



Realising the Right to Education for Children with Disabilities: A Critical Assessment of South Africa's Legislative and Policy Framework

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REALISING THE RIGHT TO EDUCATION OF CHILDREN WITH DISABILITIES: A CRITICAL ASSESSMENT OF SOUTH AFRICA'S LEGISLATIVE AND POLICY FRAMEWORK

1. CHAPTER 1 - INTRODUCTION

The right to education is recognised as a fundamental means of realising other human rights.¹ Education is essential for the full development of a person's personality and mental and physical abilities.² It enhances a person's ability to survive, develop to their fullest potential, and make informed decisions.³ It promotes the ability of persons to actively participate in and contribute to a democratic society, and to strive against inequality, intolerance, and unfair discrimination.⁴ Education is seen as a method of promoting tolerance and understanding and building cohesion amongst all nations and social, political, and religious groups.⁵ Finally, it reduces the exploitation of vulnerable groups by giving them the tools necessary to empower themselves.⁶

Despite the universal acceptance of the importance of the right to education, its implementation has been deficient.⁷ South Africa, specifically, which has ratified at least five international human rights treaties that apply to education,⁸ and which has made the right to

¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 at 1.

² UN Committee on the Rights of the Child (CRC Committee), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1 at Annex IX.

³ World Conference on Education for All: Meeting Basic Learning Needs. (1990). *World declaration on education for all and framework for action to meet basic learning needs adopted by the World Conference on Education for All: Meeting Basic Learning Needs, Jomtien, Thailand, 5-9 March 1990*. New York, N.Y: Inter-Agency Commission (UNDP, UNESCO, UNICEF, World Bank) for the World Conference on Education for All at Preamble.

⁴ *Ibid* & South African Schools Act 84 of 1996.

⁵ *Ibid*.

⁶ CESCR *op cit* note 1 at 1.

⁷ UN Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 4 on the Right to Inclusive Education*, 25 November 2016, CRPD/C/GC/4 at 3.

⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577; UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249; UNESCO, *Convention Against Discrimination in Education*, 14 December 1960; UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106; Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

access basic education a human right in its constitution,⁹ has failed to provide education for all.¹⁰ One such group whose right to education has been continuously violated is children with disabilities.¹¹ It is estimated that almost 600 000 children with disabilities are currently out of school.¹² This is an incredibly alarming number.

This paper argues that a key reason why the right to education for children with disabilities has not been adequately realised in South Africa is because of the lack of a comprehensive legislative and policy framework to guide implementation. This paper aims to determine how the South African legal and policy framework can be transformed to ensure that it adequately caters for children with disabilities by considering the legislative and policy gaps that exist that have hindered the realisation of the right to education for children with disabilities and how they can be remedied.

Chapter two considers what constitutes a disability by looking at the disability models that have been used to define disability. Chapter three considers South Africa's obligations to provide education for children with disabilities under international law. It considers the various treaties that South Africa has signed and ratified and the nature and content of its duties under each treaty. Chapter four compares the two main methods that have been suggested for educating children with disabilities: namely special education and inclusive education. Chapters five and six analyse South Africa's current domestic legislative and policy framework for implementing the right to education for children with disabilities and outline the current legislative and implementation gaps that have hindered this implementation. Chapter seven provides recommendations for the establishment of a legislative and policy framework that can guide the effective implementation of the right to education for children with disabilities.

⁹ Constitution of the Republic of South Africa at s29.

¹⁰ Human Rights Watch (HRW) 'Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities' (2015) at 36; Raj Mestry 'A Critical Analysis of the Learners' Constitutional Rights to Basic Education in South African Public Schools' (2017) 28 *KOERS* 3 at 3; Crain Soudien, Vijay Reddy, & Jaqueline Harvey 'Chapter 12: The Impact of COVID-19 on a Fragile Education System: The Case of South Africa' in Fernando M. Reimers (Ed) *Primary and Secondary Education During Covid-19: Disruptions to Educational Opportunity During a Pandemic 2022* at 312 & 313.

¹¹ Ibid; Timothy Fish Hodgson 'The Right to Inclusive Education in South Africa: Recreating Disability Apartheid Through Failed Inclusion Policies' (2018) 135 *SALJ* at 490.

¹² Department of Basic Education (DBE) *Report on the Implementation of Education White Paper 6 on Inclusive Education. An Overview for the Period: 2013-2015* (2015) at 21.

2. CHAPTER 2 - DEFINITIONS OF DISABILITY

Disability is a difficult concept to define.¹³ “Definitions of disability vary with the purposes, values, and needs, and the intellectual discipline, of the definers.”¹⁴ However, models of disability have been created to attempt to provide an understanding of disability.¹⁵ Models are a “set of guiding assumptions, concerns, and propositions about the nature of phenomena or human experience.”¹⁶ Models aim to provide tools for understanding and guidelines for action.¹⁷ Disability models attempt to define disability by asking what a disability is, who has a disability and what the appropriate responses to disability are.¹⁸ Three models of disability are discussed here: the medical model, the social model, and the human rights model.

The medical model of disability has the longest history and has been in use for centuries.¹⁹ Under this model, disability is defined as a “defect, deficiency, dysfunctional, abnormality, failing or medical problem that is located within the individual”²⁰ The main problem lies within the individual.²¹ The physical and social environment are seen as fixed and the person with the disability must be changed to fit into the environment.²²

Theresia Degener identified two assumptions that flow from the medical model.²³ Firstly, persons with disabilities require special care as it is impossible for them to function optimally in society.²⁴ Persons with disabilities are seen as having needs that cannot be accommodated in the normal world and must thus be met in specialised settings.²⁵ This has led to the segregation of persons with disabilities through their placement in specialised settings such as special schools.²⁶

¹³ Julie Smart ‘Models of Disability: The Juxtaposition of Biology and Social Construction’ in T.F. Riggat & Dennis R. Maki (eds) *Handbook of Rehabilitation Counseling* (2004) at 26.

¹⁴ Ibid.

¹⁵ Ibid at 25.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid at 26.

¹⁹ Ibid at 30.

²⁰ Ibid.

²¹ Ibid.

²² Marno Retief & Rantsoa Letšosa ‘Models of Disability: A Brief Overview’ (2018) 74 *HTS Theological Studies* at 3.

²³ Theresia Degener ‘A Human Rights Model of Disability’ in Peter Blanck & Eilionor Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (2016) at 33.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

The second assumption is that disability leads to legal incapacity.²⁷ This has led to the denial of human rights for persons with disabilities.²⁸ Lack of access and accommodation has led to persons with disabilities not being able to exercise their rights to equality, dignity, freedom of movement, and education.²⁹

This model has played a big role in the creation of stigma around persons with disabilities.³⁰ Disability is seen, not as a valued difference, but as a deviation from the desired standard of normality.³¹ People with disabilities are considered inferior to their able-bodied counterparts.³² Society has been socialised to view disability as a negative characteristic and consequently people with disabilities as victims deserving of pity or charity.³³ Further, regardless of a person's social or economic standing, achievements, or privilege, their disability is the dominant characteristic that essentially defines who they are.³⁴

The primary response is to try to fix the problem in the individual.³⁵ Because this model regards the problem as existing entirely within the individual, it disregards the roles that the environment might play in exemplifying a person's disability.³⁶ As such, most interventions fall into the realm of medical professionals who focus on trying to cure or rehabilitate the individual.³⁷

However, there has been a move away from this model in recent years due to its prejudicial and discriminatory effects.³⁸ The social model, which is popular today, requires a shift in the location of the problem.³⁹ The social model locates the problem, not in the individual, but in how society responds to persons with disabilities.⁴⁰ This model distinguishes between

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Smart op cit note 13 at 30.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid at 32.

³⁵ Retief & Letšosa op cit note 22 at 3.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Degener op cit note 23 at 3.

³⁹ Ibid.

⁴⁰ Ibid.

impairment and disability.⁴¹ Impairment is defined as “a condition of the body and mind”.⁴² Disability is defined as those socially constructed disabling barriers and attitudes that are imposed on people with impairments that restrict them from participating in mainstream society.⁴³ Disability is seen as a form of social oppression that is shaped by how society perceives the impairment.⁴⁴ Such barriers include an inaccessible built environment, segregated education, unusable transport systems, institutional discrimination, and individual prejudice.⁴⁵

The impairment is seen as just a form of human variation.⁴⁶ In response to this, the social model aims to remove all forms of discrimination that persons with disabilities face and to ensure their full social integration and access to equal protection of the law.⁴⁷ Society must remove the barriers that continue to disable such persons.⁴⁸ Since disability is socially constructed, it can be deconstructed.⁴⁹

The final model is the human rights model.⁵⁰ Whilst the social model provides a useful tool to identify and analyse discriminatory systems in society, the human rights model seeks to provide the principles and values that should underlie disability policy.⁵¹ The human rights model also views disability as a social construct.⁵² However, impairment is not just seen as a human variation, but as a valued part of human dignity.⁵³ This model recognises that all persons, regardless of ability, have human rights.⁵⁴ Human rights are acquired at birth and cannot be taken away from anyone.⁵⁵ While they may, in appropriate cases, be limited, they are still unconditional.⁵⁶

⁴¹ Ibid.

⁴² Ibid.

⁴³ Retief & Letšosa op cit note 22 at 4.

⁴⁴ Ibid.

⁴⁵ Degener op cit note 23 at 4.

⁴⁶ Ibid at 3.

⁴⁷ Ibid at 5.

⁴⁸ Smart op cit note 13 at 42.

⁴⁹ Degener op cit note 23 at 3.

⁵⁰ Ibid.

⁵¹ Retief & Letšosa op cit note 22 at 5.

⁵² Degener op cit note 23 at 4.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

Degener explains it well when she says:

The human rights model focuses on the inherent dignity of the human being and subsequently, but only, if necessary, on the person's medical characteristics. It places the individual at the centre stage in all decisions affecting him/her and, most, importantly, locates the problem outside the person and in society.⁵⁷

The state must address the socially constructed barriers that persons with disabilities face ensuring their full participation in society and full respect for their dignity and human rights.⁵⁸ It also goes beyond just anti-discrimination and includes providing access to social, economic, and cultural rights for persons with disabilities.⁵⁹

The Convention on the Rights of Persons with Disabilities (CRPD),⁶⁰ the leading disability rights international instrument is modelled on the social and human rights model.⁶¹ It does not define disability but instead recognises it as an evolving concept and notes that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”⁶² The CRPD does define persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁶³

In South Africa, there is no official definition of disability and there is no consensus on what should and should not be classified as a disability.⁶⁴ As such, the human rights model will be adopted in this paper.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

⁶¹ Degener op cit note 23 at 3.

⁶² UN General Assembly supra note 60 at Preamble at (e).

⁶³ Ibid Article 1.

⁶⁴ Dana Donohue & Juan Bornman ‘The Challenges of Realising Inclusive Education in South Africa’ (2014) 34 *South African Journal of Education* 2 at 3.

3. CHAPTER 3 - INTERNATIONAL LAW OBLIGATIONS ON THE RIGHT TO EDUCATION FOR CHILDREN WITH DISABILITIES

The right to basic education is protected by multiple international instruments. It has been given extensive content in the context of, amongst other things, children's rights, and socio-economic rights. The right to education was first acknowledged in international law in the Universal Declaration of Human Rights (UDHR).⁶⁵ Article 26 recognises the right to education and requires that education be compulsory and free at the elementary stage.⁶⁶

The right to education generally enjoys protection in other international law instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁷ was signed by South Africa in 1994 and ratified in 2015.⁶⁸ Article 13 requires states to recognise the right of everyone to education and like the UDHR places a duty on states to make primary education "compulsory and available free to all."⁶⁹

The Convention on the Rights of the Child (CRC)⁷⁰ was ratified by South Africa in 1995.⁷¹ Articles 28 and 29 protect the right to education for all children.⁷² As with the above Conventions, Article 28(1)(a) requires primary education to be made compulsory and free for all and additionally requires states to take steps to reduce the rates of dropouts.⁷³

The CRC was the first binding treaty to feature a dedicated disability provision.⁷⁴ Article 23(2) requires states to take measures to ensure that children with disabilities have effective

⁶⁵ UN General Assembly *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

⁶⁶ Ibid at Article 26.

⁶⁷ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

⁶⁸ Ibid. SECTION27 'Education Declaration Mars ICESCR Ratification' available at SECTION27 *Education Declaration Mars ICESCR Ratification* (2015) <https://SECTION27.org.za/2015/01/education-declaration-mars-icescr-ratification/> accessed 25 June 2022. Although the South African government finally ratified the ICESCR, it declared that it would progressively realise the right to education provided for in the ICESCR according to its National Education Policy and within its available resources. This goes against the unqualified nature of the right to education in the Constitution and the Constitutional Court's binding interpretation that the right to basic education is not subject to progressive realisation.

⁶⁹ Ibid at Article 13.

⁷⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

⁷¹ Ibid. UN Status of Treaties: Convention on the Rights of the Child as at 25/06/2022 available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en

⁷² Ibid Article 28 & 29.

⁷³ Ibid.

⁷⁴ Helene Combrinck 'Chapter 12: The Hidden Ones: Children with Disabilities in Africa and the Right to Education' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) at 306.

access to education and employment opportunities with the view to achieving their full participation in society.⁷⁵ It further requires states to recognize the right of children with disabilities to special care and to provide that care to ensure the effective access of the child to education amongst other things.⁷⁶ However, the provision of care is subject to limitations. Article 23(2) states that an application must be made for special assistance and the child must be eligible for such assistance.⁷⁷ Further, such assistance, if given, must be “appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.”⁷⁸

Article 23 has been criticised for its restrictive approach to aiding children with disabilities.⁷⁹ Kilkelly has noted that Article 23 does not provide an absolute right to assistance and does not recognise a right or general entitlement to assistance based on need.⁸⁰ Additionally, it is submitted that determining what assistance is appropriate by looking mainly at the child’s “condition” leans heavily towards the medical model of disability. The focus on a child’s condition and not on any social or environmental barriers continues to locate the problem within the child.

Further, the various conditions imposed could potentially make it difficult for children to access support if they are deemed ineligible.⁸¹ The provision of support is further made subject to available resources and the financial resources of the parents or caregivers.⁸² As such, these various qualifications greatly limit access to assistance for children with disabilities.⁸³

However, the more recent Convention on the Rights of Persons with Disabilities (CRPD)⁸⁴ has provided a more comprehensive exposition of the right to education for persons with disabilities which is explored further below.⁸⁵

⁷⁵ UN General Assembly supra note 70 Article 23(2).

⁷⁶ Ibid Article 23(3).

⁷⁷ Ibid article 23(2).

⁷⁸ Ibid.

⁷⁹ Combrinck op cit note 74 at 307.

⁸⁰ Dr Ursula Kilkelly ‘Chapter 8: Disability and Children: the Convention on the Rights of the Child (CRC)’ in Gerard Quinn & Theresia Degener (eds) *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002) at 192.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ UN General Assembly supra note 60.

⁸⁵ Ibid Article 24.

The Right to Basic Education

Although not binding, the World Declaration on Education for All⁸⁶ provides a useful definition for basic learning needs.⁸⁷ Basic learning needs

Comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem-solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.⁸⁸

Primary education is seen as the main delivery system for basic learning needs outside the home.⁸⁹ Primary education is the first layer of formal schooling and consists of structured and graded instruction which is delivered in an educational institution.⁹⁰

The right to education is largely given content in General Comment No. 13 on the Right to Education (General Comment 13) issued by the Committee on Economic, Cultural and Social Rights (CESCR).⁹¹ Whilst the exact content of education will depend upon the conditions in a particular state, states must ensure that education exhibits four factors that are seen as interrelated and essential.⁹² Education, at all its levels and in all its forms must be available, accessible, acceptable, and adaptable.⁹³ Availability means that educational facilities must be physically present before the right to education can be accessed.⁹⁴ This includes buildings, trained teachers, learning materials, sanitation, and any technology required.⁹⁵

Accessibility has three interrelated dimensions.⁹⁶ Education must be physically accessible which means that education must be in a convenient geographic location and that children should

⁸⁶ World Conference on Education for All: Meeting Basic Learning Needs op cit note 3.

⁸⁷ Ibid.

⁸⁸ Ibid at Article 1.

⁸⁹ Ibid at Article 5.

⁹⁰ LN Murungi 'Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation' (2015) 18 *PER* at 3161.

⁹¹ CESCR op cit note 1.

⁹² Ibid at 6.

⁹³ Ibid.

⁹⁴ Ibid at 6.

⁹⁵ Ibid.

⁹⁶ Ibid.

be within a safe travelling distance.⁹⁷ Secondly, children should be able to access education without being discriminated against on any grounds.⁹⁸ Thirdly, education should be economically accessible meaning that it must be affordable for all.⁹⁹ Learners should not be refused admission because of an inability to pay school fees.¹⁰⁰

Adaptability means that education must be able to adapt to the changing needs of society.¹⁰¹ This entails providing the relevant skills and knowledge necessary to further the development of the economy and the country.¹⁰² It also entails the extent to which the educational system can accommodate minority and vulnerable groups.¹⁰³

Finally, acceptability means that the form and substance of education must be culturally appropriate and of good quality.¹⁰⁴ This means that the curriculum and teaching methods employed must be acceptable.¹⁰⁵ This can be challenging in a country such as South Africa which has diverse cultures and beliefs. What may be seen as acceptable in one group may not be acceptable in another group. Together, these four features give effect to article 13(2) of the ICESCR.¹⁰⁶

The duty to provide free and compulsory education is expanded upon in the CESCR's General Comment 11 on the Plans of Action for Primary Education (General Comment 11).¹⁰⁷ Compulsory means that neither the State nor parents or guardians can decide that primary education is optional.¹⁰⁸ Free of charge is unequivocal to ensure that fees do not hinder the ability of children to access primary education.¹⁰⁹ Where states cannot immediately provide free

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid at 12.

