

INCLUSIVE EDUCATION

**LEARNERS WITH LEARNING BARRIERS
THE RIGHT TO AN EQUAL AND QUALITY EDUCATION**



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EXECUTIVE SUMMARY

This report provides an overview of the legislative framework governing the inclusive education system in South Africa and an examination of the status of the government's implementation of its inclusive education plan. Although government policy statements have adopted conflicting interpretations of the right, both South African courts and international bodies have defined the right to an education as a mechanism that must meet the needs of a learner. Despite South Africa's extensive legal and policy framework enabling the creation of an inclusive education system, the Department of Basic Education has floundered in its implementation.

1.1. Education is a fundamental human right.¹ Education “contribute[s]² to the full personal development of each learner, and to the moral, social, cultural, political and economic development of the nation at large, including the advancement of democracy, human rights and the peaceful resolution of disputes.” For far too long, in all parts of the world, the most vulnerable members of society have been excluded from schools. “All children, regardless of their physical, intellectual, social, emotional, linguistic or other conditions,” including “disabled and gifted children, street and working children, children from remote or nomadic populations, children from linguistic, ethnic or cultural minorities and children from other disadvantaged or marginalized areas or groups,” have the right to education.³

1.2. The “emerging [worldwide] consensus that children and youth with special educational needs should be included in the educational arrangements made for the majority of children” has led to the rise of the concept of “inclusive education.” Inclusive education mandates that schools can and should accommodate all children, not only to provide a quality education to all children on an equal basis but also to help “change discriminatory attitudes,” create “welcoming communities,” develop “an inclusive society,” and act as the “training ground for a people-oriented society that respects both the differences and the dignity of all human beings.”⁴

1.3. South Africa, in particular, has committed itself to the ideal of equal and inclusive education for all. South Africa’s current legislative framework recognises the right to basic education as an immediately realisable right. Yet, an equal and inclusive basic education system for all remains elusive.

2. The right to education

2.1. Prior to the transition to a constitutional democracy in 1993, education in South Africa was segregated not only on the basis of race but also on the basis of disability.⁵

2.2. The apartheid regime adopted a medical approach to disability (as opposed to a social approach). As a result, it is estimated that only 20% of learners with disabilities were accommodated in school.⁶ Further exacerbating the problem, special schools for children with disabilities were disproportionately distributed across the country.⁷ This resulted in a disparity between the incidence of disability and the availability of special schools.⁸ Because of the government’s apathetic approach and general lack of educational support, learners with disabilities have historically been one of the most susceptible groups to barriers to learning and exclusion in the South African education system.⁹

¹ P. viii – Salamanca Statement 1994

² Basic Education Laws Amendment Act 2011 (No. 25 of 2011), amending section 4(b) of the National Education Policy Act of 1996.

³ Salamanca Statement p. 6

⁴ Salamanca Statement, p. 6-7.

⁵ Dep’t of Basic Educ., Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System (2001).

⁶ Id. at 9.

⁷ Id. at 15.

⁸ Id. (e.g., .28% of learners in the Eastern Cape were enrolled in special schools, yet the overall incidence of disabled persons in the region was 17.39%).

⁹ Id. at 7.

2.3. The Constitutional transition marked a dramatic shift in the obligations of the state to provide basic education for all children. Section 29(1)(a) of the South African Constitution guarantees the fundamental right “to a basic education.”¹⁰ The Constitutional Court has recognised that this entails both a positive and negative component. More specifically, Section 29(1)(a) “creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”¹¹

2.4. The Constitution guarantees “everyone” the right to a basic education. The right to education must be read in harmony with section 9, which requires individuals to be treated equally under the law. Section 9 further provides that the state may not unfairly discriminate, either directly or indirectly, on the basis of certain enumerated grounds, including disability.¹²

2.5. Section 28(2) further stresses the importance of this fundamental right by declaring that a “child’s best interests are of paramount importance in every matter concerning the child.”¹³

