal assessment in terms of the SIAS policy, then you have a right to insist that the school does so, and you may complain to the school governing body or district department of education that this has not happened. It is possible that schools have still not yet been appropriately informed about and trained on the SIAS policy, so it is important to insist that it is followed.

The SIAS policy itself includes standard forms that must be used in the identification and referral process if necessary. If you are concerned that the process is not being followed, you may want to have a look at the SIAS policy and get the assistance of a local legal advice office or a human rights organisation.

If a parent is presented with forms that they do not understand, the school and those conducting the assessment of the child must explain the forms to the parents, and assist parents to fill them in.



THE IMPACT OF COVID-19 ON THE RIGHT TO EDUCATION FOR CHILDREN WITH DISABILITIES

In an effort to curb the spread of COVID-19, schools were the first public institutions to be closed in March 2020. As the initial lockdown period was underway, planning focused on ensuring at-home support for learners to continue learning. In this respect, though the DBE produced learning support materials and lessons – which were made available to learners on its website, TV channels and radio – no effort was made to ensure these were accessible to learners with disabilities.

As discussions shifted to the reopening of schools, the DBE began publishing hygiene standards for schools and procedures to follow to keep both learners and teachers safe and to contain the spread of the virus. These guidelines dealt with (for example) measures to ensure social distancing in schools. No reference was made to learners with disabilities or special schools in any of these documents, despite the fact that learners with disabilities face significant and unique obstacles in complying with even seemingly simple COVID-19 response measures, such as social distancing norms. It was only after sustained pressure by civil society organisations that the Department amended their directions to include some provisions for learners with disabilities, on 9 June 2020.

As the re-opening date for Grade 7 and 12 learners drew closer, no guidelines were published by the DBE to assist special schools to prepare. In fact, only three guidelines were developed by the Department (for blind and partially sighted, Deaf, and autistic learners) and these were only made available on the DBE website on 25 June 2020, two weeks after the return to schools of some learners with disabilities.

As an example of the practical challenges faced, the DBE *Guidelines for Schools on Maintaining Hygiene during the COVID-19 Pandemic* made reference to the provision of ‘basic and

essential hygiene and sanitation packs for each school’, but this basic pack did not take into account that schools for visually impaired learners would need additional sanitiser, as these learners rely on touch to move around, read and otherwise navigate their physical environments. Nor was any provision made for ‘coveralls’ for staff who support learners with physical disabilities. As a result, many schools had to resort to their own fundraising in order to pay for the additional personal protective equipment (PPE) they urgently needed.

Of the 501 special schools around the country, 179 are residential, which means that large numbers of learners travel long distances to attend these schools, and live in the hostels at or near the schools. Special-school principals and other stakeholders repeatedly raised concerns about the lack of infrastructure capacity to manage the phased return of learners to schools in the context of the pandemic. A school in KwaZulu-Natal, for example, reported that their hostel ordinarily accommodated 360 learners, but in order to comply with social-distancing measures they would only be able to take back 120 learners. Another school reported that learners ordinarily share beds – a problem in and of itself – and that the hostel would only be able to allow two grades to return.

The DBE recommended that schools make do with the infrastructure they had, and rotate learners weekly. But as many learners often live up to 500 or 600 kilometres from their school, weekly transport to and from school is simply not an option. In addition, the disruption to learning and routines for some learners would be detrimental to their mental and emotional well-being.

Despite attempts by civil society organisations (including organisations for persons with disabilities) to engage meaningfully with

the DBE, unsatisfactory responses from the Minister left organisations concerned that the very specific needs of hundreds of thousands of learners with disabilities across the country were not taken into consideration.

In July 2020, the Centre for Child Law (CCL), represented by Equal Education Law Centre (EELC), launched an urgent application in the North Gauteng High Court against the Minister of Basic Education for her failure to adequately provide support, as well as proper health and safety measures, to all learners with disabilities who were returning to special schools and special-school hostels, as well as to those who remain at home during the COVID-19 pandemic.

In August 2020, the North Gauteng High Court handed down an order (by consent). The order ultimately led to the publication of final amendments to the directions, on 21 October 2020, to provide for support to schools in terms of infrastructure capacity in hostels; as well as providing revised Standard Operating Procedures, including provisions for the support of learners with disabilities who remain at home. In addition, the DBE published three new sets of guidelines – for learners with intellectual disability, epilepsy and physical disability – intended to provide detail on how the safety of learners with disabilities would be ensured.