¹⁰¹ Ibid at 15.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid at 14.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23.

¹⁰⁸ Ibid at 6.

¹⁰⁹ Ibid at 7.

and compulsory education they are required to formulate a detailed plan of action to progressively realise this right.¹¹⁰

The Right to Education for Children with Disabilities

Under the UDHR and ICESCR, the right to basic education for children with disabilities was not explicitly addressed. Rather, as shown above, these Conventions deal with the right to education for everyone.

The right to education of children with disabilities was fully addressed at the Salamanca conference which took place intending to further the objective of Education for All.¹¹¹ Before the Salamanca conference, the main responses to educating children with disabilities were largely guided by the medical model of disability.¹¹² Children with disabilities were included in the category of “children with special needs”.¹¹³ Although the term “special” was never defined, it encompassed all children who did not fit into the general education system.¹¹⁴ Depending on the child’s disability, they were either completely excluded from the education system, placed into specialised learning environments that were meant to better cater for their needs, or integrated into the general education system.¹¹⁵ At the Salamanca conference, many countries acknowledged that exclusion, segregation, and integration did not adequately protect the right of all children to education.¹¹⁶

Recognising this issue, the Salamanca Statement and Framework for Action on Special Needs Education were adopted (Salamanca Statement).¹¹⁷ The Salamanca Statement advocates for a more inclusive approach to educating children with disabilities.¹¹⁸ The idea of inclusive education was first largely expanded upon in these documents.¹¹⁹ Inclusive education is based on

¹¹⁰ UN General Assembly supra note 67 at Article 14.

¹¹¹ UNESCO *The Salamanca Statement and Framework for Action on Special Needs Education* (1994) available at <https://www.right-to-education.org/resource/salamanca-statement-and-framework-action-special-needs-education>

¹¹² UN Human Rights Council (UNHCR), *Thematic study on the right of persons with disabilities to education*, 18 December 2013, A/HRC/25/29 at 6.

¹¹³ Sue Stubbs *Inclusive Education: Where there are Few Resources* (2008) at 42.

¹¹⁴ *Ibid* at 43.

¹¹⁵ UNHCR op cit note 25 at 4.

¹¹⁶ UNESCO *The Salamanca Statement and Framework for Action on Special Needs Education*. 7-10 June 1994.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ Stubbs op cit note 113 at 11.

the idea that everyone has the right to an education and that every person must be allowed to receive an acceptable level of learning.¹²⁰ It recognises that all children are unique and that at some point in their schooling career, most children will experience some type of learning barrier.¹²¹ Disability is one such barrier.¹²² It recognises that what are often considered special learning needs are ordinary learning needs that simply require a more child-centred approach. States must design education systems that can accommodate a wide variety of learning needs.¹²³

The Salamanca Statement calls for children with disabilities to be accommodated in regular schools and for these schools to be capable of meeting each child's unique needs.¹²⁴ Inclusive education is child-centred and focuses on changing the environment to accommodate the child rather than trying to make the child fit into a fixed environment.¹²⁵ Inclusive schools should be able to respond to different styles and rates of learning and should provide quality education to all.¹²⁶

Governments must prioritise the development of laws and policies that provide for an educational system that is fully inclusive regardless of the different circumstances that each child faces.¹²⁷ These laws and policies must ensure that children with disabilities are accommodated in regular schools unless this is impossible.¹²⁸ Governments are urged to facilitate the participation of communities, parents, teachers, organisations of persons with disabilities and other relevant stakeholders in the creation of an inclusive education system.¹²⁹ Different sectors of government such as health, social welfare, and employment are also called on to collaborate to adopt parallel measures that give effect to the collective goals.¹³⁰

Although the Salamanca Statement is not binding on states, it did provide a basis for future international law instruments that dealt with inclusive education.¹³¹

¹²⁰ UNESCO op cit note 116 at Article 2.

¹²¹ Ibid at Introduction.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid at 3.

¹²⁵ Ibid at 7.

¹²⁶ Ibid.

¹²⁷ Ibid at Article 3.

¹²⁸ Ibid.

¹²⁹ Ibid at 39.

¹³⁰ Ibid.

¹³¹ Stubbs op cit note 113 at 10.

Inclusive Education

Following Salamanca, inclusive education was once again mentioned in CRC General Comment No. 9 on The Rights of Children with Disabilities.¹³² The CRC Committee recognised that inclusive education is essential for educating children with disabilities.¹³³ However, it also recognised that there would be instances in which countries may not be able to achieve inclusive education in the immediate future.¹³⁴ It recognised that in some instances special education may still be necessary to accommodate certain groups of learners.¹³⁵

The CRPD, a more recent Convention, was adopted in 2007.¹³⁶ It is the first Convention to explicitly refer to inclusive education.¹³⁷ It was created to promote, protect, and fulfil the rights and fundamental freedoms of persons with disabilities.¹³⁸ It recognises that disability is a ground upon which people continue to face discrimination and thus requires states to take measures to ensure that the human rights and fundamental freedoms of persons with disabilities are fully realised without any kind of discrimination.¹³⁹

Article 24 provides extensive protection for the right to education of persons with disabilities.¹⁴⁰ Article 24 requires states to take steps to ensure that such persons are not excluded from the general education system, and specifically requires that children with disabilities be not excluded from receiving free and compulsory primary education.¹⁴¹ It requires that states ensure that persons with disabilities have access to primary education that is inclusive and free.¹⁴² It further requires states to ensure that persons with disabilities enjoy equal access to education on the same level as their peers and in the communities they live in.¹⁴³

¹³² UN Committee on the Rights of the Child (CRC Committee), *General comment No. 9 (2006): The rights of children with disabilities*, 27 February 2007, CRC/C/GC/9.

¹³³ *Ibid* para 66.

¹³⁴ *Ibid* para 67

¹³⁵ *Ibid*.

¹³⁶ UN General Assembly *supra* note 60.

¹³⁷ *Ibid* Article 24(2).

¹³⁸ *Ibid* Article 1.

¹³⁹ *Ibid* Preamble.

¹⁴⁰ *Ibid* Article 24.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

It places further duties on states such as the duty to reasonably accommodate individuals, to provide the support required to facilitate their effective education and to provide “effective individualised support measures in environments that maximise development.”¹⁴⁴ Article 24(3) recognises that persons who are deaf, blind, and deafblind may require further measures to facilitate their full and equal participation in education and consequently places further obligations on states in relation to these groups.¹⁴⁵ For instance, Article 24(3)(a) and (b) require states to facilitate the learning of, amongst other things, Braille, alternative script, and sign language.¹⁴⁶ Article 24(3)(c) has been interpreted as creating an exception to inclusive education for children with sensory disabilities as it specifically refers to educating such persons in environments that maximise academic and social development.¹⁴⁷

Article 24 is significant because it provides an explicit and detailed substantive right to inclusive education for persons with disabilities.¹⁴⁸ Although the right to education recognised in other treaties applies equally to children with disabilities their textual invisibility previously resulted in them being generally overlooked.¹⁴⁹ As such, article 24 was intended to play a key role in changing society’s approach to educating persons with disabilities.¹⁵⁰

However, two potential issues are worth noting. Firstly, no definition of inclusion or inclusive education is provided in the CRPD.¹⁵¹ Unfortunately, until a general comment on inclusive education was passed, this left a gap in what exactly was expected of states in creating an inclusive education system.¹⁵² The second issue is article 24’s extensive focus on individualised support.¹⁵³ Instead of article 24 calling on states to eradicate those systemic barriers that hinder the inclusion and participation of children with disabilities in the education

¹⁴⁴ Ibid.

¹⁴⁵ UN General Assembly supra note 60.

¹⁴⁶ Ibid.

¹⁴⁷ Bornagh Byrne ‘How Inclusive is the Right to Inclusive Education? An Assessment of the UN Convention on the Rights of Persons with Disabilities’ Concluding Observations’ (2022) 26 *International Journal of Inclusive Education* 3 at 312.

¹⁴⁸ Bronagh Byrne ‘Hidden Contradictions and Conditionality: Conceptualisations of Inclusive Education in International Human Rights Law’ (2013) 28 *Disability and Society* 2 At 239.

¹⁴⁹ Ibid.

¹⁵⁰ Beth A. Ferri; Arlene S Kanter & Michelle L Damiani ‘The Right to Inclusive Education Under International Law: Following Italy’s Lead’ (2014) *Journal of International Special Needs Education* at 24.

¹⁵¹ Byrne op cit note 148 at 240.

¹⁵² Ibid.

¹⁵³ Ibid at 241.

system, it focuses rather on the individual needs of children.¹⁵⁴ This is the case with articles 24(2) (c), (d), and (e).¹⁵⁵ According to Byrne the progress created by the CRPD is diluted by the continuing emphasis upon forms of support required by the individual to access existing pedagogies rather than upon barriers to inclusion erected by educational institutions and discourses themselves.¹⁵⁶

These issues were somewhat remedied in General Comment No. 4 on the Right to Inclusive Education (General Comment 4)¹⁵⁷ issued by the Committee on the Rights of Persons with Disabilities (CRPD Committee).¹⁵⁸ It was only in General Comment 4 that inclusion and inclusive education were defined.¹⁵⁹ Inclusive education is defined as a fundamental right of all learners.¹⁶⁰ It involves the continuing elimination of barriers that hinder the right to education for children with disabilities and the promotion of changes in culture, policy, and practice to ensure the effective accommodation of all learners in regular schools.¹⁶¹ It refers to the four As outlined in General Comment 13 of the ICESCR.¹⁶² The state must make sure that the entire education system is accessible for all children without discrimination.¹⁶³ This includes creating a flexible curriculum that can be adapted to children's needs and providing accessible buildings, educational materials, transport, language, and support services.¹⁶⁴

In addition to accessibility, in line with article 24(2)(c) of the CRPD, states must take steps to reasonably accommodate all children so that they can access education on an equitable basis with their peers.¹⁶⁵ According to General Comment 4

Reasonableness is understood as the result of a contextual test that involves an analysis of the relevance and the effectiveness of the accommodation and the expected goal of countering discrimination. The availability of resources and financial implications is recognised when

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid at 242.

¹⁵⁷ CRPD Committee op cit note 7.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid para 10.

¹⁶¹ Ibid.

¹⁶² Ibid para 20.

¹⁶³ Ibid para 22.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid para 28.

assessing disproportionate burden. The duty to provide reasonable accommodation is enforceable from the moment a request for such accommodation is made.¹⁶⁶

The state must adopt policies at all levels of government that require reasonable accommodation.¹⁶⁷ States cannot use a lack of resources as a justification for not advancing the goals of inclusive education.¹⁶⁸ This would be a violation of article 24 of the CRPD.¹⁶⁹ It is worth noting that whereas general accessibility benefits the group and is implemented gradually, reasonable accommodation benefits the individual and should be implemented immediately if it is possible.¹⁷⁰

States must ensure that sufficient financial and other resources are committed to the development of an inclusive education system.¹⁷¹ All sectors of government must have access to enough resources to implement inclusive laws, policies and programs.¹⁷² Effective systems for monitoring the quality of inclusive education and the barriers faced by children must be developed.¹⁷³ Quality education requires the state to constantly recognise and correct any issues in the educational system that hinder the progress of inclusive education.¹⁷⁴

The question, however, remains as to what extent education systems must be inclusive. General Comment 9 of the CRC recognised that the extent of inclusive education in different countries may vary and that in some instances, where inclusion is not possible special education may still be required provided that children are not discriminated against.¹⁷⁵ However, the CRPD Committee seems to have taken a different approach.¹⁷⁶ The CRPD does not bar the existence of special schools.¹⁷⁷ However, the CRPD Committee seems to have set a higher standard for inclusion by asserting in some Concluding Observations that the existence of special schools is discriminatory and violates the rights of children.¹⁷⁸ For example, the CRPD Committee noted

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid para 29.

¹⁷¹ Ibid para 69.

¹⁷² Ibid para 73.

¹⁷³ Ibid.

¹⁷⁴ Ibid para 74.

¹⁷⁵ CRC Committee op cit note 123.

¹⁷⁶ Byrne op cit note 147 at 311.

¹⁷⁷ UN General Assembly supra note 60 at Article 24.

¹⁷⁸ Byrne op cit note 147 at 311.

that Portugal's establishment of model schools for blind, deaf and deafblind children constituted discrimination.¹⁷⁹

Whilst advocating against segregation may be important, it potentially ignores the need for states to take a more nuanced approach to inclusive education as there may be instances where there are exceptions.¹⁸⁰ This is especially so considering the rationale for article 24(3) which requires further consideration of which environments may be best for children with sensory disabilities.¹⁸¹ It is worth noting that inclusive education may not be achievable for certain children especially those children with serious or multiple impairments.¹⁸² It should not be ruled out that even with reasonable accommodation or support measures some children may not be able to participate in the general education system.¹⁸³

Another key issue is General Comment 4's suggestion that resources be reallocated from special schools to promote inclusion in the general education system.¹⁸⁴ This creates questions about what happens to those children who are in the special education system and what a reduction of resources means for them.¹⁸⁵ The transition to inclusive education is a slow process and whilst it should, in the long run, benefit all, there may be immediate consequences for those in specialised settings.¹⁸⁶ In various countries, a significant portion of funds is used for special education.¹⁸⁷ The question is how these funds can be reallocated in a way that does not adversely affect those children in specialised settings. It may also be difficult to ascertain at what point the education system is inclusive enough to accommodate most children.¹⁸⁸ Consequently, it may be unclear how long children must remain in segregated settings that are receiving less funding. Additionally, if these funds are reallocated and the general education system is unable to accommodate children who are currently in special schools, what happens to them?¹⁸⁹ As such,

¹⁷⁹ Ibid.

¹⁸⁰ Ibid at 312.

¹⁸¹ Ibid.

¹⁸² Gauthier De Beco 'The Right to Inclusive Education According to Article 24 of the UN Convention on the Rights of Persons with Disabilities: Background, Requirements, and (Remaining) Questions' (2004) 32 *Netherlands Quarterly of Human Rights* 3 at 285.

¹⁸³ Ibid.

¹⁸⁴ Byrne op cit note 147 at 312.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ CRPD Committee op cit note 7 para 70.

¹⁸⁸ Byrne op cit note 147 at 312.

¹⁸⁹ Ibid.

during this transitional window states must ensure that certain children are not benefitting at the expense of other children.¹⁹⁰

Although human rights standards are universal, states may apply them differently depending on the context.¹⁹¹ States are best placed to implement human rights as they have the best understanding of the human rights situation in their country and how it can be improved.¹⁹² As such, while the CRPD Committee should ensure that states are meeting their international obligations, it must also provide room for variations in implementation. Hodgson has argued that it would be ironic if an approach which involves embracing diversity becomes overly prescriptive and fails to allow different states to adopt inclusive education according to their varying contexts.¹⁹³

A final point is that whilst inclusive education is about responding to all forms of diversity, it has often been conflated with educating persons with disabilities.¹⁹⁴ The Salamanca Statement identified various groups that may face barriers including gifted children, street children and children from certain ethnic or cultural minorities.¹⁹⁵ However, the promotion of inclusive education in the context of disability rights in the CRPD and General Comment 4 has caused states to largely focus on children with disabilities when implementing inclusive education.¹⁹⁶ It is thus paramount that inclusive education is established as a general right in the general education system to which every person is entitled.¹⁹⁷

General Legal Obligations in Relation to Children and the Right to Education

The ICESCR and the CRC require states to take legislative and other measures to implement the rights recognised in the Conventions.¹⁹⁸ Both Conventions recognise that states may face resource restrictions and thus require states to progressively realise these rights by making them

¹⁹⁰ Ibid.

¹⁹¹ De Beco op cit note 182 at 45.

¹⁹² Ibid.

¹⁹³ Hodgson op cit note 11 at 489.

¹⁹⁴ Stubbs op cit note 113 at 20.

¹⁹⁵ UNESCO op cit note 116 at 3.

¹⁹⁶ Stubbs op cit note 113 at 22.

¹⁹⁷ Ibid.

¹⁹⁸ UN General Assembly supra note 67 Article 2 & UN General Assembly supra note 70 Article 4.

accessible to the maximum of their available resources.¹⁹⁹ However, some aspects are immediately realisable.²⁰⁰ Under the ICESCR, states have an immediate obligation to ensure that the right to education is exercised without discrimination on any grounds.²⁰¹ States must also immediately take the necessary steps with the view to achieving the full realisation of article 13 of the ICESCR.²⁰²

The right to education places obligations on states to respect, protect, and fulfil it.²⁰³ The obligation to fulfil requires the state to take positive steps to implement the right to education for all individuals.²⁰⁴ General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (General Comment 5)²⁰⁵ defines implementation as “the process whereby States parties take action to ensure the realisation of all rights in the CRC for all children in their jurisdiction.”²⁰⁶ The right must be implemented without discrimination of any kind and non-discrimination applies to every aspect of education.²⁰⁷ This means every child must have equitable access to educational opportunities without facing discrimination of any kind on any of the internationally prohibited grounds.

States are required to ensure that their existing domestic law is compatible with the principles of the Conventions.²⁰⁸ This means ensuring that the laws of the state adequately protect the rights of all children.

Plans of action and policies are also seen as fundamental to the implementation of rights.²⁰⁹ They consolidate all the provisions of the Convention into concrete steps and measurable outcomes.²¹⁰ The importance of legislation and policy in the implementation of rights cannot be overstated. In South Africa, a dualist approach is adopted.²¹¹ This means that for

¹⁹⁹ Ibid; Ibid.