2.6 The right to education is unqualified in the Constitution and therefore must be directly and immediately implemented.¹⁴

This unqualified, positive right stands in stark contrast to other constitutional rights. For example, both the right to housing and the right to social security are qualified by limitations on the state’s obligations.¹⁵

3. The meaning of “basic education” in South African legislation and education policy

3.1. *Education White Paper 6: Special Needs Education: Building an inclusive education and training system* (hereinafter, “White Paper 6”) recognises that the Department of Education carries “a special responsibility . . . to ensure that all learners, with and without disabilities, pursue their learning potential to the fullest.”¹⁶

3.2. However, *White Paper 6* provides conflicting statements on the definition of “basic education” that it adopt.¹⁷ For example, the document officially endorsed the definition of basic education set forth in the *World Declaration on Education for All*, which defines basic education “in terms of learning needs appropriate to the age and experience” of students.¹⁸ This endorsement seems to suggest that the Department was adopting a definition that equated a basic education with meeting the learning needs of students. However, the *White Paper* subsequently states that basic education, for purposes of the Section 29(1)(a) right, is defined by the total length of time that the government provides a child with an education.¹⁹ The Department further expanded on this “period of schooling” approach in the *South African Schools Act* (SASA).²⁰ The SASA defines a basic education for purposes of Section 29(1)(a) as a “level of education that covers a period of 10 years up to grade 9 or the age of 15 years, whichever comes first.”²¹

“The right to education is unqualified in the Constitution and therefore must be directly and immediately implemented.”

¹⁰ S. Afr. Const. (1996) § 29(1)(a).

¹¹ *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC) at para. 9.

¹² S. Afr. Const. (1996) § 9 (2)-(5). It is important to note that these enumerated grounds include disability.

¹³ S. Afr. Const. (1996) § 28(2).

¹⁴ Woolman and Bishop “Education” 57-11; Seleane “Right to Basic Education,” 224-225; Viljoen *International Human Rights Law in Africa* 549.

¹⁵ Calderhead, V., 2011, *The Right to an ‘Adequate’ and ‘Equal’ Education in South Africa*, 28.

¹⁶ WP 6, p. 11 (2001) by Department of Education

¹⁷ Dep’t of Basic Educ., *White Paper on Education and Training* (1995), para. 12.

¹⁸ *Id.*

¹⁹ *Id.* at ch. 7 para. 15.

²⁰ *South African Schools Act* 84 of 1996 .

²¹ Murungi, L.N., *Inclusive Basic Education in South Africa: Issues in its Conceptualization and Implementation*, Potchefstroom Electronic Law Journal, Vol. 18, 3163, 2015.

3.3. Academics opine that the inconsistency in the Department's approach should be interpreted as an attempt to accommodate both perspectives on the definition of basic education in the country's educational framework.²² In her article, *Inclusive Basic Education in South Africa*, Murungi argues that it is not rational to "interpret basic education solely in terms of levels because an organisational structure and the sufficiency of education are complementary aspects of an education system."²³ In addition, Murungi argues that "learning is also a function of time, and therefore it would not be sufficient to define 'basic education' exclusively with respect to its content."²⁴

3.4. While Murungi posits a logical interpretation of the inconsistencies in the Department's policy statements, the Department of Basic Education is not sufficiently clear. Thus, it is necessary to adopt a holistic approach in interpreting Section 29(1)(a). The Department's expressed stance must be examined in light of the judiciary's interpretation of the right and relevant international and foreign law.

4. South African jurisprudence on inclusive education

4.1. In light of the above, it is clear that the right to a basic education as guaranteed in section 29(1)(a) of the Constitution includes an inclusive basic education for all as envisaged in White Paper 6. This conclusion is supported by the jurisprudence of the courts on the right to a basic education.