Monitoring of the implementation of the order has revealed that infrastructure provisioning for special-school hostels remains an urgent concern. Schools have not been provided with additional hostel capacity, and many learners are not attending school or are attending sporadically. With some Grade 12 learners unable to complete their schooling in 2020, it is critical that special schools are able to safely allow learners to return in order to mitigate against further learning losses compromising learners’ right to basic education.



RELEVANT CASE LAW

LETTIE HAZEL OORTMAN V THOMAS AQUINAS PRIVATE SCHOOL

Lettie Hazel Oortman’s daughter Chelsea, who is in a wheelchair, attended a private school in Witbank. Although the school took many actions to accommodate Chelsea, she still experienced such serious problems at school that she dropped out. Her mother approached the Equality Court, which focuses on equality and discrimination issues.

Thomas Aquinas, the school Chelsea was attending, had made sure that all her classes were on the ground floor, had ensured that she had access to a toilet, had provided her with a wheelchair and a special table, and had even made plans to ensure that she could use the school tuck shop. However, she still encountered other problems at the school, which resulted in her dropping out:

- **Infrastructure** A high step in front of all classrooms and toilets. Without ramps, Chelsea could not enter these rooms without assistance. The library was on the first floor, and the only way to get to it was up a staircase.
- **Sanitation** The toilet allocated to Chelsea, which was a ‘normal’, unmodified toilet, was locked most of the time, and she often had to ask a teacher to unlock the door. She could not reach the washbasin to wash her hands.
- **Teachers** These problems meant Chelsea needed a lot of help from her teachers to get around, on a daily basis. Chelsea complained that her teachers were not always helpful, and some became ‘impatient’ with her. None of her teachers had any training in working with or teaching children with disabilities.

The Equality Court made its decision in terms of the constitutional right to equality and the Equality Act. The Equality Act defines as “unfair discrimination on the ground of disability” any “failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities, or failing to take steps to reasonably accommodate the needs of such persons”. The judgment noted that there were at this time no other schools in Witbank at all for children with disabilities.

The judgment read: “Several praiseworthy steps were taken by [the school] to accommodate Chelsea, but unfortunately not all reasonable steps were taken to remove obstacles to enable her to have access to the classes, toilet and washbasin.”

Noting that the measures needed to accommodate Chelsea would



not be expensive, the court found that the school had unlawfully failed to take “necessary and reasonable steps” to “renovate the building”.

The judge encouraged the principal to “have discussions” with the teachers who were impatient, and acknowledged that it was within the principal’s power to “instruct some teachers to attend a course on how to work with disabled persons”.

Furthermore, the judge found that it was an “unnecessary burden” on Chelsea to require her to ask for permission and assistance before being able to use locked toilets. In concluding that the school had unfairly discriminated against Chelsea on the basis of her disability, the judge

decided that the school must:

- Not refuse to readmit Chelsea
- Take reasonable steps to remove obstacles to her education, including building ramps and an appropriate toilet and washbasin
- Investigate the strained relationship between Chelsea and some of her teachers and ensure that the schools’ teachers get the necessary training for and experience with teaching children with disabilities.

There are a few important things to notice about this case. First, the Equality Act and the Constitution prohibit discrimination by both the government (as we will see below, in Western

Cape Intellectual Disability Forum) and private entities such as private schools (for example Thomas Aquinas, as seen in Oortman). Both public and private schools must “reasonably accommodate” children with disabilities.

Second, Oortman makes clear that mainstream schools must take steps to accommodate children with disabilities, even if only for the needs of one child.

Third, courts will not excuse schools from making further accommodations, just because they have made some – even many – positive accommodations. Schools must make as many accommodations as are reasonable and necessary for children with disabilities to enjoy the right to education.

WESTERN CAPE FORUM FOR INTELLECTUAL DISABILITY V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

The Western Cape Forum for Intellectual Disability (‘Forum’), with the assistance of the Legal Resources Centre, approached the Western Cape High Court for an order declaring the exclusion of children with ‘severe and profound intellectual disabilities’ from appropriate schooling to be unlawful.

The Forum’s members provide care for 1 000 of the 1 500 children with severe and profound intellectual disabilities in the Western Cape, in special care centres subsidised by the Department of Health.

The government’s policy at the time the case was brought to court was to accommodate children with ‘moderate to mild’ intellectual disabilities in special schools. Their disability was determined based on their having an IQ of between 30 and 70.

Children with severe intellectual disabilities (defined as having an IQ of between 20 and 35) and profound intellectual disabilities (an IQ of lower than 20) were explicitly excluded from admission to special schools in terms of Department of Education policy. This policy has since been replaced with the SIAS policy described above.