²⁰⁰ CESCR op cit note 1 at 31.

²⁰¹ Ibid.

²⁰² Ibid at 43.

²⁰³ Ibid at 47.

²⁰⁴ Ibid.

²⁰⁵ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5.

²⁰⁶ Ibid para 1.

²⁰⁷ CESCR op cit note 1 para 31.

²⁰⁸ UN General Assembly supra note 70 at 1.

²⁰⁹ Ibid at 29.

²¹⁰ Ibid at 32.

²¹¹ Supra note 9 at 231. John Dugard, Max du Plessis, Tiyanjana Maluwa et al. *Dugard's International Law: a South African Perspective* (2018) 5 ed at 73 & 4.

these international law provisions to become binding, they must be enacted into domestic law.²¹² Thus, the enactment of legislation and policy and the development of plans of action place legally binding duties on the state to act and provide mechanisms to hold the state accountable where it fails to act. They provide legal protection for vulnerable groups and provide remedies where these rights are violated. They set out how the rights will be implemented, who the key role players are, and how financial and other resources will be allocated.

As such, domestic legislation, policy and plans of action are indispensable in the realisation of the right to education.

Regional Law

South Africa ratified the African Charter on Human and Peoples' Rights (ACHPR) in 1996.²¹³ The ACHPR only provides that "every individual shall have the right to education."²¹⁴ The African Charter on the Rights and Welfare of the Child (ACRWC), which South Africa ratified in 2000, contains a more extensive right to education.²¹⁵ article 11(1) states that "every child shall have the right to an education."²¹⁶ As with the other treaties, it recognises the importance of education in the development of the child and in preparing them for life in a free society.²¹⁷ It also requires states to provide "free and compulsory basic education", to promote regular attendance and reduce the dropout rate.²¹⁸ It further requires states to take special measures regarding disadvantaged children to ensure that they have the same access to education as their peers.²¹⁹ It has already been established above that children with disabilities are a vulnerable, and consequently disadvantaged, group.

Article 13 of the ACRWC deals specifically with children with disabilities. States are required to take measures to meet every child's physical and moral needs to protect their dignity

²¹² Ibid at 231(4); Ibid at 79.

²¹³ Organisation of African Unity *African Charter on Human and Peoples' Rights* 27 June 1981, CAB/LEG/67/3 REV. 5.

²¹⁴ Ibid at Article 17.

²¹⁵ Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

²¹⁶ Ibid at Article 11.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

and to ensure that they can actively participate in society.²²⁰ Further, the Charter gives every child with a disability the right to access training and preparation for employment and to ensure that the child can fully integrate into society.²²¹

As with the above-mentioned treaties, there is a general obligation on state parties to adopt legislative and other measures to give effect to the rights contained in the Convention.

Summary of International Law Obligations

From the above consideration of international and regional law, some key obligations emerge. The education system should be accessible, available, adaptable, and acceptable. It should cater for all children alike, whether they have a disability or not. No child should be discriminated against, and all children should be equally protected by the law. The best way to provide quality education for all children is to adopt an inclusive approach which aims to ensure that all children are catered for in the general education system. Where necessary, children should receive reasonable accommodation to ensure their full and effective participation in the learning process. States must also make education free and compulsory.

Key to the implementation of inclusive education is the enactment of a comprehensive legislative and policy framework that outlines how inclusive education will be implemented. This includes reviewing and abolishing existing legislation which is not in line with international law. It also includes creating new legislation, policies, guidelines, and plans of action that comprehensively outline how inclusive education will be implemented.

Finally, since education is a socio-economic right, the obligation to progressively realise the right is present in the ICESCR, the CRC and the CRPD.

²²⁰ Ibid at Article 13.

²²¹ Ibid.

4. CHAPTER 4 - SPECIAL EDUCATION VS INCLUSIVE EDUCATION: THE DEBATE

There has been some debate over whether inclusive education is the best approach to educating children with disabilities.²²²

Some authors argue that special education is preferable to inclusive education and several reasons are cited for this.²²³ First, the purpose of special education was initially to ensure that children with disabilities were not neglected and that they had the opportunity to learn in an environment that could accommodate their special needs.²²⁴ It is argued that it is not special education that is the issue, but rather how it has been implemented.²²⁵ Both special education and inclusive education have the potential to be implemented badly. Inclusive education does not guarantee that the quality of education will be better.²²⁶

Second, it is also recognised that special education is costly, but writers state that the argument that special education costs too much is misleading.²²⁷ Special education costs more because children with disabilities require more teachers, special equipment, specialised therapies and more.²²⁸ However, it is argued that the long-term benefit of having productive citizens outweighs these costs.²²⁹

Third, it is argued that the inclusion of all students in the general education system is not feasible.²³⁰ Special education differs from education that is normally effective for most students.²³¹ Special education is not just about watering down the curriculum, but rather involves providing children with disabilities with a different curriculum that addresses their specific needs.²³² Certain children require specialised instruction that most children do not need and it is

²²² James M. Kauffman, Daniel P. Hallahan, Paige C. Pullen et al. *Special Education: What It is and Why We Need It* 2nd ed (2018) at 134.

²²³ *Ibid* at 189.

²²⁴ *Ibid* at 5.

²²⁵ *Ibid*.

²²⁶ *Ibid* at 126.

²²⁷ *Ibid* at 117.

²²⁸ *Ibid*.

²²⁹ *Ibid*.

²³⁰ *Ibid* at 135.

²³¹ *Ibid* at 2.

²³² *Ibid* at 136.

not feasible to expect all teachers in the general education system to have the skills required to teach a diverse class of students well.²³³

Fourth, argued that children with disabilities need an affiliation with other children who share similar characteristics as they are more likely to find understanding and support in congregation.²³⁴ Where their differences are ignored and they are not allowed to be around others like them, this closes the door to supportive disability culture.²³⁵

The fifth argument is the difficulty involved in implementing it.²³⁶ Inclusive education does not only involve catering to children with disabilities but to all learning barriers that children face.²³⁷ Inclusive education requires a complete restructuring of education systems and this requires great commitment, proper planning and extensive resource provision from states.²³⁸ In developing countries, these types of resources tend to be lacking.²³⁹ Additionally, many developing countries have not made inclusive education a priority in government policy or expenditure.²⁴⁰ Inclusive education is seen as too costly, as a waste of scarce resources, and as taking a backseat to the needs of the “normal” majority.²⁴¹

Finally, there is contestation over what inclusion entails.²⁴² For instance, in developed countries, inclusion may entail mainstream schools that are adequately resourced to include children with disabilities.²⁴³ However, in some developing countries where access to school is generally not guaranteed, special schools may be seen as the only way to include children with disabilities in the educational system.²⁴⁴

Despite these arguments against inclusive education, many states, including South Africa continue to attempt to adopt the inclusive approach. Although inclusive education is costly, it is

²³³ Ibid at 136.

²³⁴ Ibid at 136.

²³⁵ Ibid at 41.

²³⁶ C. Jonah Eleweke & Michael Rodda ‘The Challenge of Enhancing Inclusive Education in Developing Countries’ (2002) 6 *International Journal of Inclusive Education* 2 at 114.

²³⁷ Ibid.

²³⁸ Ibid at 115.

²³⁹ Ibid.

²⁴⁰ Ibid at 118.

²⁴¹ Ibid.

²⁴² Lani Florian ‘On the Necessary Co-existence of Special and Inclusive Education’ (2019) 23 *International Journal of Education* 7-8 at 698.

²⁴³ Ibid

²⁴⁴ Ibid.

estimated that special education is likely to be more costly.²⁴⁵ Special education would require governments to set up a complex system of specialist schools that cater only for specific groups of children in addition to operating the general education system.²⁴⁶ But without a definition of what special learning needs are, this could result in children who can be accommodated in ordinary schools being referred to special schools.²⁴⁷ Although an economic cost-benefit analysis has not been done due to the benefits of inclusive education being hard to quantify, it is estimated that the potential savings from running a single inclusive education system far outweighs the cost of running two parallel systems.²⁴⁸

The second benefit of inclusive education is that it is seen as the most effective method of providing quality education for all.²⁴⁹ The importance of education and its potentially beneficial effects have been discussed in the introduction. Inclusive education is meant to cater for everyone. While inclusive education is normally conflated with education for children with disabilities, it is meant to cater for all vulnerable groups, including young girls, sexual minorities, and religious and cultural minorities.²⁵⁰ It aims to address all the barriers that people face and ensure that everyone can attend school.²⁵¹ Therefore, it is currently considered the best method for achieving education for all.²⁵²

The third benefit is that creating an inclusive education system is key to creating an inclusive society.²⁵³ Discrimination, segregation and exclusion still occur based on various social, religious, and political grounds. The results of exclusion are very apparent today from the intolerance, unrest and conflict that still exists today.²⁵⁴ Unfortunately, real sustainable development cannot occur without the inclusion of all members of society.²⁵⁵ As such, everyone should be allowed to participate in and contribute to society.²⁵⁶ The aim is to create a society

²⁴⁵ UNESCO 'Towards Inclusion in Education: Status, Trends and Challenges. The UNESCO Salamanca Statement 25 Years On' (2020) at 12.

²⁴⁶ Ibid

²⁴⁷ Stubbs op cit note 113 at 43.

²⁴⁸ UNESCO 'Global Education Monitoring Report: Inclusion and Education: All Means All' (2020) at 17.

²⁴⁹ UNESCO op cit note 245 at 11.

²⁵⁰ Ibid at 24.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Stubbs op cit note 113 at 50.

²⁵⁴ Ibid.

²⁵⁵ Ibid

²⁵⁶ Ibid.

where everyone can live together, where difference does not indicate inferiority and where diversity is celebrated.²⁵⁷ By creating an inclusive education system, people, and children, in particular, are allowed to engage with difference in an inclusive space where they can learn to accept and celebrate it.

Many countries including South Africa have stayed committed to inclusive education.²⁵⁸

5. CHAPTER 5 - DOMESTIC LAW

Under Apartheid, the education system was deeply unequal. Schools were segregated by three factors: race, geography, and disability.²⁵⁹ This meant that although special schools existed, they were few and unevenly distributed across the country.²⁶⁰ The admission criteria employed by these special schools were rigid to match the few available spots.²⁶¹ Consequently, only 20% of all learners with disabilities attended special schools.²⁶²

In 1994, South Africa adopted a democratic Constitution that was meant to be a decisive break from Apartheid.²⁶³ The Constitution of the Republic of South Africa (the Constitution)²⁶⁴ is the supreme law and any law or conduct inconsistent with it is invalid.²⁶⁵

According to the Constitution, the Republic of South Africa is founded on the values of dignity, equality, and freedom.²⁶⁶ Education White Paper 6 on Special Needs Education,²⁶⁷ noted that these constitutional values “summon all of us to take up the responsibility and challenge of building a humane and caring society, not for the few, but for all South Africans.”²⁶⁸

Considering these values, the next section considers constitutional provisions directly relevant to the rights of learners with disabilities to education.

²⁵⁷ Ibid.

²⁵⁸ UNESCO op cit note 245 at 16 & 17.

²⁵⁹ Department of Education (DoE) *Education White Paper 6: Special Needs Education- Building an inclusive education and training system* (2001) at 9.

²⁶⁰ Charles Ngwena & Loot Pretorius ‘Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* (2012) 28 *SAJHR* at 89.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ *S v Makwanyane and Another* 1995 (6) BCLR 665 at 261.

²⁶⁴ Supra note 9.

²⁶⁵ Ibid at s2.

²⁶⁶ Ibid at s1.

²⁶⁷ DoE op cit note 259.

²⁶⁸ Ibid at 11.

Constitutional Rights

The Right to Basic Education

The right to basic education is set out in section 29(1)(a) of the Constitution. It states that

“Everyone has the right to a basic education, including adult basic education.”²⁶⁹

Unlike other socio-economic rights, the right to basic education in the Constitution does not contain any internal limitations that require progressive realisation subject to available resources.²⁷⁰ In *Juma Masjid*²⁷¹ the court stated that this right is immediately realisable and subject only to limitation by section 36 of the Constitution.²⁷² The usage of the word “everyone” in section 29(1)(a) means that all persons have the right to basic education. In the *Centre for Child Law*²⁷³ case, the High Court stated that “the right to education extends to ‘everyone’ within the boundaries of South Africa.”²⁷⁴

The courts have given content to the right to basic education incrementally. The courts have taken a substantive approach to interpreting s29(1)(a) of the Constitution by giving tangible content to the right to basic education. The key aspects recognised thus far as necessary for the realisation of the right to education include adequate school infrastructure,²⁷⁵ the presence of sufficient teaching and non-teaching staff,²⁷⁶ adequate school furniture,²⁷⁷ textbooks,²⁷⁸ and transportation to and from school at state expense in appropriate cases.²⁷⁹ Most recently, the courts recognised the right of children to receive basic nutrition in and out of school.²⁸⁰

In *Pridwin*,²⁸¹ the majority of the Constitutional Court did not define basic education in terms of a person’s age or grade.²⁸² Instead, they recognised that basic education refers to the

²⁶⁹ Supra note 9 at 29(1)(a).

²⁷⁰ Ibid.

²⁷¹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13.

²⁷² Ibid para 37.

²⁷³ *Centre for Child Law and Others v Minister of Basic Education and Others* (1749/2012) [2012] ZAECGHC 60.

²⁷⁴ Ibid para 80.

²⁷⁵ *Equal Education & Another v Minister of Basic Education & Others* (2008) ZAECBHC.

²⁷⁶ *Centre for Child Law v Minister of Basic Education* 2012 (4) All SA 35 (ECG).

²⁷⁷ *Madzodzo v Minister of Basic Education* 2014 (2) All SA 339 (ECM).

²⁷⁸ *Section 27 v Minister of Education* Case 24565/12, 4 October 2012.

²⁷⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

²⁸⁰ *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306.

²⁸¹ *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC).

²⁸² Ibid para160.

content of education and must be flexible enough to meet the “learning needs appropriate to age and experience of the learner whether child, youth or adult.”²⁸³ The minority judgment, on the other hand, stated that basic education can be interpreted to include primary education.²⁸⁴ If this approach is adopted it would be in line with the definition of basic learning needs as adopted in the *World Declaration of Education for All* which also recognises that primary education is the main delivery method for basic education.²⁸⁵ However, in *Moko*²⁸⁶, the constitutional court was of the view that basic education should be up to and including matric.²⁸⁷ The court stated that an interpretation of basic education that limits education up until grade 9 or only primary education was unduly narrow.²⁸⁸ As such, the state must ensure that the right to basic education is fulfilled in secondary schools as well.²⁸⁹

The right to education must be understood in the context of other constitutional rights, namely equality and dignity. These are considered below.

Equality

Section 9 of the Constitution provides an extensive equality provision.²⁹⁰ Section 9 places an obligation on the state to promote the achievement of equality by adopting measures that protect persons or groups of persons who have been disadvantaged by unfair discrimination.²⁹¹ The section also prohibits unfair discrimination by the state, or anyone based on amongst other things, disability.²⁹² Everyone is entitled to equal protection of the law.²⁹³

The Constitution embraces a substantive view of equality as opposed to formal equality.²⁹⁴ Substantive equality requires equality to be understood within South Africa’s social and historical context.²⁹⁵ Apartheid resulted in a deeply unequal society. There are certain categories of persons, such as persons with disabilities, who suffered a great deal of

²⁸³ Ibid para 162 & 164.

²⁸⁴ Ibid at 78.

²⁸⁵ Ibid at 3163.

²⁸⁶ *Moko v Acting Principal of Malusi Secondary School and Others* (CCT297/20) [2020] ZACC 30.

²⁸⁷ Ibid para 31.

²⁸⁸ Ibid para 32.

²⁸⁹ Ibid.

²⁹⁰ Supra note 9 at s9.

²⁹¹ Ibid at s9(2).

²⁹² Ibid at 9s(3) and s9(4).

²⁹³ Ibid at s9(1).

²⁹⁴ *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3 para 142.

²⁹⁵ Catherine Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 *SAJHR* at 259.

discrimination in the past and the negative effects resulting from this are still ongoing.²⁹⁶ It is not enough to remove those laws that caused discrimination and require everyone to be treated identically.²⁹⁷ Substantive equality requires the government to remedy those systemic inequalities that are deeply entrenched in society.²⁹⁸ The government must act positively to fulfil the right to equality.²⁹⁹ In certain instances, this may require the government to implement measures that privilege a particular group to address that group's disadvantaged position in society.³⁰⁰ This is especially so for groups who have been denied access to their social or economic rights.³⁰¹

Substantive equality plays a role in how the state meets its socioeconomic obligations.³⁰² In *Grootboom*³⁰³, the Constitutional Court recognised the interdependence of the human rights enshrined in Chapter 2 of the Constitution.³⁰⁴ Scholars have argued that the realisation of the right to substantive equality requires the realisation of access to socio-economic rights and conversely principles of substantive equality must inform how socio-economic rights are realised.³⁰⁵ This is because there is an intersection between group-based discrimination and socio-economic deprivation.³⁰⁶ For example, discrimination against people with disabilities results in them being unable to access their socio-economic right to education. Conversely, the failure to access socio-economic rights will continue to entrench deeply rooted systems of inequality thereby denying them their right to equality.

To ensure equitable access to education, the government must fulfil the right to education for those groups who have been marginalised and disadvantaged. This means that the

²⁹⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15 para 60.

²⁹⁷ *Van Heerden* supra note 294 para 142.

²⁹⁸ *Albertyn* op cit note 295 at 259.