4.2. In *Governing Body of the Juma Masjid Primary School v. Essay* (hereafter *Juma Masjid*), the Court interpreted the constitutional right to an education as a standard of educational adequacy that is measured by achieving specified learning outcomes.²⁵ More specifically, the Court found that

a basic education must "promot[e] and develop a child's personality, talents and mental and physical abilities to his or her fullest potential."²⁶ In defining a basic education, the Court also endorsed the definition proposed in the *United Nations Convention on the Rights of a Child's* (UNCRC).²⁷

4.3. Similar to the Court's interpretation in *Juma Masjid*, the UNCRC definition requires countries to implement an educational system that "develop[s] each child's personality, talents and abilities to the fullest."²⁸ Therefore, Section 29(1)(a)'s mandate does not simply require the government to provide compulsory education for a certain period but rather demands a system that maximizes a child's social and intellectual abilities. A substantial body of research demonstrates that an inclusive education increases both the quality and quantity of academic success for students with disabilities.²⁹

4.4. In *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa*, the Western Cape High Court adopted an expansive interpretation of Section 29(1)(a) that included the development of traits that are not academically



²² *Id.*

²³ *Id.* at 3163.

²⁴ *Id.*

²⁵ *Governing Body of the Juma Masjid Primary School v. Essay*, 2011 8 BCLR 761 (CC).

²⁶ *Id.* at 43.

²⁷ *Id.* at 40.

²⁸ *United Nations Convention on the Rights of the Child*, § 29, 1990.

²⁹ See Goor, M., Schween, J. *Accommodating Diversity and Disability with Cooperative Learning* (1993); Udvari-Solner. & Thousand (1996).

assessable.³⁰ The case dealt with the exclusion of severely (IQ levels of 20-35) and profoundly (IQ levels of less than 20) disabled children from all public schools.³¹ In response to arguments that children with such disabilities do not benefit from an education, the court opined that a basic education is not limited to maximizing academic outcomes.³² More specifically, a basic education expands beyond intellectual development to include “the development of a child’s potential, personality, talents and creativity.”³³ Based on this definition, the court proceeded to find that the government was “infringing the rights of the affected children, both in respect of the positive dimension of the right, by failing to provide the children with a basic education and also in respect of the negative dimension of the right, by not admitting the children concerned to special or other schools.”³⁴ Moreover, the positive dimension of this right was violated when the government failed to implement an inclusive education system that met the needs of severely and profoundly intellectually disabled children.³⁵

4.5 Thus, accommodating children with severe disabilities through an inclusive education framework is constitutionally mandated under Section 29(1)(a). Similarly, it must follow that section 29(1)(a) requires an inclusive education for children with less severe disabilities.



... accommodating children with severe disabilities through an inclusive education framework is constitutionally mandated

5. International and foreign law

Expansive definitions of a basic education have been adopted in international and foreign jurisdictions, which nearly all extend beyond assessable academic outcomes to the development of non-academic traits. South African courts are required to consider international law in interpreting the Bill of Rights and may consider foreign law. Therefore, the definitions adopted by these legal bodies further reinforces an interpretation that an inclusive education is included within the meaning of Section 29(1)(a).

5.1. International Law

5.1.1. Section 39(1)(b) of the Constitution compels courts to “consider international law” when interpreting the Bill of Rights.³⁶ Section 233 also requires the Court to “prefer any reasonable interpretation ... that is consistent with international law over any alternative interpretation that is inconsistent with international law”.³⁷ Therefore, an interpretation of the right to a basic education that is consistent with international law likely takes precedence over other interpretations.

5.1.2. Relevant international law makes clear that the right to a basic education entitles every person to an education that not only meets their basic learning needs but also enables them to develop certain non-academic traits.

5.1.3. The *United Nations Convention on the Rights of the Child* (“CRC”), ratified by South Africa in 1995, affirms a child’s right to education and states in Article 23(1) and (3), “State Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active

³⁰ *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa* 2011 5 SA 87 (WCC) para. 52.

³¹ *Id.* at para. 3.