The Forum argued that the exclusion of children with severe and intellectual disabilities contradicted WP6, and violated the children’s right to basic education, equality and dignity, and their right as children to be protected from neglect and degradation.

The Government put up various defences, including an argument that it was doing all that it currently could within its available resources; and that if there was a limitation of these children’s rights, it was because government was forced to prioritise where to allocate its resources, especially because of the large backlog in access to education for children with disabilities.

In court, the government also argued that ultimately, the exclusion of children with severe and profound intellectual disabilities could be explained by the fact that no amount of education could assist these children, and that the special care centres were sufficient for their development.

The Court decided that the Government was infringing the constitutional rights of children with severe and profound intellectual disabilities. This is because it was both failing to provide schooling (positive obligation) and refusing to admit children (negative obligation) to existing schools within the existing schooling system. The judge said:

As I have attempted to show, there is in my view no valid justification for the infringement of the rights of the affected children to a basic education and to equality. From what has been set out in this judgment, it must in my view also follow that the children’s rights to dignity have been infringed, since they have been marginalised and ignored, and in effect stigmatised. The failure to provide the children with education places them at risk of neglect, for it means that they often have to be educated by parents who do not have the skills to do so, and are already under strain. The inability of the children to develop to their own potential, however limited that may be, is a form of degradation.

The Court granted an order in favour of the Forum that provides extensive protection for the rights of children with intellectual disabilities.

The order is important because it shows how far courts will go in requiring ‘reasonable accommodations’ from even ordinary schools. The government was instructed by the court to take reasonable measures to give effect to the rights of children with severe and profound intellectual disabilities, including:

- Ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality
- Providing adequate funds to organisations which provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres
- Providing access to schools with the use of adequate facilities and adequate staff who are properly trained, paid and accredited
- Providing appropriate transport for the children, and
- Planning and providing for the training of persons to provide education for children with severe and profound intellectual disabilities.

Western Cape Intellectual Disability Forum is therefore a good example of the use of litigation in order protect children’s rights to basic education. The Western Cape Intellectual Disability Forum, however, told Parliament as recently as November 2020 that the government is yet to take adequate measures to implement the Court’s order in this matter.

CASSIM NO V MEC, DEPARTMENT OF SOCIAL DEVELOPMENT, FREE STATE

'R', as she is referred to in court papers, was a 12-year old girl who had been diagnosed with foetal alcohol syndrome, cognitive impairments, a behavioural disorder and epilepsy. She was living in difficult circumstances and had already become addicted to substances and been subjected to physical and sexual violence.

R had only briefly attended an ordinary mainstream school. Because the school couldn't cater for her needs, she was removed from it. By the age of 12, she had not attended a school that could accommodate her learning needs. Advocate Hasina Cassim was appointed by a court in January 2018 to assist R in ensuring the protection of her rights. The Court ordered the government to "ensure that she can access a school that is able to cater to her needs".

Despite the best efforts of Advocate Cassim to move this process forward, little or no tangible progress had been made in the following two years to implement the court order; and Advocate Cassim, alongside NGO the Centre for Child Law, approached the High Court again in 2020. Though R had been formally admitted to a public special school, she was refused entry to it because her admission to the hostel at the school was made conditional on her behaviour impediments and addictions first being "dealt with".

The Court described R's situation as urgent, and said that she had been left "wallowing [on] the periphery of society"; and emphasised that admission to schools must occur without discrimination of any kind. Noting that R is in the process of

growing up and is receiving medication, and that there is no evidence that she presents a danger to other learners, the Court found R's conditional admission to fall short of the standards required by the government's own SIAS policy.

The Court noted that the SIAS policy recognises children may experience challenges such as those faced by R, and that its main focus was to ensure that "all the support must be given to the learner to facilitate access to education without predicaments". It decided that it should be ensured that R would receive treatment and rehabilitation at the same time as being allowed to attend the school, and that the impact of the conditional acceptance would have the effect of "perpetuating exclusivity". The Court therefore ordered that R be given consistent access to a healthcare team and facilities to attend to her medical, therapeutic, psychiatric and psychological needs, while also simultaneously being granted access to the school.

SOUTH AFRICAN NATIONAL COUNCIL FOR THE BLIND V MINISTER OF BASIC EDUCATION

The South African National Council for the Blind and the National Braille Authority undertook long-term advocacy to ensure the provision of Braille textbooks to visually impaired learners in South African schools. As one learner told SECTION27 in its 2015 report on the state of education for children with visual impairments, "It is frustrating because we are left behind and we feel that we do not have

enough information because we only have notes. I would like to have all my textbooks in Braille." For many years, Braille-using learners were compelled to do without textbooks of their own, or without access to textbooks at all.