²⁹⁹ Sandra Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* at 166.

³⁰⁰ Sandra Liebenberg & Beth Goldblatt 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAJHR* at 342.

³⁰¹ *Ibid*; *Albertyn* op cit note 295 at 254 & 255.

³⁰² *Ngwenya & Pretorius* op cit note 260 at 98.

³⁰³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169.

³⁰⁴ *Ibid* para 23.

³⁰⁵ *Liebenberg & Goldblatt* op cit note 300 at 341.

³⁰⁶ *Ibid* at 339.

government must take measures to ensure that children with disabilities, who have largely been deprived of their right to education, have access to it.

The constitutional court in *Grootboom* also recognised that measures directed at accessing socio-economic rights will not be reasonable if they do not cater to those whose needs are most urgent.³⁰⁷ As the court held:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.³⁰⁸

Although the right to basic education is not qualified by reasonableness, this dictum is useful because it emphasises the need to pay attention to equality when constructing socio-economic measures. Whilst government may adopt measures aimed at benefiting a disadvantaged group, this may result in it failing to assist other disadvantaged groups.³⁰⁹ Thus, whilst seemingly beneficial, this type of government measure would only serve to perpetuate systemic inequality for one of the disadvantaged groups.³¹⁰

This issue was recently considered by the Western Cape High court in the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa (Western Cape)*.³¹¹ In this case, children with severe and profound disabilities were excluded from receiving an education because they failed to meet the admission criteria to be admitted into mainstream and special schools.³¹² These children were largely catered for in Special Care Centres that were run by non-governmental organisations (NGOs).³¹³ The state made a financial contribution to the NGOs but the amount paid per child was significantly lower than what the government was spending on children in mainstream and special schools.³¹⁴ The government argued that this was due to financial constraints.³¹⁵

³⁰⁷ *Grootboom* supra note 303 para 44.

³⁰⁸ *Ibid.*

³⁰⁹ Liebenberg & Goldblatt op cit note 300 at 349.

³¹⁰ *Ibid.*

³¹¹ (2011) 5 SA 87 (WCC).

³¹² *Ibid* at 3.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

The court recognised that whilst progress had been made in children with disabilities accessing education, this could not be done at the expense of children with severe and profound disabilities.³¹⁶ The court concluded that the state had unfairly discriminated against these children.³¹⁷ The government failed to explain why the burden of the budgetary shortfall had to be borne by children with severe or profound intellectual disabilities instead of being shared by all children.³¹⁸ Further, there was no justification for why the most vulnerable and disadvantaged group of children with intellectual disabilities could not access basic education because of budgetary constraints.³¹⁹

As such, when creating measures, the government must be careful that it does not perpetuate discrimination. Liebenberg & Goldblatt argue that if socio-economic programs are not sensitive to the value of equality, they may end up perpetuating and entrenching discriminatory value judgments.³²⁰ For instance, in the *Western Cape* case, the exclusion of children with severe or profound intellectual disabilities perpetuated the idea that these children cannot learn.³²¹

When providing access to education, the state must consider the historical context of education for children with disabilities. It must adopt measures to redress the discrimination and resultant negative effects that children with disabilities have continued to face post-apartheid.

Dignity

The courts have recognised that dignity is a difficult concept to define.³²² However, at the very least, dignity

Is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect or concern. This right, therefore, is the foundation of the other rights that are specifically entrenched in the BOR.³²³

³¹⁶ Ibid at 26.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Liebenberg & Goldblatt op cit note 300 at 76.

³²¹ *Western Cape* supra note 311 para 19.

³²² *National Coalition* supra note 296 para 28.

³²³ *Makwanyane* supra note 263 para 328.

In *Harksen v Lane*³²⁴ it was found that unfair discrimination impairs the fundamental dignity of human beings.³²⁵ The categories listed in s9(3), which include disability, have been used in the past to oppress and marginalise people.³²⁶ Thus, where such persons continue to be discriminated against, their dignity will likely be impaired.

In *Western Cape*, the court recognised that children with severe or profound intellectual disabilities who were not able to attend school had their right to dignity infringed as their right to education had been ignored resulting in them being marginalised.³²⁷ The court further realised that it was degrading for these children to not have the opportunity to develop their potential.³²⁸ The realisation of the right to dignity required these children to be protected from neglect and degradation and to be allowed to learn.³²⁹

In the *Centre for Child Law*³³⁰ case the court said concerning the dignity of undocumented children who were unable to attend school, “some children have expressed feelings of shame and embarrassment at being unable to perform tasks that other children can perform...”³³¹ In *Watchuneka*³³² the court stated: “The freedom to study is inherent in human dignity for without it a person is deprived of the potential for human fulfilment.”³³³

With this constitutional context in mind, the next sections consider the relevant laws, policies, guidelines and plans of action related to the right to education for children with disabilities.

³²⁴ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489.

³²⁵ *Ibid* para 46.

³²⁶ *Ibid* para 47.

³²⁷ *Western Cape* supra note 311 para 46.

³²⁸ *Ibid*.

³²⁹ *Ibid* para 46, 47.

³³⁰ *Centre For Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGC.

³³¹ *Ibid* para 80.

³³² *Minister of Home Affairs and Others v Watchuneka and Others* (010/2003) [2003] ZASCA 142.

³³³ *Ibid* para 36.

Domestic Legislation and Policies

The South African Schools Act

The South African Schools Act³³⁴ (the Schools Act) is an important piece of legislation that signified a movement from the segregated school systems of Apartheid to a national system that is supposed to cater for all students regardless of race, class, and ability.³³⁵ The Schools Act was passed to give effect to the right to basic education in the Constitution.³³⁶ In the preamble of the Schools Act, it is stated that the new educational system

will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in doing so lay a strong foundation for the development of all our people's talents and capabilities...³³⁷

It thus requires the state to take steps to ensure that all learners receive the same level of education. Provisions relating to learners with disabilities are outlined below.

Section 3(1) of the Act states that it is compulsory for every learner to attend school from the age of seven years until they reach the age of fifteen years or the ninth grade.³³⁸ However, section 3(2) states that the Minister must determine the ages of compulsory school attendance for children with special needs.³³⁹ However, the Minister has not done so.³⁴⁰ Section 4 allows a Head of Department to exempt a learner from compulsory school attendance if it is in the best interest of the child.³⁴¹ However, international law notes that it is better to adapt the environment to ensure that the rights of all learners are met rather than excluding children on any basis.³⁴²

Section 5 states that “a public school must admit learners and serve their educational requirements without unfairly discriminating in any way.”³⁴³ Public schools include ordinary public schools, public schools that serve learners with special needs, and public schools that

³³⁴ South African Schools Act 84 of 1996.

³³⁵ Ibid at Preamble.

³³⁶ Ibid.

³³⁷ Ibid at Preamble.

³³⁸ Ibid s3.

³³⁹ Ibid.

³⁴⁰ HRW op cit note 10 at 36.

³⁴¹ Schools Act supra note 326 at s4.

³⁴² CRPD op cit note 7 at 8.

³⁴³ Schools Act supra note 326 at s5.

serve learners with specialised talents.³⁴⁴ This section is particularly important in giving effect to the constitutional right to equality. In determining their school admissions policies, schools cannot discriminate based on any of the listed grounds, including disability.³⁴⁵

Section 12(4) of the Act requires the relevant Member of the Executive Council (MEC) to take steps where reasonably practicable to “provide education for learners with special education needs at ordinary public schools and provide relevant educational support services.”³⁴⁶ Section 12(5) further states that the relevant MEC must “take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.”³⁴⁷ These two sections are important because they place an obligation on the government to take positive steps to realise the right to basic education for learners with disabilities. Section 12(4) takes a step toward including learners with disabilities in ordinary schools. It ensures that learners can be placed in ordinary schools and also receive the necessary support to fully benefit from the schools as much as their peers.

Section 12(5) ensures the removal of physical barriers at schools and allows ease of access for learners that may have physical disabilities. In poorer and rural areas school buildings may not only be inaccessible but also poorly maintained which makes them unsafe.³⁴⁸ In essence, there is a duty on the government to create a barrier-free and safe environment that is conducive to learning.

However, some issues with the Schools Act have been noted. Section 12(4) limits the obligations of the government by qualifying its duties with the statement “where reasonably practicable.”³⁴⁹ The sections are contradictory because they use the word “must” which creates a mandatory obligation and qualify it with reasonableness which seems to give the MEC wide discretion to determine what is reasonable.³⁵⁰ Because of the unqualified nature of the right to education, the state should be required to do as much as possible to make the right to education

³⁴⁴ Ibid at 12(3)(a).

³⁴⁵ Ibid.

³⁴⁶ Ibid at 12(4).

³⁴⁷ Ibid at 12(5).

³⁴⁸ Ibid at 25.

³⁴⁹ Schools Act Supra note 326 at s12.

³⁵⁰ National Commission on Special Needs in Education and Training (NCSNET) & National Committee on Education Support Services (NCESS) ‘Quality Education for All: Overcoming Barriers to Learning and Development’ 1997 at 37.

available for everyone.³⁵¹ Limiting access to ordinary schools in this manner means that children with disabilities may continue to be excluded from the education system if the state can prove that it is reasonably practicable to do so. This runs counter to the compulsory nature of attending school. Children cannot be expected to attend school if the state fails to accommodate them. Additionally, the Schools Act does not indicate what happens to these children when it is not reasonably practicable for them to be accommodated in ordinary schools.³⁵²

Other countries, including the United States of America, have chosen to adopt the phrase “unless this would constitute an unjustifiable hardship” as this places a higher premium on the government to act and places the onus on the government or school to prove that it has taken all measures to try to accommodate the learner.³⁵³ This is also in line with the Schools Act’s compulsory attendance requirement as this can only happen where a student is properly accommodated.³⁵⁴

Sections 12(4) and (5) seem to promote inclusive education by requiring the government to accommodate children with disabilities in ordinary schools. On the one hand, it can be argued that because inclusive education is not synonymous with basic education, the limit of reasonable practicability is justified as these children can be accommodated in special schools. However, thus far, the limited number of special schools have failed to accommodate most children with disabilities and many of the special schools that exist are in poor condition.³⁵⁵ As such, inclusion in ordinary schools is key to realising the right to education for children with disabilities.

Beyond these few provisions, the Schools Act has no other provisions related to inclusive education.

³⁵¹ Ibid.

³⁵² Schools Act supra note 326.

³⁵³ NCSNET & NCESS op cit note 350 at 37.

³⁵⁴ Schools Act supra note 326 at s3.

³⁵⁵ DBE op cit note 12 at 71.

The National Disability Strategy White Paper

The Integrated National Disability Strategy White Paper (National Disability Strategy)³⁵⁶ was published in 1997.³⁵⁷ It laid the foundation for addressing the discrimination experienced by persons with disabilities and ensuring their equitable access to human rights.³⁵⁸ It recognised that despite there being a large percentage of people with disabilities in South Africa, there were fewer services available to enable them to effectively participate in society.³⁵⁹ Concerning education, the National Disability Strategy also acknowledged the failure of the education system at the time to fully accommodate all learners with disabilities due to the inequalities of apartheid.³⁶⁰

In calling for redress, some key principles and objectives were identified. Importantly, all persons with disabilities are entitled to equal educational opportunities regardless of the nature and severity of their disability.³⁶¹ Where necessary, special measures should be taken to ensure that learners with disabilities have access to the necessary resources, support mechanisms and assistance to achieve their full potential.³⁶² The key to meeting these objectives is the development of good policy. Good policy ensures, first and foremost, that there is a clear goal or standard to be achieved.³⁶³ It places responsibility for meeting this goal on the relevant stakeholders and provides mechanisms to hold them accountable.³⁶⁴ And finally, it provides definitive steps that the stakeholders must take to achieve these goals.³⁶⁵ This would ensure uniformity in the implementation of said policy.

In particular, the creation and development of policy relating to curriculum development, teacher training and support, and the provision of “adequate and appropriate education support services to all learners” were considered important.³⁶⁶ The National Commission on Special Needs in Educations and Training (NCSNET) and the National Committee on Education Support

³⁵⁶ Office of the Deputy President *Integrated National Disability Strategy White Paper* (1997).

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid* at 1.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid* at 39.

³⁶¹ *Ibid* at 39.

³⁶² *Ibid* at 40.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid* at 41.

Services (NCESS) were commissioned to investigate and make policy recommendations on how to transform the education system to facilitate equal access to education.³⁶⁷ This report is considered next.

Report of the NCSNET and NCESS

The Report on Overcoming Barriers to Learning and Development (the NCSNET Report)³⁶⁸ was published in 1997.³⁶⁹ The purpose of this report was to assess the “special needs and support services in education and training in South Africa” and to make recommendations.³⁷⁰ This was done as part of the creation and development of an education system that is inclusive and caters to the diverse needs of all learners, regardless of ability.³⁷¹ Four key issues guided the process.³⁷² First, education and training policy would need to ensure that everyone has access to lifelong learning.³⁷³ Secondly, the report recognised that massive inequalities exist in South Africa and policy would play a key role in redressing these inequalities.³⁷⁴ Third, state resources would need to be provided equitably to ensure that all learners have equal access to educational opportunities.³⁷⁵ Finally, the education provided would need to be of good quality.³⁷⁶

The NCSNET Report provided recommendations in line with the inclusive approach adopted in the Salamanca Statement.³⁷⁷ It called for a move from distinguishing between learners with special needs and learners with ordinary needs and instead, recognising that all learners face barriers.³⁷⁸ It is these barriers that would need to be addressed to ensure that all learners have equal access to educational opportunities. Socio-economic barriers, for example, played and continue to play one of the biggest roles in limiting learners’ access to education.³⁷⁹ At the time, there was an inadequate number of learning centres to accommodate all children of school-going

³⁶⁷ Ibid.

³⁶⁸ NCSNET & NCESS op cit note 350.

³⁶⁹ Ibid.

³⁷⁰ Ibid at 2.

³⁷¹ Ibid at 2.

³⁷² Ibid at 35

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Ibid at 39.

³⁷⁸ Ibid at 10

³⁷⁹ Ibid at 11.

age.³⁸⁰ Children in rural areas had to travel far to reach learning centres.³⁸¹ Additionally, these learning centres were not all of the same quality.³⁸² Learning centres which were previously reserved for black learners were overcrowded and inadequately resourced and staffed.³⁸³

Other barriers noted in the report were discriminatory attitudes relating to persons with disabilities, inflexible curriculums, inadequate support services, the lack of parental involvement, and more significantly, the lack of enabling legislation and policies.³⁸⁴

The NCSNET Report called for some major changes to the education system. It primarily called for the establishment of only one educational system that would be able to provide for the diverse needs of all learners.³⁸⁵ If special learning contexts were necessary, learners would be allocated by the type of support needed and not the nature of the disability³⁸⁶. It further suggested educators and all personnel be adequately trained to cater to the diverse needs of the learners.³⁸⁷ Further, buildings would need to be made accessible and the curriculum would need to be made flexible enough to adapt to the needs of learners.³⁸⁸ Finally, parental involvement would need to be increased and communities would need to be mobilised to provide additional support.³⁸⁹

The report called on the national and provincial governments to issue a *White Paper* to provide “national guidelines and norms regarding issues of diversity and overcoming and preventing barriers to learning and development.”³⁹⁰ It also called for new legislation to be developed and promulgated which would reflect the recommendations outlined in the report and certain amendments to be made to the Schools Act to make it more inclusive.³⁹¹

³⁸⁰ Ibid. This continues to be a problem in South Africa today. See ‘South Africa: Broken and Unequal Education Perpetuating Poverty and Inequality’ (11 February 2020) <https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> last accessed 02 July 2022.

³⁸¹ Ibid. This also continues to be a problem. See n228 above.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid at 11-18.

³⁸⁵ Ibid at 120.

³⁸⁶ Ibid at 103. For example, only those learners who require high levels of support will be accommodated in specialised learning centres.

³⁸⁷ Ibid.

³⁸⁸ Ibid at 104.

³⁸⁹ Ibid at 105.

³⁹⁰ Ibid at 123.

³⁹¹ Ibid.

The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)³⁹² was passed in 2000 to give effect to section 9 of the Constitution.³⁹³ PEPUDA recognises that in achieving equality it is fundamental to redress and eradicate those past inequalities that remain deeply embedded in society today.³⁹⁴ In line with section 9(3) of the Constitution, the definition of prohibited grounds in the PEPUDA includes disability.³⁹⁵ In several sections, PEPUDA emphasises the importance of eradicating discrimination on the grounds of race, gender and disability.³⁹⁶ Section 9 in particular deals with the “prohibition of unfair discrimination on the ground of disability.”³⁹⁷ Section 9(a) and (c) are particularly relevant here. They state:

Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including

- a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- b) ...
- c) 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.³⁹⁸

Section 6 states that this provision applies to the state and any person.³⁹⁹ The section requires the relevant parties to take steps to remove all obstacles that may unfairly limit the equitable enjoyment of the rights of persons with disabilities.⁴⁰⁰ This can be construed to include all obstacles, whether physical, economic, social, or psychosocial. Regarding education, it can be seen as reinforcing the government’s duty to adequately accommodate learners in schools by providing a barrier-free learning environment.

³⁹² Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁹³ Ibid at Preamble.

³⁹⁴ Ibid.

³⁹⁵ Ibid s1.

³⁹⁶ Ibid s2(c); s4(2); s9; s28.

³⁹⁷ Ibid s9.

³⁹⁸ Ibid.

³⁹⁹ Ibid s6.

⁴⁰⁰ Ibid.