³² *Id.* at para. 19-26.

³³ Murungi, L.N., *Inclusive Basic Education in South Africa: Issues in its Conceptualization and Implementation*, Potchefstroom Electronic Law Journal, Vol. 18, 3163, 2015 (summarizing the definition adopted by the Court in *Western Cape Forum for Intellectual Disability*).

³⁴ *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa* 2011 5 SA 87 (WCC) para. 45.

³⁵ *Id.* at para. 52.

³⁶ S. Afr. Const. (1996) § 39(1)(b).

³⁷ *Kaunda v President of the Republic of South Africa and Others* (2) 2004 (10) BCLR 1009 (CC), para. 33.

participation in the community,” and State assistance “shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.”³⁸

5.1.4. The *CRC* adopts an expansive definition of the right and emphasises the purpose of education as a mechanism to empower children.³⁹ More specifically, “the education to which every child has a right is one designed to provide the child with life skills, to strengthen the child’s capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values.”⁴⁰

5.1.5. The *World Declaration for All states*, “every person—child, youth and adult—shall be able to benefit from educational opportunities designed to meet their basic learning needs.”⁴¹ The focus of this education must “be on actual learning acquisition and outcome, rather than exclusively upon enrolment, continued participation in organised programmes and completion of certification requirements.”⁴²

5.1.6. The *Committee on Economic, Social and Cultural Rights* makes clear in its General Comments that a basic education must be designed to attain “the full development of the human personality and the sense of its dignity, and ... [to] strengthen the respect for human rights and fundamental freedoms.”⁴³

5.1.7. In international law, similar to the South African Constitution, a child’s right to an education is not subject to progressive realization but rather is immediately recognizable. In Comment No. 13 of the *Committee on Economic, Social and Cultural rights*, the Committee found that a basic education is a minimum core obligation for all states and must be implemented immediately.⁴⁴ Accordingly, “the duties in respect of the right to primary education include granting it priority in resource allocation and implementation, taking immediate (as opposed to progressive) measures towards the realisation thereof, and providing the service free of charge.”⁴⁵

5.1.8. The *Convention on the Rights of Persons with Disabilities* (“CRPD”), ratified by South Africa in 2007, also explicitly recognises the right of persons with disabilities to education, and in recognizing and realizing this right, State Parties must ensure that “[p]ersons with disabilities are not excluded from the general education system on the basis of disability” and “can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.”⁴⁶

5.2. Foreign Law – United States

5.2.1. Section 39(1) permits South African courts to “consider foreign law” when interpreting the Bill of Rights.⁴⁷ Whilst comparative jurisprudence is rich, for the purposes of this review we have selected a few jurisdictions as illustrative examples.

5.2.2. Similar to most international bodies, the United States has adopted an expansive interpretation of the right to an education that incorporates an inclusive education into its scope.

³⁸ United Nations Convention on the Rights of the Child, ratified by South Africa in 1995, entered into force in 1990, Section 28, 23(1, 3).

³⁹ United Nations Convention on the Rights of the Child, 1990.

⁴⁰ Committee on the Rights of the Child, General Comment No. 1: *The Aims of Education*, Article 29 (1) (2001), CRC/GC/2001/1, 2001, para. 2.

⁴¹ *World Declaration on Education For All* (5-9 March 1990, Jomtien, Thailand) at para. IV.

⁴² *Id.*

⁴³ Committee on Economic, Social and Cultural Rights (1966).

⁴⁴ *Committee on Economic, Social and Cultural Rights General Comment No 13: The Right to Education* (1999) para. 51

⁴⁵ Murungi, L.N., *Inclusive Basic Education in South Africa: Issues in its Conceptualization and Implementation*, Potchefstroom Electronic Law Journal, Vol. 18, 3176 (2015).

⁴⁶ United Nations Convention on the Rights of Persons with Disabilities, ratified by South Africa on 30 November 2007, entered into force on 3 May 2008, Article 24(2)(a, b).