Eventually, on behalf of the South African National Council for the Blind, the National Braille Authority and School Governing Bodies of schools for visually impaired learners, SECTION27 initiated litigation against the Department of Basic Education to ensure the provision of Braille textbooks to all learners who need them. After six years of persistent and ongoing engagement with the Minister of Basic Education, a settlement was concluded, which is legally binding on the Minister because it was made an order of court.

The court order declared that the non-delivery of textbooks was a violation of the rights to basic education, equality and dignity of blind learners. It also issued a structural interdict to compel the DBE and the provinces to create a sustainable plan for the production and delivery of Braille textbooks. Finally, it ordered the DBE to engage meaningfully with partners on matters relating to Braille materials.

Since the order, Braille production and delivery have significantly improved, with SECTION27 and the South African National Council for the Blind meeting with government regularly to address issues relating to Braille production and delivery. While the structural order has now been discharged, the South African National Council for the Blind continues to sit on the Braille advisory committee.

EQUAL EDUCATION V MEC FOR EDUCATION, KWAZULU-NATAL

In 2017, on behalf of 12 schools in Nquthu, KwaZulu-Natal, Equal Education approached the High Court for an order declaring the failure of the provincial government to provide adequate transport for learners to and from school, in violation of the right to a basic education. Represented by Equal Education Law Centre, Equal Education also asked the Court to order the government to report back on specific issues, which included clarifying the status of the KwaZulu-Natal policy on scholar transport and formulating a plan to provide the learners at the 12 specific schools with adequate transport.

Siphilisa Isizwe, a community organisation of persons with disabilities, intervened in the matter as an amicus curiae ('friend of the court'), and was represented by SECTION27. Though supporting the case of Equal Education, Siphilisa Isizwe stated that a comprehensive plan (as argued for by Equal Education) would also require the KwaZulu-Natal provincial department of education to "make provision for the diverse range of scholar transport needs of learners with disabilities".

In its arguments, Siphilisa Isizwe highlighted the significant difficulties faced by children with disabilities in accessing transport to and from school. For example, learners staying in hostels at special schools far away from their homes were not provided with transport to and from school on weekends or during school holidays. In addition, learners with disabilities requiring daily transport to and

from schools often were not provided with appropriate transport to accommodate their needs. This resulted in learners with disabilities either missing school on some days, or in extreme cases, dropping out because of unsafe and unreliable transport. Some learners, Siphilisa Isizwe noted, simply do not attend school at all because of inappropriate or inadequate transport.

Ultimately, the case was settled, with a consent order made by the High Court which (among other things) required the KwaZulu-Natal Department of Education to file a report to the Court which would include its plans to provide learners with disabilities with adequate transport. The KwaZulu-Natal scholar transport policy has been approved by the provincial cabinet; however, at the time of writing it had not yet been published and was not publicly available.

BLIND SA V MINISTER OF INDUSTRY TRADE AND COMPETITION

In April 2021, Blind SA (represented by SECTION27) filed an application in the High Court to challenge South Africa's Copyright Act, which they argue is in violation of persons with visual disabilities' rights to equality, dignity, basic and further education, freedom of expression, language and participation in the cultural life of one's choice.

Blind SA argued that the government's failure to amend the Act to provide for exceptions that allow easier and equal access to reading materials for persons with disabilities goes against its constitutional obligations and South

Africa's international law commitments in the UN Convention on the Rights of Persons with Disabilities. People with visual and other disabilities that make the use of printed material difficult often require copyrighted materials to be converted or transformed into different forms or formats in order for them to equally enjoy and benefit from them.

Retired Constitutional Court Justice Zak Yacoob and editor and writer Marcus Low filed supporting affidavits explaining their experiences as blind persons in accessing reading materials on an equal basis with others, when less than 0.5 percent of publications are available in accessible formats in South Africa. Though the impact is broader than merely in respect of the educational environment, Blind SA argues that the absence of access to reading materials has a particularly serious impact on the right to education.

Blind SA wanted the Court to read in Clause 19 (D) of the Copyright Amendment Bill, which was presented to Parliament in 2015, and for it to apply until the Bill is passed into law. This clause provides for general exceptions to the protection of copyrighted works that would allow people with disabilities to more easily access a range of reading materials in accessible formats without violating copyright laws.