Section 28 of PEPUDA provides “special measures to promote equality concerning race, gender and disability.”⁴⁰¹ Subsection 3(b) states that parties must give priority “to the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability.”⁴⁰² This is so because, under apartheid, people were not only segregated according to race, but also gender and disability.⁴⁰³ Thus, it is commendable that PEPUDA recognises the importance of redressing this unequal past.

White Paper 6 on Special Needs Education

White Paper 6 on Special Needs Education (WP6)⁴⁰⁴ was described as a “post-apartheid landmark policy that was intended to make a radical break with the past and lay to rest the legacy of exclusion that had characterised the provision of education for children with intellectual disabilities during the apartheid years.”⁴⁰⁵

WP6 is the main policy document addressing the right to education for children with disabilities.⁴⁰⁶ WP6 is based on the findings of the NCSNET Report.⁴⁰⁷ The purpose of WP6 was to promote inclusive education so that all learners can participate equally in the education process.

Inclusive education, according to WP6, involves identifying the barriers that all learners face and taking steps to remove those barriers.⁴⁰⁸ It is based on the assertion that everyone can learn and that everyone, at some point in their education journey experiences barriers to learning and thus requires some type of support to facilitate this learning.⁴⁰⁹ The learning needs of children differ according to the barriers they face, and the government must attempt to remove these barriers to ensure that all children have equal access to educational opportunities.⁴¹⁰ WP6

⁴⁰¹ Ibid at 28

⁴⁰² Ibid at 28(3)(b).

⁴⁰³ Department of Social Development, Department of Women, Children and People with Disabilities & UNICEF *Children with Disabilities in South Africa: A Situation Analysis: 2001-2011* (2012) at 71.

⁴⁰⁴ DoE op cit note 259.

⁴⁰⁵ Ngwena & Pretorius op cit note 260 at 89.

⁴⁰⁶ Ibid.

⁴⁰⁷ NCSNET & NCESS op cit note 350.

⁴⁰⁸ DoE op cit note 259 at 6.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

acknowledges that learners with disabilities have been the most vulnerable to barriers to learning and have consequently experienced exclusion from the education system.⁴¹¹

Central to WP6 is the inclusion of learners with disabilities in the general education system.⁴¹² It thus recommends three types of schools to accommodate the level of support learners may need. Learners requiring low-intensive support would be placed in ordinary schools and receive the necessary support there.⁴¹³ Learners requiring moderate support would be placed in full-service schools.⁴¹⁴ Full-service schools are schools that are fully equipped to accommodate a wide range of different learning needs among learners.⁴¹⁵ Learners requiring high-intensive support would remain in special schools.⁴¹⁶ Special schools are those schools that provide specialised education to children who require intense levels of support and cannot be accommodated in full-service schools.⁴¹⁷

WP6 adopted 6 key strategies to address various barriers to learning and create an inclusive education system.⁴¹⁸

The first strategy was the improvement and conversion of special schools into resource centres that would cater for children requiring high support and would also provide expertise and support to neighbouring ordinary and full-service schools.⁴¹⁹ The second strategy would be to ensure that the 280 000 children and youth with disabilities who were outside of the school system at the time would be placed in schools that could cater to their needs.⁴²⁰ The third strategy was the conversion of ordinary schools into full-service schools.⁴²¹ The fourth strategy was the introduction of the relevant stakeholders to the inclusion model.⁴²² The fifth strategy was the establishment of district-based support teams which were meant to provide support to ordinary

⁴¹¹ Ibid at 7.

⁴¹² Ibid at 22.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid at 22.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid at 21.

⁴¹⁸ Ibid at 20.

⁴¹⁹ Ibid at 21.

⁴²⁰ Ibid at 22.

⁴²¹ Ibid.

⁴²² Ibid.

and full-service schools. The final strategy was the implementation of “a national advocacy and information programme in support of the inclusion model.”⁴²³

To successfully implement these strategies, WP6 set out its short, medium, and long-term goals. Between 2001 and 2003, the government would focus on mobilising out-of-school children and youth.⁴²⁴ This would entail conducting outreach programs to reach children with disabilities who were out of school and enrol them into schools.⁴²⁵ The government would begin converting primary schools into full-service schools and creating district support teams to provide the necessary support to these schools.⁴²⁶ Additionally, they would establish a system for identifying barriers to learning in the foundation phase.⁴²⁷

In the medium term, between 2004 and 2008, the government would continue to mobilise out-of-school children and convert schools into full-service schools.⁴²⁸ In the long term, by 2021, they intended to have established 380 special schools/resource centres, 500 full-service schools, and district support teams and to have all children of school-going age in school.⁴²⁹ The government gave itself 20 years to achieve its goals.⁴³⁰

Guidelines

To assist with the implementation of WP6, the Department of Basic Education (DBE) issued several guidelines. These guidelines are outlined below.

Guidelines for Inclusive Teaching and Learning⁴³¹ were issued to specifically assist educators who work with children with learning barriers.⁴³² The guidelines provide information on different barriers to learning, how they may present themselves, how they affect learners and how educators can mitigate them.⁴³³ They guide educators in planning for the diverse needs of

⁴²³ Ibid at 23.

⁴²⁴ Ibid at 42.

⁴²⁵ Ibid.

⁴²⁶ Ibid at 42.

⁴²⁷ Ibid.

⁴²⁸ Ibid at 43.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Department of Basic Education *Guidelines for Inclusive Teaching and Learning* (2010).

⁴³² Ibid at 9.

⁴³³ Ibid.

learners and provide practical examples to illustrate how the suggested strategies can be employed.⁴³⁴

The Guidelines for Full-Service/Inclusive Schools⁴³⁵ were published in 2010.⁴³⁶ They provide the minimum standards that schools must comply with to be considered full-service schools.⁴³⁷ The guidelines state that these schools must be able to provide for a wide range of learning needs.⁴³⁸ This does not necessarily mean that these schools must provide all forms of learner support, but rather that they should have the potential to do so if required.⁴³⁹ Other key characteristics full-service schools must exhibit include physical accessibility, a healthy and safe environment, good leadership and efficient support systems in place.⁴⁴⁰ The guidelines outline the role and duties of educators, the school management team, and the school principal.⁴⁴¹ They also outline the type of support measures that full-service schools can provide, such as curriculum differentiation or individual lesson plans, and how children should be assessed to determine the type of support they need.⁴⁴² These guidelines are meant to be used not only by schools but also by government officials at all levels to guide them on the type of resources they should be providing to schools.⁴⁴³

Guidelines for District-Based Support Teams⁴⁴⁴ guide the formation and functioning of district-based support teams (DBSTs).⁴⁴⁵ These teams must consist of specialist support personnel who are employed at the district, regional, or provincial level.⁴⁴⁶ They may include health and welfare professionals, psychologists, and curriculum experts who support educators.⁴⁴⁷ DBSTs are expected to collaborate with other support personnel such as special school resource centres, higher education institutions, members of the community, NGOs and

⁴³⁴ Ibid.

⁴³⁵ Department of Basic Education *Guidelines for Full-service/Inclusive Schools* (2010).

⁴³⁶ Ibid.

⁴³⁷ Ibid at 2.

⁴³⁸ Ibid at 3.1.

⁴³⁹ Ibid at 3.3.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid at 4.

⁴⁴² Ibid at 7.

⁴⁴³ Ibid at 1.8.

⁴⁴⁴ Department of Education *Conceptual and Operational Guidelines for the Implementation of Inclusive Education: District-based Support Teams* (2005).

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid at 7 & 8.

⁴⁴⁷ Ibid.

others in fulfilling their functions.⁴⁴⁸ Their functions include assisting learners so that their learning needs are met, assisting educators in curriculum differentiation and assessment-setting, and assisting in the identification of learning barriers and how they can be addressed.⁴⁴⁹

In 2014 the Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres⁴⁵⁰ were published.⁴⁵¹ As noted above, special schools serve two purposes: providing education to children who require high levels of support and acting as resource centres for other ordinary and full-service schools in their district.⁴⁵² The guidelines outline how the curriculum should be managed and delivered, what type of teaching and non-teaching personnel should be employed, what qualifications and skills they should possess, how the physical infrastructure of the schools should be designed, and the management of hostel and transport services.⁴⁵³ Additionally, it also outlines how special schools will function as resource centres for other schools in the community.⁴⁵⁴

SIAS Policy

A key policy that was published by the DBE is the Policy on Screening, Identification, Assessment and Support (SIAS Policy).⁴⁵⁵ The purpose of the SIAS Policy is to “provide a policy framework for the standardisation of the procedures to identify, assess, and provide programmes for all learners who require additional support to enhance their participation and inclusion in school.”⁴⁵⁶

The process outlined in the SIAS Policy is supposed to be used to determine the various learning barriers that learners may experience and the nature and extent of support required to facilitate the learner’s participation in the learning process.⁴⁵⁷ The policy provides a set of forms to be used to identify and address the learning barriers.⁴⁵⁸ For instance, a Support Needs

⁴⁴⁸ Ibid at 8.

⁴⁴⁹ Ibid.

⁴⁵⁰ Department of Basic Education *Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres* (2014).

⁴⁵¹ Ibid.

⁴⁵² Ibid at 5.

⁴⁵³ Ibid at 2.

⁴⁵⁴ Ibid.

⁴⁵⁵ Department of Basic Education (DBE) *Policy on Screening, Identification, Assessment and Support* (2014).

⁴⁵⁶ Ibid at 10.

⁴⁵⁷ Ibid at 13.

⁴⁵⁸ Ibid at 13.

Assessment Form is provided that must be completed by a teacher to determine if there are any areas of concern and what teacher interventions or support can be provided to the learner.⁴⁵⁹ Two more forms are provided to request assessment and intervention by a school-based support team (SBST) or a DBST.⁴⁶⁰

SBSTs are the first port of call when teachers require assistance with providing support for learners.⁴⁶¹ SBSTs assist teachers to identify the learning needs of learners, to provide the necessary support and to evaluate and monitor the support given.⁴⁶² They are also required to identify other barriers at the teacher, curriculum and school levels and develop strategies to address these barriers.⁴⁶³ If the SBST cannot organise support practically and efficiently, then the DBST is the next level of support.⁴⁶⁴

The SIAS Policy unpacks the three levels of support -low, moderate, and high- what form they should take, who should implement them, how they should be resourced and their potential implementation implications.⁴⁶⁵

Once a child is identified as being at risk, the teachers and SBSTs must follow the SIAS process to investigate and provide for the learners' needs.⁴⁶⁶ This policy is fundamental to the realisation of inclusive education because it facilitates the inclusion of learners with disabilities in mainstream schools.⁴⁶⁷ By providing a method to identify and address learning barriers, this policy ensures that all learners can participate effectively in the learning process.⁴⁶⁸ It also ensures that ordinary schools can accommodate more learners thus curbing the unnecessary referral of learners to special schools.⁴⁶⁹

⁴⁵⁹ Ibid at 1.

⁴⁶⁰ Ibid at 7 & 9.

⁴⁶¹ Ibid at 31.

⁴⁶² Ibid at 30.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid at 19-21.

⁴⁶⁶ Ibid at 37.

⁴⁶⁷ Ibid at 14.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

Action Plans

In 2011, the DBE published its first sector plan titled *Action Plan to 2014: Towards the Realisation of Schooling 2025* (Action Plan).⁴⁷⁰ This plan outlines the long-term goals that the DBE plans to achieve.⁴⁷¹ The plan was not intended to provide budgetary allocations or detailed implementation plans but was rather intended to guide the ten basic education departments.⁴⁷² The Action Plan has 27 goals that it aims to achieve by 2025.⁴⁷³ Goal 26, in particular, aims to

Increase the number of schools that effectively implement the inclusive education policy and have access to centres that offer specialist services.⁴⁷⁴

The Action Plan recognises that there are still many learners with special needs who are not in school, and this hinders the goal of compulsory schooling from being realised.⁴⁷⁵ It also recognises that generally, teachers do not know how to properly implement inclusive education.⁴⁷⁶ It calls on the state to capacitate ordinary schools with trained teachers, specialist support, and the necessary facilities to cater for children's needs. It also recognises the importance of establishing norms and standards for funding the implementation of inclusive education.⁴⁷⁷

The update to the Action Plan, *Action Plan to 2019: Toward the Realisation of Schooling 2030*⁴⁷⁸, does not go into any further detail regarding how inclusive education should be implemented.⁴⁷⁹

In the subsequent update, *Action Plan to 2024: Towards the Realisation of Schooling 2030*⁴⁸⁰, the progress made in the implementation of inclusive education is recognised.⁴⁸¹ According to the Action plan, by 2020, over 800 full-service schools had been designated, there was an increase in the availability of specialist support staff such as therapists, and more diverse

⁴⁷⁰ Department of Basic Education *Action Plan to 2014: Towards the Realisation of Schooling 2025* (2011).

⁴⁷¹ Ibid at 8.

⁴⁷² Ibid at 12.

⁴⁷³ Ibid at 8.

⁴⁷⁴ Ibid at 165.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid at 166.

⁴⁷⁸ Department of Basic Education *Action Plan to 2019: Toward the Realisation of Schooling 2030* (2015).

⁴⁷⁹ Ibid at 46

⁴⁸⁰ Department of Basic Education *Action Plan to 2024: Toward the Realisation of Schooling 2030* (2020).

⁴⁸¹ Ibid at 126.

subjects were introduced into the curriculum.⁴⁸² The Action Plan does not go into any more detail regarding the implementation of inclusive education.⁴⁸³

The White Paper on the Rights of Persons with Disabilities

The White Paper on the Rights of Persons with Disabilities⁴⁸⁴ is an update to the 1997 White Paper on an Integrated National Disability Strategy.⁴⁸⁵ It is meant to guide the realisation of the human rights of persons with disabilities considering the state's duties under the CRPD.⁴⁸⁶

The White Paper outlines policy directives about lifelong education and training.⁴⁸⁷ They include providing accessible education facilities, providing educational support and reasonable accommodation at all institutions of learning, ensuring that all children with disabilities of school-going age are in school, and integrating disability awareness into all school curricula.⁴⁸⁸

6. CHAPTER 6- GAPS IN LEGISLATION AND THE SITUATION ON THE GROUND

While the domestic legislation, policies, guidelines, and plans discussed in the previous chapter have contributed to the implementation of inclusive education, it is submitted that they are not enough to ensure that inclusive education is implemented per South Africa's international law obligations. These gaps in policy and legislation and implementation are explored below.

Gaps in the Legislative and Policy Framework

Gaps in Legislation

The importance of legislation in the implementation of human rights has been discussed at length in Chapter 3. Most of the relevant international law instruments, including the CRPD, the CRC and the ICESCR require states to enact legislation to properly implement the rights of persons.⁴⁸⁹ General Comment 4 of the CRPD requires states to introduce legislation that is in line with the human rights model of disability and article 24 of the CRPD.⁴⁹⁰ Despite this, South Africa has

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Department of Social Development *White Paper on the Rights of Persons with Disabilities* (Published in GG 39792 of 09 March 2016).

⁴⁸⁵ Ibid at 8.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid at 84.

⁴⁸⁸ Ibid.

⁴⁸⁹ Refer to n189.

⁴⁹⁰ CRPD Committee op cit note 7 at 62.

failed to enact legislation dealing with the right to education for children with disabilities or inclusive education.⁴⁹¹

In the NCSNET Report, it was recommended that the Department of Education amend the Schools Act to make it more inclusive and develop a separate Act for inclusive education.⁴⁹² In WP6, the Department of Education also committed to reviewing the Schools Act so that it would be consistent with the policy proposals outlined in WP6.⁴⁹³ This is because, despite the few provisions discussed in Chapter 5, there are no other provisions in the Schools Act relating to inclusive education.

It is only in January 2022 that the Basic Education Laws Amendment Bill was introduced to amend the Schools Act.⁴⁹⁴ However, none of the amendments proposed relates to inclusive education.⁴⁹⁵ As such, there is still no legislation in place to guide the implementation of inclusive education.

Gaps in Policy

Without any enabling legislation, WP6 has remained the main policy document for the implementation of inclusive education. In 2015, the DBE published the Report on the Implementation of Education White Paper 6 on Inclusive Education (the WP6 Report).⁴⁹⁶ The WP6 Report outlined the challenges that have slowed down the progress of inclusive education implementation.⁴⁹⁷ One of the biggest challenges mentioned is the unclear conception and understanding of what inclusive education entails and how it should be implemented.⁴⁹⁸ WP6 provided broad goals that the government aimed to achieve but failed to provide detailed guidance on how these goals would be met.

Further WP6 does not create legally binding obligations because its purpose is to show the government's policy position on a certain matter.⁴⁹⁹ To this day, the government has failed to

⁴⁹¹ HRW op cit note 10 at 4.

⁴⁹² NCSNET & NCESS op cit note 350 at 121.

⁴⁹³ DoE op cit note 259 at 27.

⁴⁹⁴ 'Basic Education Laws Amendment Bill' available at <https://pmg.org.za/bill/1055/> last accessed 02 July 2022.

⁴⁹⁵ Ibid.

⁴⁹⁶ DBE op cit note 12.

⁴⁹⁷ Ibid at 6 & 7.

⁴⁹⁸ Ibid at 6.