⁴⁷ S. Afr. Const. (1996) § 39(1)(c).

5.2.3. In *Rose v. Council for Better Education*, the Kentucky Supreme Court elaborated on the “right to an efficient school system” to include seven substantive principles that extended far beyond educational outcomes.⁴⁸ A majority of states have similarly expanded on their states’ right to an education. As a result, a consensus has emerged in United States courts that an education “in essence, means a basic quality education that provides students with the essential skills they need to function productively in contemporary society.”⁴⁹

5.2.4. United States case law generally holds that additional measures must be implemented to ensure that students with learning disadvantages benefit equally from government education programs. In the United States, courts have found that a student’s barriers to learning must be taken into account and accommodated for in order to ensure that they receive the same benefit from the public school system as their peers.⁵⁰ This is because students must “equally enjoy the state constitutional protection for the right to schooling.”⁵¹ As a result, education “goes well beyond providing accommodative measures for students with disabilities” and “could/should extend to school transportation, school feeding programs and supportive counseling.”⁵²

measures must be taken to ensure that the equality provisions contained in Canada’s *Charter of Rights and Freedoms* are correctly implemented. In Canada, where private institutions are not beholden to the *Charter*, courts have still found that any entity that implements government policies or programs has a responsibility to act positively in order to accommodate disadvantaged groups.⁵³

5.3.2. Canadian courts have dictated that the purpose of the *Charter*’s equality provision “is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.”⁵⁴ In this respect, courts have recognised that exclusionary practices violate human rights and require positive action to remedy these violations. Courts have also recognised the exclusion of disabled persons as a broad, systemic issue in which “exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access.”⁵⁵

5.4. Foreign Law—Europe

5.3. Foreign Law—Canada

5.3.1. Canadian Jurisprudence dictates that special

5.4.1. The European Court of Human Rights has recognised the damaging effects of education that seeks to divide learners based on

⁴⁸. *Rose v. Council for Better Education*, 790 S.W.2d 186 at 212 (1989).

⁴⁹. Rebell, M.A., Wolff, J.R., *Campaign for Educational Equity, Litigation and Education Reform: The History and the promise of the education adequacy Movement* (2006) at ii.

⁵⁰. See, e.g. *Vincent v. Voight*, 614 N.W. 2d 388, 397 (Wis. 2000) (requiring the legislature to take into account districts with disproportionate numbers of disabled students, economically disadvantaged students and students with limited English language skills); *Campaign for Fiscal Equity v. State*, 719 N.Y. 2d 475 (N.Y. Sup. Ct. 2001) (further elaborating on the education essentials required for a sound basic education by emphasizing the need for adequate resources for students with extraordinary needs and an expanded platform of programs for at risk students); *Hoke County Bd. of Educ. v. State*, 95 C.V.S. 1158, 2000 WL 1639686, slip op. at 30 (N.C. Sup. Ct. Oct. 12, 2000) (holding that at-risk students are constitutionally entitled to a preschool education); *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (requiring the state to provide financing sufficient to provide the facilities and equipment necessary to enable students to master the [states] educational goals).

⁵¹. *Calderhead, V.*, 2011, *The Right to an ‘Adequate’ and ‘Equal’ Education in South Africa*, 25.

⁵². *Id.*

⁵³. *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 79, 74 ACWS (3d) 41 [Eldridge].

⁵⁴. *Eaton v Brant (County) Board of Education*, [1997] 1 SCR 241 at para 66, DLR (4th) 385.