The International Commission of Jurists (ICJ), represented by Equal Education Law Centre, was admitted as an amicus curiae ('friend of the Court'). The ICJ argued that South Africa is required by both the International Covenant on Economic, Social and Cultural Rights and the CRPD, which protects the

rights to education, participation in cultural life and accessibility of reading materials, to bring into law the relevant provisions of the Copyright Amendment Bill relating to accessible reading materials for persons with disabilities.

On 21 September 2021, the High Court agreed with Blind SA and declared the Copyright Act to be unconstitutional to the extent that it limits persons who are blind or visually impaired from accessing accessible format material. While the High Court is able to make this ruling, section 172(2)(a) of the Constitution states that when any law is declared invalid, it must be confirmed by the Constitutional Court.

The matter was heard before the Constitutional Court on 12 May 2022 and judgment has been reserved.

RUBÉN CALLEJA LOMA V SPAIN

Rubén Calleja Loma was a minor child with Down Syndrome living in Spain and attending a public school, with the support of a special education assistant. When he was 10, he entered Grade 4 and was placed in a class with a teacher who subjected him to discrimination, neglect and abuse. For example, the teacher had grabbed him by the neck, thrown him out of a window, threatened to hit him with a chair, told his parents he was

‘anti-social and dangerous’, and indicated that he should be placed in a special school. Another teacher had slapped him several times. Rubén’s parents reported this abuse to the relevant government department, but no action was taken.

In Grade 5, Rubén stopped receiving support from the special educational assistant because another teacher did not think it was necessary. Rubén’s parents complained and he was allowed access to the assistant again, but the teacher still refused to cooperate with the assistant. Reports that the school had written up did not acknowledge the discrimination and abuse experienced by Rubén, and focused instead on the breakdown of his relationships with teachers at the school. His transfer to a special school was authorised in light of these reports.

Rubén’s parents approached various Spanish courts to have his rights protected and to ensure he could continue to attend an ordinary school with the appropriate support. The Spanish High Courts decided that since children with disabilities could not be considered to be in the same position as other children, recommending that they attend special schools could not be considered discrimination. The Constitutional Court dismissed his appeal. When Rubén’s parents did not take him to the special school they were criminally charged, including for neglect.

Having found no possible remedy in Spain, Rubén’s parents filed a complaint with the UN Committee on the Rights of Persons with Disabilities (CRPD). They argued, among other things, that Rubén’s treatment amounted to a violation of his right to inclusive education. The Committee found that Spain had infringed on this right, because before taking the decision to transfer him to a special school, it had not:

- Considered sufficiently the views of Rubén’s parents
- Conducted an independent, reasonable assessment of Rubén’s educational needs and the reasonable accommodations that he would have needed in order to be able to continue to attend a mainstream school
- Given appropriate weight to the expert reports of a clinical psychologist and special educational assistant that Rubén’s difficulties in adjusting to schooling in the mainstream establishment were due to a lack of educational support and the discriminatory, hostile environment
- Taken all necessary efforts to ensure the provision of a non-segregated, inclusive education system.

This decision by the CRPD could be useful to activists and judges determining similar cases in South Africa.



CONCLUSION: BUILDING AN INCLUSIVE SOUTH AFRICA

This chapter aimed to give the reader an understanding of the importance of a truly inclusive education system in South Africa, in which each and every child can be supported to reach their full learning potential.

We need to ensure that special, full-service and ordinary schools are strengthened, resourced and supported by national, provincial and district departments of education to fulfil the roles they need to play within an inclusive education system.

The lack of capacity of the national, provincial and local departments of education and their collective failure to implement even the short-term aims of WP6 – including even basic short-term goals, such as the

establishment of a conditional grant, and the execution of comprehensive mobilisation campaigns for out-of-school learners – is of serious concern.

Communities and schools must put pressure on the government to ensure that the core aspects of WP6 are implemented as soon as possible. The same is true of the SIAS policy discussed above, and the various guidelines produced by the national Department of Basic Education – including guidelines on special school

resource centres, full-service schools, and District-Based Support Teams.

Most importantly, there must be a societal shift in the understanding of disability and people with disabilities as ‘others’ who are fundamentally different. Both personally and interpersonally, this will take daily activism and individual introspection towards thinking, acting and shaping our surroundings in a way that is more conscious of the complexities of disability, and of the many challenges faced by people with disabilities.

Systemically, the first step in this direction is a truly inclusive education system, grounded in the constitutional rights to basic education and equality. To build an inclusive South Africa, we must first build an inclusive education system.

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