⁴⁹⁹ Equal Education Law Centre (EELC) 'Let in or Left Out? A 20-Year Review of the Regulatory Framework for Inclusive Education and Its Implementation in South Africa' (2021) at 8.

convert its inclusive education policies into legally binding obligations and consequently, it has not been made a national priority.⁵⁰⁰

In South Africa's Baseline Country Report to the Committee on the Rights of Persons with Disabilities⁵⁰¹ (Baseline Country Report), the government admitted that the implementation of WP6 has been "impeded by the fact that it was not regarded as a fundamental driving force of educational change, as had been intended."⁵⁰² The government further acknowledged that "up to 2012, inclusive education has not been mainstreamed in most of the intervention programmes and senior managers within departments have therefore not been held accountable for implementing the policy directives."⁵⁰³ There has been limited support from various levels of the education system and consequently, the implementation of inclusion has been slow and unsystematic.⁵⁰⁴

The plan outlined in WP6 was very idealistic in terms of what the government could achieve.⁵⁰⁵ The purpose, which was to fulfil the right to basic education, was good. However, it is submitted that in addition to its non-binding nature, WP6 contains many policy gaps that have prevented it from serving as an effective driving force for inclusive education.

The biggest issue with WP6 is the broadness and vagueness of its provisions.⁵⁰⁶ WP6 did not provide concrete steps on how its goals would be achieved but instead only outlined what outcomes were expected of the various stakeholders.⁵⁰⁷

For instance, teachers are the key role players in the implementation of inclusive education as they interact first-hand with learners.⁵⁰⁸ However, the nature of the training they would undergo was not clearly outlined. Ideally, there would be consistency in the type of training educators across the country would receive to ensure that they could all cater to the needs of learners and provide quality education. However, the only thing stated in WP6 was that

⁵⁰⁰ HRW op cit 10 note at 4.

⁵⁰¹ Government of South Africa *Baseline Country Report to the Committee on the Rights of Persons with Disabilities* (2014).

⁵⁰² *Ibid* at 223.

⁵⁰³ *Ibid* at 223.

⁵⁰⁴ *Ibid*.

⁵⁰⁵ Donohue & Bornman op cit note 64 at 9.

⁵⁰⁶ *Ibid* at 7.

⁵⁰⁷ *Ibid*.

⁵⁰⁸ DoE op cit note 259 at 18.

The 80 hours annual in-service education and training requirement of the Government in respect of educators, will be structured in such a manner that they include the requirement to complete courses relating to policies and programmes put forward in this White Paper.⁵⁰⁹

Educator training is key, and the failure of WP6 to provide for that is alarming. In the proposed full-service schools, educators would potentially have to cater to a diverse range of learning needs in a single classroom.⁵¹⁰ Yet, beyond the allocated 80 hours, it is unclear how the government would provide this training. It is thus unsurprising that in its 2015 report, Human Rights Watch found that a lack of teacher knowledge, training, and skills was still an issue in providing quality education to learners with disabilities.⁵¹¹

Another example is how the plan to mobilise children into schools was not exactly clear despite it being paramount to ensure that all children of school-going age were in school. It was unclear how these children would be identified, where they would be placed and how they would be accommodated. Additionally, WP6 did not provide measures to ensure that ordinary schools would not refuse admission to learners with disabilities. Although discrimination in admission is prohibited in section 5 of the Schools Act, it is still an ongoing practice that unfortunately results in many learners with disabilities being excluded from the educational system.⁵¹²

The broadness and vagueness of WP6 continue to be a problem today.⁵¹³ Donohue & Bornman argue that WP6 was enacted more for its political symbolism than its practicality.⁵¹⁴ The implementation strategies are vague, resulting in a lack of clarity on how the goals outlined will be achieved.⁵¹⁵

There are many other issues with WP6. A key issue was the estimated 20-year period.⁵¹⁶ As discussed above, the right to education is immediately realisable.⁵¹⁷ At the time WP6 was published, over 200 000 children with disabilities of school-going age were out of school.⁵¹⁸ In

⁵⁰⁹ Ibid at 50.

⁵¹⁰ Ibid at 18.

⁵¹¹ HRW op cit note 10 at 59.

⁵¹² *Western Cape* supra note 311 at 56.

⁵¹³ Donohue & Bornman op cit note 64 at 9.

⁵¹⁴ Ibid at 8.

⁵¹⁵ Ibid.

⁵¹⁶ DoE op cit note 259 at 38.

⁵¹⁷ See n259.

⁵¹⁸ DoE op cit note 259 at 9.

2015, it was estimated that almost 600 000 children with disabilities of school-going age were out of school.⁵¹⁹ Thus, this long timespan has perhaps not yielded the results that were intended in the WP6.

There are also some key elements that WP6 did not address. WP6 did not go into detail about Early Childhood Development (ECD) even though it was identified in the NCSNET Report as a key phase in which children with disabilities can be identified and catered for from an early stage.⁵²⁰ At the time ECD was not part of the formal schooling system and was thus neglected by the government.⁵²¹ In the NCSNET Report, it was recognised that ECD plays a key role in the early identification of disability and learner needs and allows early intervention to ensure effective learning.⁵²² The NCSNET Report recommended that attention be paid to ECD programs.⁵²³ Under these programs, barriers such as medical, psychological, and social problems would be identified and appropriately addressed as early as possible.⁵²⁴ Where possible, preventative programs aimed at preventing barriers to learning would be implemented.⁵²⁵ However, none of this was addressed in WP6.

However, in 2021, it was directed that ECD functions would be transferred from the Department of Social Development to the DBE.⁵²⁶ The purpose of this is to ensure standardised learning in the sector which is aligned with the CAPS curriculum.⁵²⁷ It remains to be seen how ECD programs will cater for children with disabilities.⁵²⁸

WP6 also failed to address how socio-economic barriers would be addressed. Parents have generally had to bear the heavy costs of enrolling their children in special schools as well as providing them with the necessary technical equipment required for learning.⁵²⁹ For families who come from disadvantaged backgrounds, this cost was often seen to outweigh the benefit of

⁵¹⁹ DBE op cit note 12 at 21

⁵²⁰ NCSNET & NCESS op cit note 350 at 20.

⁵²¹ Ibid.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Ibid at 137.

⁵²⁵ Ibid at 55.

⁵²⁶ Babalwa Ndlanya 'ECD Moves with Basic Education' *News24* 18 November 2021 available at <https://www.news24.com/news24/southafrica/local/mthathaexpress/ecd-moves-with-basic-education-20211116> last accessed on 07 July 2022.

⁵²⁷ Ibid.

⁵²⁸ Ibid.

⁵²⁹ HRW op cit note 10 at 27.

sending their children to school.⁵³⁰ As such families living in poverty were often unable to send their children to school.⁵³¹ WP6 failed to address how children with disabilities who face social and economic barriers would be catered for.

Another issue that was not adequately traversed was the national advocacy and education program on inclusive education. It was found in the NCSNET Report that negative attitudes toward disabilities constituted a significant barrier to accessing education.⁵³² In some communities, a disability results in ostracism from the community or the immediate family.⁵³³ These attitudes are also present in teachers.⁵³⁴ More attention should have been paid to this.

Other issues not addressed in WP6 include the provision of adequate transport or boarding facilities for learners with disabilities. The reality on the ground at the time was that many children who lived in rural areas still lived far away from the schools.⁵³⁵ Because of that, children would often have to stay in school hostels or use unsafe or unsuitable transportation.⁵³⁶ However, hostels in special schools were often dilapidated and unsafe. As such, these were serious areas of concern.

Another major issue was the experience of abuse by learners with disabilities in special schools.⁵³⁷ Children were often neglected or subjected to corporal punishment in some cases due to a lack of understanding of their conditions.⁵³⁸ WP6 failed to go into detail about these issues when it discussed the strengthening of special schools.

Finally, WP6 failed to discuss the need for legislation as outlined in the NCSNET Report.⁵³⁹ WP6 recognised that “policies, legislation and frameworks for the school and college systems must provide the basis for overcoming the causes and effects of barriers to learning.”⁵⁴⁰ However, beyond the commitment to revise current legislation, there was no commitment to develop new legislation. Considering the shortcomings of the Schools Act in protecting the rights

⁵³⁰ Ibid at 29.

⁵³¹ Ibid.

⁵³² NCSNET & NCESS op cit note 350 at 24.

⁵³³ Ibid.

⁵³⁴ Ibid.

⁵³⁵ HRW op cit note 10 at 28.

⁵³⁶ Ibid.

⁵³⁷ Ibid at 53.

⁵³⁸ Ibid.

⁵³⁹ NCSNET & NCESS op cit note 350 at 121.

⁵⁴⁰ DoE op cit note 259 at 27.

of learners with disabilities, the new legislation would have played a key role in placing binding legal obligations on the government to fulfil the right to education for these learners. It was stated in the NCSNET Report that “where such legislation or policy fails to protect learners from discrimination or perpetuates particular inequalities, it directly contributes to the existence or maintenance of such barriers.”⁵⁴¹ Unfortunately, WP6 does not have binding status and instead simply outlines the visions and goals of government.

Like WP6, the existing Guidelines issued do not have the force of law and do not place any legally binding obligations on the government.⁵⁴² Whilst these guidelines are useful to a certain extent, weak monitoring and evaluation systems have undermined their effectiveness.⁵⁴³ There are no continuous monitoring systems in place by the DBE to ensure that these guidelines are being adhered to.⁵⁴⁴ For instance, no evidence exists as to the effectiveness of the special schools' resource centres.⁵⁴⁵ There was also no evidence as to the qualitative functioning of full-service schools up until 2019.⁵⁴⁶ No continuous monitoring by the government takes place of the skills acquisition and qualifications of educators and other education officials.⁵⁴⁷ As such, where there is no monitoring there is no accountability and, consequently, no implementation.⁵⁴⁸

The government has also failed to develop an education sector plan in line with General Comment 4 of the CRPD.⁵⁴⁹ General Comment 4 requires the state, in consultation with organisations of persons with disabilities and children with disabilities, to develop a comprehensive education sector plan that details the process of implementing inclusive education.⁵⁵⁰ The plan should be based on the current context of inclusive education in the country and should outline a timeframe and measurable goals to be achieved.⁵⁵¹ The DBE's Action Plans do not meet these requirements. The plans largely focus on the provision of

⁵⁴¹ NCSNET & NCESS op cit note 350 at 16.

⁵⁴² Brian Watermeyer, Chandre Stuurman, Emma McKinney et al ‘Alternative Report to the UN Committee on the Rights of Persons with Disabilities in response to South Africa’s Baseline Country Report of March 2013 on the UN Convention on the Rights of Persons with Disabilities, with particular reference to the provisions of Article 24’ (January 2017) at 7.

⁵⁴³ Ibid at 24.

⁵⁴⁴ Ibid.

⁵⁴⁵ EELC op cit note 488 at 11.

⁵⁴⁶ Ibid at 12.

⁵⁴⁷ Ibid at 13.

⁵⁴⁸ Ibid.

⁵⁴⁹ CRPD Committee op cit note 7 at 64.

⁵⁵⁰ Ibid at 64.

⁵⁵¹ Ibid.

education to ordinary schools. Inclusive education is just one of the 27 goals listed in the Action Plan. Apart from the two pages that briefly touch on inclusive education, no in-depth guidance is given.

Additionally, it is clear from the Action Plan that inclusive education is not seen as a major driving force to overhaul the whole education system, but rather as a small part of the education system that is meant to cater for children with disabilities.

These policy gaps have resulted in the poor implementation of inclusive education. This is explored further below.

Implementation Failures

In WP6 the government outlined its goals and gave a timeframe for the proposed implementation of the inclusive education system.⁵⁵² The government set a realistic timeframe of 20 years for this implementation.⁵⁵³ By 2021 the government aimed to ensure that all children and youth were in school, that there were 380 special schools/resource centres and that 500 schools were converted into full-service schools with district support teams.⁵⁵⁴ However, 21 years on, the government has failed to meet many of its goals.

Failure to Mobilise Out-of-School Youth

In WP6, the government planned to mobilise out-of-school children and youth to ensure that all children of school-going age would be in school.⁵⁵⁵ However, based on the DBE's calculations in 2015, it was estimated that approximately 597 953 children with disabilities were out of school.⁵⁵⁶ This is a significant increase compared to the 280 000 estimate in 2001.⁵⁵⁷

In a 2007 study conducted by IDASA, it was found that funds related to the mobilisation of out-of-school youth were not classified as funding needs by provincial education departments.⁵⁵⁸ Without the mobilisation of out-of-school children, not only is a vital part of

⁵⁵² DoE op cit note 259 at 42.

⁵⁵³ Ibid at 43.

⁵⁵⁴ Ibid.

⁵⁵⁵ Ibid at 22.

⁵⁵⁶ DBE op cit note 12 at 21.

⁵⁵⁷ DoE op cit note 259.

⁵⁵⁸ Russel Andrew & Christina Nomdo 'Implementation of Inclusive Education: How Far are We?' (2007) IDASA Budget Information Service at 17.

WP6 not met, but it also undermines the requirement of compulsory schooling outlined in the Schools Act.⁵⁵⁹ It was also found that most of these provinces had not established targets for how many out-of-school learners they planned to reach annually.⁵⁶⁰

In a study conducted by SECTION27 in 2015, it was found that where enrolment drives did take place, they often excluded children with disabilities.⁵⁶¹ For instance, in 2014, an enrolment drive in KZN failed to mention or focus on children with disabilities despite the provincial department's awareness that this was an issue.⁵⁶² In the IDASA study, it was found that provincial department officials were reluctant to run mobilisation campaigns out of fear that they would be unable to provide for the learners' needs.⁵⁶³ However, this is because when campaigns to mobilise children with disabilities did take place, they were poorly planned.⁵⁶⁴ This resulted in children with disabilities being mobilised but most of them not being placed due to saturated schools or them being placed in schools where they could not be reasonably accommodated.⁵⁶⁵

Failure to Collect Accurate Data

There is no proper system in place to track how many children with disabilities are actually out of school or have been refused admission to schools.⁵⁶⁶ In contrast to the DBE's calculations in its WP6 Report, the government, in its Baseline Country Report, estimated that 480 036 children with disabilities were out of school whereas, in the draft First Periodic Country Report of the CRPD, it was estimated that 197 517 children with disabilities were out of school.⁵⁶⁷ These huge discrepancies indicate a failure to track children with disabilities who are currently out of school as well as the failure of the government to mobilise out-of-school children.⁵⁶⁸ Failure to collect

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid at 23.

⁵⁶¹ Timothy Fish Hodgson & Silomo Khumalo 'Left in the Dark: Failure to Provide Access to Provide Quality Education to Blind and Partially Sighted Learners in South Africa' SECTION27 Report (2015) at 33.

⁵⁶² Ibid 33.

⁵⁶³ Wildeman & Nomdo op cit note 558 at 23.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ Government of South Africa op cit note 501 at 212.

⁵⁶⁷ Watermeyer et al op cit note 542 at 19.

⁵⁶⁸ Ibid at 21.

data also means that it is difficult to accurately track the progress of the policy implementation or to determine which areas require the most attention.⁵⁶⁹

Even with inadequate data, it is clear that many children with disabilities are not accessing basic education. In its Concluding Observations on the Initial Report of South Africa⁵⁷⁰, the CRPD Committee expressed concern over the high number of children with disabilities who are still currently out of school.⁵⁷¹

Inadequate Training of Educators

In WP6, the Department of Education indicated that classroom educators would be the primary resource for implementing inclusive education.⁵⁷² Educator training and development would thus be critical for ensuring that educators had the required skills and knowledge to cater to the diverse needs of students.⁵⁷³ Educators would be expected to provide multi-level classroom instruction through the preparation of lessons with variations that could cater to the needs of each learner

However, several studies have found that teachers lack the necessary skills and competence to identify barriers to learning and implement the necessary interventions.⁵⁷⁴ Although the government, in its Baseline Country Report, indicated that 39 515 educators had received training on how to implement the inclusive education policy, studies have shown that this training does not provide educators with the sufficient skills and knowledge required to instruct a classroom of learners with diverse needs.⁵⁷⁵

For instance, it was found that curriculum differentiation training, which is a key area in responding to the diverse needs of learners in the classroom, provided by the government only ran over 5 days.⁵⁷⁶ In a study conducted by SECTION27 in the uMkhanyakude district in KZN, it was found that teachers lacked the necessary expertise to teach children with disabilities and

⁵⁶⁹ Ibid at 19.

⁵⁷⁰ Committee on the Rights of Persons with Disabilities *Concluding Observations on the Initial Report of South Africa* 23 October 2018 CRPD/C/ZAF/CO/1.

⁵⁷¹ Ibid at 11.

⁵⁷² DoE op cit note 259 at 18.

⁵⁷³ Ibid.

⁵⁷⁴ Hodgson & Khumalo op cit note 550 at 45; HRW op cit note 10 at 59; Donohue & Bornman op cit note 64 at 4 & 9.

⁵⁷⁵ Watermeyer et al op cit note 542 at 35.

⁵⁷⁶ Ibid.

often had difficulties addressing the barriers to learning.⁵⁷⁷ Whilst the DBE did provide ad hoc training sessions, the schools argued that they were not sufficient and were not generally beneficial because the schools were asked to nominate only a few teachers to attend the training sessions.⁵⁷⁸

In a series of interviews conducted by Human Rights Watch, it was also uncovered that teachers generally lacked the practical skills to implement inclusive education in their classrooms.⁵⁷⁹ Various examples were given of instances where children with disabilities attended full-service schools, but teachers failed to engage them in learning activities, encourage their participation or pay enough attention to ensure that the children kept up with the rest of the class.⁵⁸⁰

In the Revised Policy on the Minimum Requirements for Teacher Education Qualifications⁵⁸¹, it is stated that anyone who studies towards a qualification in education “must be knowledgeable about inclusive education and skilled in identifying and addressing barriers to learning, as well as in curriculum differentiation to address the needs of individual learners within a grade.”⁵⁸²

However, most universities do not offer core modules in inclusive education as part of their education programs.⁵⁸³ Human Rights Watch noted that only three universities offer modules or postgraduate programs in inclusive education and only one university offers modules in special needs education.⁵⁸⁴ One principal, who was interviewed by SECTION27 argued that the inclusive education modules which are offered are purely theoretical and do not offer much practical experience.⁵⁸⁵

⁵⁷⁷ Timothy Fish Hodgson & Silomo Khumalo ‘Too Many Children Left Behind: Exclusion in the South African Inclusive Education System with a Focus on the Umkhanyakude District, KwaZulu-Natal’ SECTION27 Report (2016) at 66.

⁵⁷⁸ Ibid at 66.

⁵⁷⁹ HRW op cit note 10 at 61.

⁵⁸⁰ Ibid at 60.

⁵⁸¹ Revised Policy on the Minimum Requirements for Teacher Education Qualifications’ (Published in GG 38487 of 19 February 2015).

⁵⁸² Ibid at 23, 29, 37.

⁵⁸³ HRW op cit note 10 at 63.

⁵⁸⁴ Ibid.

⁵⁸⁵ Hodgson & Khumalo op cit note 577 at 66.

The consequences of employing ill-equipped, untrained, and unskilled teachers are disastrous. Even if children manage to be placed in schools, they are more likely to receive a low-quality education.⁵⁸⁶

Failure to Implement an Information and Advocacy Program

Negative attitudes and stigma towards persons with disabilities have always been critical barriers to development.⁵⁸⁷ These include the attitudes of government officials, communities, parents, and school staff.⁵⁸⁸ To address this issue WP6 committed to running information and advocacy campaigns to deconstruct negative stereotypes and promote inclusion.⁵⁸⁹ They were meant to introduce the inclusion model to the relevant stakeholders including governmental actors, communities, and education personnel.⁵⁹⁰ However, the government failed to do.⁵⁹¹

Views held by stakeholders have largely been guided by traditional beliefs or the medical model of disability.⁵⁹² Traditional beliefs in South Africa mostly attribute disability to angered ancestors, witchcraft or family sin.⁵⁹³ This often leads to mothers or families being blamed for a child's disability leading to them being shunned by the community.⁵⁹⁴ Those who ascribe to traditional beliefs may delay accessing medical interventions in the hopes of finding a traditional remedy to cure the disability.⁵⁹⁵

On the other hand, the medical model, as discussed in chapter 2, has largely shaped societal views on disability.⁵⁹⁶ Although current policy reflects the social and human rights models of disability, practices on the ground are still in line with the medical model.⁵⁹⁷ Stakeholders still hold the belief that persons with disabilities cannot fit into normal society and must be taken care of in specialised settings.⁵⁹⁸

⁵⁸⁶ HRW op cit note 10 at 3.

⁵⁸⁷ NCSNET & NCESS op cit note 350 at 13.

⁵⁸⁸ Pierre Du Plessis 'Legislation and Policies: Progress Towards the Right to Inclusive Education' (2013) *De Jure* at 90.

⁵⁸⁹ DoE op cit note 259 at 33.

⁵⁹⁰ *Ibid* at 34.

⁵⁹¹ Donohue & Bornman op cit note 64 at 11.

⁵⁹² *Ibid* at 6.

⁵⁹³ *Ibid*.

⁵⁹⁴ *Ibid*.

⁵⁹⁵ *Ibid*.

⁵⁹⁶ *Ibid*.

⁵⁹⁷ *Ibid*.

⁵⁹⁸ *Ibid*.

Du Plessis stated that

The education system can provide good policy, education support, and resources and build the capacity of participants to implement policy, but if attitudes have not changed, the implementation will fail.⁵⁹⁹

Successful implementation of inclusive education requires a commitment to providing high-quality education for all without discrimination. However, stakeholders cannot be committed to something they do not understand. This lack of understanding of inclusive education has slowed the process.

Failure to Allocate Adequate Funding

Funding is one of the biggest obstacles to the implementation of inclusive education.⁶⁰⁰ In the WP6 Report, the DBE acknowledged that the funding that is being allocated to the expansion of inclusive education is insufficient.⁶⁰¹ The DBE further acknowledged that the funds were not being consistently allocated across the provinces and this has had dire effects on poorer provinces such as Eastern Cape and Limpopo.⁶⁰² The National Treasury allocated 250 million US Dollars for the realisation of inclusive education for the 2008-2012 period.⁶⁰³ However, in its Baseline Country Report, the government stated that “regrettably, more than 50% was spent in other priority areas at a provincial level and only five of the nine provinces have used the funds available for the expansion of inclusive education.”⁶⁰⁴

Further, Human Rights Watch found that the budget allocated to special schools in the 2014/2015 year was 12 times larger than the budget allocated to inclusive education.⁶⁰⁵ More funds have been consistently allocated to special schools.⁶⁰⁶ This is so despite the government’s attempt to reduce the number of learners who are enrolled in special schools.⁶⁰⁷ However special schools, despite having a larger budget, are still severely underfunded.⁶⁰⁸ In 2014, the DBE

⁵⁹⁹ Du Plessis op cit note 588 at 90.

⁶⁰⁰ EELC op cit note 488 at 9.

⁶⁰¹ DBE op cit note 12 at 45.

⁶⁰² Ibid.

⁶⁰³ Government of South Africa op cit note 501 at 227.

⁶⁰⁴ Ibid at 228.

⁶⁰⁵ HRW op cit note 10 at 82.

⁶⁰⁶ Ibid.

⁶⁰⁷ Hodgson & Khumalo op cit note 561 at 35.

⁶⁰⁸ Ibid at 543.

admitted that five provinces had not allocated a budget for the expansion of inclusive education despite it being a priority at the national level.⁶⁰⁹

Schools in poorer areas have been unable to provide the necessary support required by learners for them to actively participate in the education process.⁶¹⁰ In a SECTION27 study, all schools interviewed agreed that the subsidies that were provided by the government were not enough to operate the schools effectively and to cater to the diverse needs of learners.⁶¹¹ Where schools had attempted to request extra support from the DBE, the Department assumed that they would be able to raise the rest of the required funds from school fees.⁶¹² However, this is not always possible in poorer areas.⁶¹³

At a parliamentary committee meeting in 2019, the DBE gave a presentation on the implementation of inclusive education.⁶¹⁴ It noted that the funding priorities are still inconsistent.⁶¹⁵ Funding deficits affected other areas such as the provision of learner transport for children with disabilities, and the training of educators on inclusive education.⁶¹⁶ There was also a funding deficit for the conversion and resourcing of full-service schools.⁶¹⁷

In March 2018 the DBE published the Draft National Guidelines for Resourcing an Inclusive Education System for comment.⁶¹⁸ However, the Equal Education Law Centre has criticised the government's decision to publish guidelines rather than legally binding norms and standards.⁶¹⁹ The inability to budget properly for inclusive education affects all aspects of its implementation. In its Concluding Remarks, the CRPD Committee recommended that the state:

Intensify efforts at allocating sufficient financial and human resources for reasonable accommodations that will enable children with disabilities, including children with intellectual

⁶⁰⁹ HRW op cit note 10 at 84.

⁶¹⁰ Nicola Deghaye *Disability Support & Accessibility in Mainstream Schools in South Africa* (2021) at 51.

⁶¹¹ Hodgson & Khumalo op cit note 561 at 35.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Parliamentary Monitoring Group 'Inclusive Education: Status Update' (30 October 2019) available at <https://pmg.org.za/committee-meeting/29205/> last accessed (02 July 2022).

⁶¹⁵ Ibid.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid.

⁶¹⁸ Department of Basic Education 'Guidelines on Resourcing an Inclusive Education System' 20 April 2017 available at <https://www.gov.za/documents/national-education-policy-act-guidelines-resourcing-and-inclusive-education-system> last accessed 02 July 2022.

⁶¹⁹ EELC op cit note 488 at 19.

disabilities or autism and those who are deaf or hard of hearing, to receive inclusive and quality education, including engaging in systematic data collection, disaggregated by sex and type of impairment, on the number of children mainstreamed into regular and inclusive schools and the dropout rates.⁶²⁰

Failure to Strengthen Special Schools and Upgrade Them into Resource Centres

One of the key strategies for improving support for learners was the conversion of special schools into resource centres that would support ordinary and full-service schools.⁶²¹ The support provided by these resource centres was meant to facilitate inclusion in ordinary and full-service schools thereby reducing the referral of children with disabilities to special schools.⁶²² WP6 intended to strengthen and convert 380 special schools into resource centres by the end of the estimated 20-year implementation period.⁶²³ However, they failed to do so.⁶²⁴ In a report by the Department of Social Development and the Department of Women, Children and People with Disabilities, it was found that 423 special schools were catering for about 105 000 children nationwide.⁶²⁵ It was further found that the quality of education offered was poor with some children reporting that they were learning nothing.⁶²⁶

In the WP6 Report, the DBE once again acknowledged that little progress had been made in remedying the inequalities experienced in special schools.⁶²⁷ In 2015 only 80 special schools had been converted into resource centres.⁶²⁸

The DBE noted the various issues that still exist in special schools.⁶²⁹ A high rate of child abuse still exists in special schools and special school hostels.⁶³⁰ In its study, SECTION27 uncovered that house mothers in hostels for blind children were not equipped with even the most basic braille literacy and generally did not possess the qualifications and skills required to care

⁶²⁰ CRPD op cit note 556 at 41.

⁶²¹ DoE op cit note 259 at 21.

⁶²² Ibid.

⁶²³ Ibid at 43.

⁶²⁴ DSD, DWCPD and UNICEF op cit note 403 at 11.

⁶²⁵ Ibid.

⁶²⁶ Ibid at 67.

⁶²⁷ DBE op cit note 12.

⁶²⁸ Ibid at 25.

⁶²⁹ Ibid at 51.

⁶³⁰ Ibid.

for children with visual impairments.⁶³¹ It also reported that many special schools are dilapidated, unsafe and poorly maintained.⁶³²

In its study of seven special schools, Human Rights Watch discovered that these schools were severely understaffed, especially with important health personnel, and many of the applicants were seldom trained to work with children with disabilities.⁶³³ The school would then have the duty to train its employees at the school's cost.⁶³⁴ This was made difficult because these schools were also underfunded, and this consequently influenced the services and care the schools could provide for the children.⁶³⁵

Failure to Convert Ordinary Schools into Full-Service Schools

In WP6, the department planned to convert 500 ordinary primary schools into full-service schools.⁶³⁶ Full-service schools were meant to accommodate a wide range of learning needs thus allowing the inclusion of learners with low, moderate, and high learning needs.⁶³⁷ However, the process of conversion has been slow and inconsistent. In 2009 only 91 schools had been converted into full-service schools.⁶³⁸ By 2015 the department had successfully converted 137 schools into full-service schools.⁶³⁹

In a 2019 report by the Auditor-General, it was noted that although 848 schools had been designated as full-service schools, they were not functioning optimally.⁶⁴⁰ The government acknowledged that funding for the conversion and resourcing of full-service schools was inadequate.⁶⁴¹ There were no plans in place to convert and resource full-service schools to enable them to function properly.⁶⁴²

⁶³¹ Hodgson & Khumalo op cit note 561 at 42.

⁶³² Ibid at 69.

⁶³³ HRW op cit note 10 at 17.

⁶³⁴ Ibid.

⁶³⁵ Ibid at 20.

⁶³⁶ DoE op cit note 259 at 43.

⁶³⁷ Ibid at 22.

⁶³⁸ DSD, DWCPD and UNICEF op cit note 403 at 45.

⁶³⁹ DBE op cit note 12 at 70.

⁶⁴⁰ Department of Basic Education *Circular S4 of 2019: Temporary Suspension of the Designation of Full-service Schools* (2019) at 2.

⁶⁴¹ Ibid.

⁶⁴² Ibid.

Consequently, the government issued a Circular in which it suspended the designation of full-service schools for three years so that the schools that have been designated could be adequately resourced and converted to ensure that they can fulfil their roles.⁶⁴³

Failure to Establish District Support Teams

Regarding DBSTs, the government acknowledged that not all support teams are fully functional, especially in rural areas.⁶⁴⁴ In the WP6 Report, the government stated that there were 231 vacancies across 6 provinces in the provincial, district, and school support systems.⁶⁴⁵ In two of the areas that Human Rights Watch visited when conducting its study, there were no particular support teams or officials.⁶⁴⁶ In a study conducted by the South African Human Rights Commission in 2018, four of the seven special schools surveyed stated that they had never received a visit from a provincial or district official to conduct assessments on their functioning.⁶⁴⁷

Failure to Implement the SIAS Policy

In a Parliamentary committee meeting, the DBE reported that it had trained 4999 district officials and 95 089 teachers from about 25 000 schools in SIAS implementation.⁶⁴⁸ However, various studies have reported issues with the implementation of the SIAS. The Equal Education Law Centre has noted the refusal of ordinary schools to accommodate children with disabilities and the continuous referral of such children to special schools.⁶⁴⁹ Other issues noted include poor support measures in special schools, and the failure to properly assess children with disabilities to determine their learning barriers.⁶⁵⁰ Although the SIAS policy outlines the duties of the school and district officials in assessing, placing and supporting the children, their inaction often leads to parents having to bear the burden of finding school spaces and getting support for their children.⁶⁵¹

⁶⁴³ Ibid.

⁶⁴⁴ HRW op cit note 10 at 87.

⁶⁴⁵ DBE op cit note 12 at 44.

⁶⁴⁶ HRW op cit note 10 at 88.

⁶⁴⁷ South African Human Rights Commission 'Learners at Special-Needs Schools Research Brief: The Management of and Rights of Learners at Special-Needs Schools' (2018) at 19.

⁶⁴⁸ Parliamentary Monitoring Group op cit note 600.

⁶⁴⁹ Equal Education Law Centre (c) 'Inclusive Education Learners with Learning Barriers: The Right to an Equal and Quality Education' (2016) at 12.

⁶⁵⁰ Ibid at 11 & 12.

⁶⁵¹ Ibid.

In the Baseline Country Report, the Minister of Basic Education set a goal that by 2014 at least one educator in each school across the country would be trained to screen and support children who experience barriers to learning.⁶⁵² However, this goal was not achieved.⁶⁵³ Additionally SIAS training only ran over 5 days.⁶⁵⁴ Thus, whilst the number of educators and officials who have received SIAS training reported by the government is impressive, the government has failed to acknowledge how inadequate the training is.⁶⁵⁵

In another study, it was found that less than half of the sampled schools were able to screen learners for hearing, vision, or potential learning difficulties.⁶⁵⁶ Although more schools reported that they could complete the SIAS forms, it was found that this did not necessarily translate into their understanding of the process of screening learners for learning barriers.⁶⁵⁷ Of those that could screen learners, 15% of the schools reported that no screening had been done.⁶⁵⁸

In another study where 320 educators were interviewed, it was found that the educators in both primary and secondary schools do not screen the learners to determine barriers to learning.⁶⁵⁹ Failure to screen learners may result in a collapse of the rest of the process as it would be difficult to determine what support learners need without being screened.⁶⁶⁰

Summary: A failure to Realise Inclusive Education

From the above, the government has thus far failed to effectively implement inclusive education. This is largely due to the lack of a coherent legislative and policy framework to guide its implementation. Without enabling legislation and comprehensive policy, the government continues to deprioritise learners with disabilities. This is evident from the increase in the number of children with disabilities who are out of school. The measures that the government has taken, including designating full-service schools, publishing guidelines, and strengthening

⁶⁵² Watermeyer et al op cit note 542 at 35.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid at 27.

⁶⁵⁶ Deghaye op cit note 610 at 34.

⁶⁵⁷ Ibid at 36.

⁶⁵⁸ Ibid at 43.

⁶⁵⁹ Manthema Florina Matolo & Awelani M. Rambuda 'Evaluation of the Application of an Inclusive Education Policy in Screening, Identification, Assessment and Support of the Learners at Schools in South Africa' (2022) 10 *International Journal of Education and Practice* at 22.

⁶⁶⁰ Ibid.

some special schools, have proved to be insufficient to fulfil the right to education for children with disabilities. Since the 20-year period stated in WP6 ended at the end of 2021, it is necessary for the government to review its progress and shortfalls over the last 20 years and to determine how exactly it can effectively implement inclusive education going forward.

The alternative- accommodating children with disabilities in special schools- was considered in the 2015 WP6 Report and found to be not feasible.⁶⁶¹ The DBE stated that if it were to focus on building new special schools to accommodate learners with disabilities, 2 300 new special schools would have to be built to accommodate the 600 000 learners who are out of school.⁶⁶² The DBE admitted that this was not feasible and that a different approach would have to be taken to ensure that these children attend school.⁶⁶³ That approach would be to effectively implement an inclusive education system.⁶⁶⁴

The next section provides some recommendations on how South Africa can strengthen its domestic framework to ensure that it can adequately fulfil the right to education for children with disabilities.

7. CHAPTER 7 - RECOMMENDATIONS

Legislative Measures

As has been emphasised throughout this paper, legislative and policy measures play a key role in the implementation of inclusive education. General Comment 4 of the CRPD calls on states to introduce and implement “legislation based on the human rights model of disability that fully complies with article 24.”⁶⁶⁵ The purpose of this legislation is to provide a clear and comprehensive framework on how inclusive education will be implemented.⁶⁶⁶ It must create legally binding obligations on the relevant stakeholders and must be a key mechanism to hold all implementers accountable.⁶⁶⁷

⁶⁶¹ DBE op cit note 12 at 21.

⁶⁶² Ibid.

⁶⁶³ Ibid at 71.

⁶⁶⁴ Ibid.

⁶⁶⁵ CRPD op cit note 7 at 62.

⁶⁶⁶ Ibid at 63.

⁶⁶⁷ Ibid.

It has been suggested by some scholars that with enough amendments, the Schools Act may be able to adequately encompass inclusive education.⁶⁶⁸ The advantage of this would be that it would take less time than drafting and enacting a new statute altogether.⁶⁶⁹ However, with the proposed substantial changes discussed below which are necessary to make the education system more inclusive, inclusive education requires extensive regulation. It is possible that any amendments made to the Schools Act may not be extensive enough to elicit any significant change from the government.⁶⁷⁰ As such, it is recommended that the state pass entirely new legislation that deals exclusively and extensively with inclusive education. The next section suggests some key aspects that should be included in this legislation.

Inclusive Education

Inclusive education requires a change in the entire educational system so that it responds to the needs of all learners.⁶⁷¹ The education system must exhibit the four requirements discussed in Chapter 2- availability, accessibility, acceptability, and adaptability- and this must be reflected in the legislation.⁶⁷²

Instead of focusing on changing the student to fit into the system, the focus should be on changing the system to accommodate the individual differences of each learner.⁶⁷³ The system should be seen as adaptable and this should be reflected in the legislation.⁶⁷⁴ Inclusive education must be appropriately defined so that its purpose and goals are clear.⁶⁷⁵ Additionally, a right to inclusive education for all children must be included.⁶⁷⁶ This ensures that every child regardless of their learning barriers will have access to quality education.

Article 24(2)(a) of the CRPD states that persons with disabilities must not be excluded from the general education system based on disability.⁶⁷⁷ In Italy, Law No. of 1994 dealing with the rights of persons with disabilities recognises the importance of inclusion by stating that “the

⁶⁶⁸ EELC op cit note 499 at 8.

⁶⁶⁹ Ibid at 8.

⁶⁷⁰ Ibid.

⁶⁷¹ NCSNET & NCESS op cit note 350 at 45.

⁶⁷² CESCR op cit note 1 at 6.

⁶⁷³ NCSNET & NCESS op cit note 350 at 45.

⁶⁷⁴ Ibid.

⁶⁷⁵ CRPD op cit note 7 at 63.

⁶⁷⁶ Ibid.

⁶⁷⁷ UN General Assembly supra note 60.

right to education and instruction cannot be prevented by learning difficulties or other difficulties deriving from disabilities or handicap.”⁶⁷⁸ This has ensured that there are no exceptions to educating children with disabilities and that no children are considered uneducable. South Africa should adopt a similar approach to ensure that no children are left behind.

Children with disabilities must as far as possible be accommodated in ordinary schools and the legislation must provide for this.⁶⁷⁹ The current standard in the Schools Act is that learners with special needs must be provided for in ordinary public schools where it is reasonably practicable.⁶⁸⁰ The Schools Act provides no further indication of what reasonable practicability concerns.⁶⁸¹ However, a fundamental principle of inclusive education is that all children must, as far as possible, be able to learn together.⁶⁸² Children with disabilities cannot continue to be referred to special schools as this is not conducive to the implementation of inclusive education.

The Equal Education Law Centre has recommended that the government do away with the concept of full-service schools and that it instead commit to making all ordinary schools generally accessible.⁶⁸³ As such, this legislation would apply to all schools.

The legislation must require the government to make schools physically accessible within a set time. It should also require the government to assess schools that are dilapidated and unsafe and to either fix them or close them down if the cost of fixing them would outweigh the potential benefits. Children cannot continue to learn in environments that are unsafe and unhealthy.

In promoting accessibility, the government should commit to reviewing the current Admission Policy for Ordinary Public Schools.⁶⁸⁴ The current policy mimics the Schools Act and states that ordinary schools may admit learners with special needs where this is reasonably practical.⁶⁸⁵ However, this provision limits the implementation of inclusive education as it leaves

⁶⁷⁸ Law No. 104 of 1992 at Article 12(4).

⁶⁷⁹ UN General Assembly supra note 60 article 24(2)(a).

⁶⁸⁰ Schools Act supra note 326 at 12(4).

⁶⁸¹ Ibid.

⁶⁸² CRPD op cit note 7 at 63

⁶⁸³ EELC op cit note 499 at 12.

⁶⁸⁴ Ibid at 10.

⁶⁸⁵ Ibid.

the determination of reasonable practicality in the hands of the MEC. As such, this limitation should be reviewed and possibly replaced with a higher standard for referral to special schools.

However, the government must prioritise its goal of converting special schools into resource centres.⁶⁸⁶ Once converted, they will provide greater support to ordinary schools which will in turn allow ordinary schools to better accommodate more learners.⁶⁸⁷ The government must also commit to strengthening those special schools that will continue to provide education to children requiring high levels of support. As discussed in Chapter 3, Article 24(3)(c) provides an exception for deaf, blind, and deafblind children that requires the state to determine the environments in which their development will be maximised. These and other children may continue to require specialised learning contexts.⁶⁸⁸

Early Childhood Intervention

The legislation must also prioritise ECD intervention.⁶⁸⁹ It has been found that where learning barriers are identified early in children, they have a greater chance of transitioning smoothly into preschool and inclusive primary school settings with the necessary support.⁶⁹⁰

Identifying Learning Barriers

The SIAS Policy was published in 2014 to outline the process of determining individual learner needs and the type of support they require.⁶⁹¹ It must be reiterated in the legislation that the SIAS Policy is the method with which learning barriers and learner support needs will be identified. The legislation must make it mandatory for all stakeholders who play a role in the SIAS process, namely, teachers, SBSTs, and DBSTs to receive ongoing training on how to implement the SIAS.⁶⁹² This will ensure that children's needs are properly identified and addressed. It will also ensure that stakeholders know what their roles are and how to execute them effectively. The legislation must also commit to reviewing the SIAS policy regularly in line with the CRPD's recognition of disability as an evolving concept.⁶⁹³

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid.

⁶⁸⁸ EELC op cit note 499 at 11.

⁶⁸⁹ CRPD op cit note 1 at 67.

⁶⁹⁰ Ibid.

⁶⁹¹ DBE op cit note 455.

⁶⁹² Ibid.

⁶⁹³ CRPD op cit note 63 at Preamble.

Increasing the Capacity of Teachers

Schools must build enough capacity to be able to accommodate diversity.⁶⁹⁴ Teachers are the key implementers of inclusive education at the school level. Teachers must be sufficiently trained to respond to the various needs of their learners.⁶⁹⁵ The legislation must provide for the ongoing training of teachers.⁶⁹⁶ It must call for changes to be made to the ordinary teaching courses in universities to include compulsory courses on inclusive education.⁶⁹⁷ Training courses must provide an understanding of diversity, human rights, learning barriers, disability, curriculum differentiation and more.⁶⁹⁸ Provision must also be made for ongoing in-service training to continuously build teachers' skills and confidence to create and work in inclusive environments.⁶⁹⁹

Other Key Stakeholders

In addition to teachers, other stakeholders play a role in implementing inclusive education. SBSTs and DBSTs are mentioned in the SIAS policy, however, as stated above, they are hardly present or functional in many full-service schools.⁷⁰⁰ As such, it is proposed that the purpose and roles of SBSTs and DBSTs be outlined in the legislation so that their duties are clear and legally enforceable. The legislation should also outline the broad range of officials that should make up DBSTs and SBSTs. It must place a duty on the government to ensure that, by a certain date, all schools have functioning SBSTs, and all districts have DBSTs.

The legislation should make provision for the employment of other support personnel such as classroom assistants and special support personnel such as social workers, therapists, nutritionists, and counsellors.⁷⁰¹ All personnel must receive training on how to address various learning barriers of children and how to properly implement inclusive education.⁷⁰²

⁶⁹⁴ CRPD op cit note 332 at 9.

⁶⁹⁵ Ibid at 71.

⁶⁹⁶ Ibid.

⁶⁹⁷ NCSNET & NCESS op cit note 350 at 29.

⁶⁹⁸ CRPD op cit note 332 at 71.

⁶⁹⁹ Ibid.

⁷⁰⁰ DBE op cit note 455.

⁷⁰¹ NCSNET & NCESS op cit note 350 at 3.

⁷⁰² Ibid at 56.

Other key stakeholders include government officials responsible for basic and inclusive education.⁷⁰³ The legislation should outline the roles and duties of local, provincial, and national authorities.⁷⁰⁴ It must clearly outline which government departments are responsible for which aspects of inclusive education.⁷⁰⁵ For instance, currently, learner transport is dealt with by either the Department of Transport or the DBE depending on the province.⁷⁰⁶ Instead, it should be allocated to a single department to ensure uniform implementation and allocation of resources across all provinces.⁷⁰⁷ Other examples include allocating the development of a barrier-free built environment to the Department of Public Works and allocating the provision of welfare needs of children to the Department of Social Development.

All these officials must undergo training on inclusive education and their implementation responsibilities under the law.⁷⁰⁸ General Comment 4 of the CRPD recognises that authorities at all levels must have the “capacity, commitment and resources to implement laws, policies and programs to support inclusive education.”⁷⁰⁹

Reasonable Accommodation

The government must make schools generally accessible for all children.⁷¹⁰ In addition to this duty, the government must also provide reasonable accommodation.⁷¹¹ Reasonable accommodation relates to the individual needs of the learner and can be legitimately requested even though the state has made the schools generally accessible.⁷¹² As such, the legislation must include a right to reasonable accommodation, and it must be clearly defined.

Reasonable accommodation is essential to achieve substantive equality by ensuring that where children with disabilities have further needs, they can be met in a manner that allows them to have equitable access to educational opportunities.⁷¹³ The CRPD has suggested that costs

⁷⁰³ CRPD op cit note 7 at 73.

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid.

⁷⁰⁶ Equal Education Law Centre (EELC) ‘A Report on the State of Education: Trends and Issues Characterising the Education Sector over the last 5 Years (2014-2019)’ (2019) at 37.

⁷⁰⁷ Ibid.

⁷⁰⁸ CRPD op cit note 7 para 73.

⁷⁰⁹ Ibid.

⁷¹⁰ Ibid para 28.

⁷¹¹ Ibid para 29.

⁷¹² Ibid.

⁷¹³ De Beco op cit note 182 at 278.

related to providing reasonable accommodation should be free and provided for by the government.⁷¹⁴

Reasonable accommodation is context-specific and must be determined on a case-by-case basis. Although the determination of reasonable accommodation is subjective and largely contextual, a decision to provide reasonable accommodation must result from a fair and objective procedure that involves all relevant parties including the learner and parents.⁷¹⁵ Globally, reasonable accommodation has been understood as those measures that do not cause undue hardship to the duty-bearer.⁷¹⁶ In the Netherlands, a two-stage test is applied to determine whether an accommodation is reasonable.⁷¹⁷ It asks firstly whether the accommodation can effectively meet the needs of the individual, and secondly, whether it imposes an undue burden on the provider.⁷¹⁸ In the USA, a few factors are taken into account to determine undue hardship.⁷¹⁹ They include the nature and cost of the accommodation and the financial resources of the provider.⁷²⁰ The government can take these factors into account as it creates its test for reasonable accommodation. General Comment 4 of the CRPD and PEPUDA suggest that the denial of reasonable accommodation should constitute discrimination and that reasonable accommodation is not subject to progressive realisation.⁷²¹

Evaluation and Monitoring

There must be monitoring systems in place to monitor the implementation of inclusive education at all levels and by all stakeholders.⁷²² This will play a key role in holding all implementers accountable.⁷²³ There must be systems in place to monitor the extent to which schools are accessible and the appropriateness and effectiveness of the accommodations made for learners.⁷²⁴ There must also be a monitoring and accountability system in place to keep track of how funds

⁷¹⁴ CRPD op cit note 7 para 24.

⁷¹⁵ Ibid at 280: Frédéric Mégret & Dianah Msipa 'Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality' (2014) 30 *SAJHR* 2 at 269.

⁷¹⁶ Ibid at 267

⁷¹⁷ Ibid at 267.

⁷¹⁸ Ibid.

⁷¹⁹ Ibid at 268.

⁷²⁰ Ibid.

⁷²¹ Ibid at 31.

⁷²² Ibid at 75.

⁷²³ Ibid.

⁷²⁴ Ibid at 31 & 75.

are allocated and spent.⁷²⁵ The expenditure must be transparent.⁷²⁶ The efficiency of government officials must be monitored as well as the functioning of SBSTs and DBSTs. General Comment 4 has recommended the creation of a complaint procedure and accessible mechanisms for redress when children, their parents, or any relevant party believes that they have not been adequately assisted.⁷²⁷

The key to evaluation and monitoring is the collection of accurate data. Data plays a key role in the allocation of funding, the drafting of policies and the determination of progress.⁷²⁸ Thus, the legislation must commit to collecting comprehensive data regularly on factors such as the number of children with disabilities out of school, the types of learning barriers faced by children, and the number of children who have been successfully accommodated.⁷²⁹

Funding

The government must commit enough financial resources to the implementation of inclusive education.⁷³⁰ The funding must cover, amongst other things, costs related to reasonable accommodation, transport, boarding facilities, textbooks, learning and teaching material, the employment and training of various stakeholders, and building a barrier-free environment.⁷³¹ In 2018 Draft National Guidelines for Resourcing Inclusive Education were approved but have not been finalised.⁷³² The Equal Education Law Centre noted that guidelines do not have enough weight to compel provinces to allocate sufficient resources to inclusive education.⁷³³ As such, the legislation must commit to passing legally binding norms and standards on funding instead.⁷³⁴ It has been further suggested that funds should be ring-fenced for specific interventions or outcomes to ensure that the money is not spent on anything else.⁷³⁵

⁷²⁵ EELC op cit note 499 at 9.

⁷²⁶ Ibid.

⁷²⁷ CRPD op cit note 7 at 31.

⁷²⁸ Ibid at 68.

⁷²⁹ Ibid.

⁷³⁰ CRPD op cit note 7 at 69.

⁷³¹ Ibid.

⁷³² EELC op cit note 499 at 9.

⁷³³ EELC op cit note 706 at 19.

⁷³⁴ Ibid.

⁷³⁵ Ibid.

Other Key Factors

In WP6 an information and advocacy program was mentioned but never properly implemented.⁷³⁶ This too must be prioritised by the legislation. Article 8 of the CRPD requires states to adopt measures to raise awareness about disabilities and to combat stereotypes and prejudices relating to persons with disabilities.⁷³⁷ The purpose of this program is to spread awareness about inclusive education and human rights and to dispense with negative attitudes and stereotypes about disabilities.⁷³⁸ The government must also commit to forming partnerships with organisations for people with disabilities, agencies, communities, parents, and caregivers.⁷³⁹ Finally, the legislation must provide children with disabilities the right to be heard in all matters concerning them, including the drafting of policies.⁷⁴⁰

Policies and Plans of Action

The government must commit to passing inclusive policies and plans of action to provide more detailed guidance to the implementers.⁷⁴¹ These may include a new or revised admission policy, a policy on reasonable accommodation, and policies on inclusive hostels and transportation. These policies must provide sufficient detail and guidance on how they must be implemented. It is not enough to simply state the goals the government aims to achieve without outlining exactly how these goals will be achieved. WP6 has shown that without sufficient guidance, the implementation of policy will be haphazard and inconsistent. Thus, legislation and subsequent policies must provide a comprehensive framework for implementation with clear obligations.

⁷³⁶ EELC op cit note 499 at 15.

⁷³⁷ CRPD op cit note 63 Article 8.

⁷³⁸ White Paper 6.

⁷³⁹ CRPD op cit note 7 at 63.

⁷⁴⁰ Ibid.

⁷⁴¹ Ibid.

8. CHAPTER 8 - CONCLUSION

This paper has considered the ability of the current South African legislative and policy framework to fulfil the right to education for children with disabilities. Under international law, South Africa is a party to multiple treaties that require it to make the right to basic education compulsory and available free to all. It has been argued that the best way to fulfil the right to education for all is by creating an inclusive education system. Inclusive education is based on the idea that most children at some point will experience some kind of learning barrier and the education system must be able to respond to all learning barriers.

Over the past 20 years, South Africa has committed to making its education system inclusive. However, due to the lack of a comprehensive legislative and policy framework, this implementation has been haphazard and fragmented. This has resulted in the number of children with disabilities who are out of school increasing. WP6, which was supposed to be South Africa's main policy on inclusive education has failed to be a driving force for change due to its non-binding nature and its many gaps.

Various organisations have called for the government to translate its inclusive education policy into a comprehensive binding law that is fully in line with the CRPD.⁷⁴² As such, it has been recommended that government enact legislation and adopt policies that clearly outline how inclusive education should be implemented. With the expiry of WP6 at the end of 2021, it is hoped that the government will take its obligations under the CRPD more seriously to realise the right to education for children with disabilities.

This paper has recommended that the government enact legislation that guides the implementation of inclusive education. Various legislative measures have been suggested. The government must create a substantive right to inclusive education for all children which includes the right to reasonable accommodation. The government must commit to making the entire education system inclusive. It has been recommended that the government let go of the concept of full-service schools and instead focus on making all schools inclusive. It has been further suggested that the government commit to training educators and other key stakeholders on how to implement inclusive education. The government must also prioritise funding for inclusive

⁷⁴² HRW op cit note 10 at 96; Hodgson & Khumalo op cit note 561 at 77; EELC op cit note 499 at 8.

education and must implement monitoring and evaluation systems to track its implementation. Finally, where necessary, the government must review existing guidelines and policies or enact new ones to provide further guidance on the implementation of inclusive education.

In conclusion, it has been recommended that the government seriously review its inclusive education policy and take steps to create a legislative and policy framework that will effectively fulfil the right to education for children with disabilities.

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