⁵⁵. *Eldridge supra* note 1 at para 65.

ability rather than practicing integration and accommodation. In *Horvath v Hungary*, the court recognised the intersections between exclusionary education practices and systemic societal divisions.⁵⁶ This case dealt with Roma children who were being sent to ‘special’ schools for mild learning disabilities, and who received a poor education that “compromised their subsequent personal development” and prevented their “integfgrat[ion] into the ordinary schools... that would facilitate life among the majority population.”⁵⁷ The Court in this case recognised that the undesirable effects of sending children to special schools, which prevented them access to opportunities afforded to students in mainstream schools, was in itself a violation of the right to an *adequate* education and indirectly resulted in a violation of equality rights. They emphasise that, in general, “treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.”⁵⁸

“White Paper 6 outlines a national strategy for systematically addressing and removing barriers to learning

- *establishing full-service schools*
- *converting special schools into resource centres*
- *training education managers and teachers*
- *developing institutional and district support structures and pursuing a funding strategy.*

5.4.2. The violation of these rights in *Horvath* represents an instance where a lack of inclusive learning creates a system that is discriminatory on the basis of culture as well as ability. Whether intentionally or not, the lack of access to mainstream schools that was overwhelmingly experienced by minority Roma children creates a parallel between South African schools, where a majority of resources that might allow for integrated education are largely enjoyed by privileged learners.

6. South Africa’s policy framework on inclusive education

6.1. South Africa has taken significant steps towards creating a legal and policy framework to enable the creation of an inclusive education system. In 2001 White Paper 6 was published with a view to implement an inclusive education system in South Africa. White Paper 6 particularly asserts that the Department of Education carries, “a special responsibility ... to ensure that all learners, with or without disabilities, pursue their learning potential to the fullest.”⁵⁹

6.2. White Paper 6 outlines a national strategy for systematically addressing and removing barriers to learning through:

- establishing full-service schools
- converting special schools into resource centres
- training education managers and teachers
- developing institutional and district support structures and pursuing a funding strategy.⁶⁰

White Paper 6 also emphasises the need for a paradigm shift from an apartheid-era segregated education system, in which white learners, both in general and in the disability context, got the lion’s

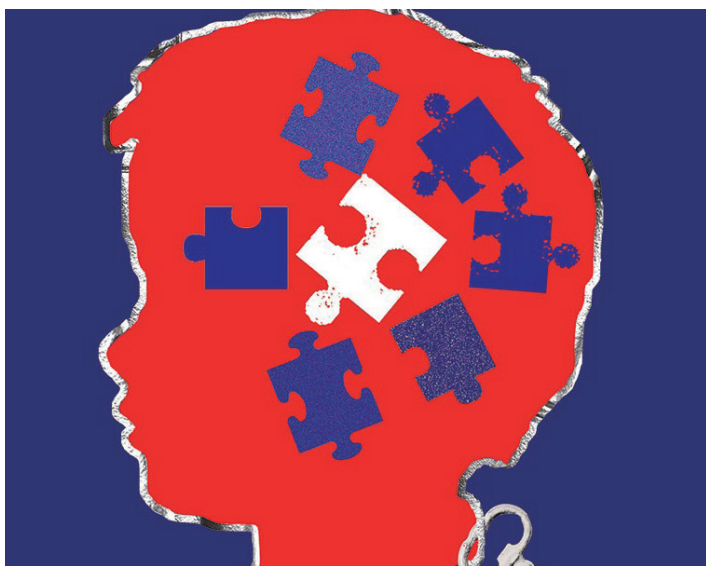
⁵⁶. *Horvath v Hungary* (11146/11), (2013) 57 EHRR 31.

⁵⁷. Ibid at para 127.

⁵⁸. Ibid at para 128.

⁵⁹. White Paper 6, p.11 (2001) by Department of Basic Education.

⁶⁰. Walton, Elizabeth and et al. “The Extent and Practice of Inclusion in Independent Schools in South Africa.” *South African Journal of Education*, vol. 29, n. 1, Pretoria, Feb 2009.



share of resources, to an empowered, integrated, dignified, equality-based, inclusive education system.⁶¹

6.3. The focus has shifted from a *medical* to a *social* understanding of disability, and White Paper 6 advocates changing the system, not the individual, in order to maximize the participation of these learners in the education system.⁶² Thus, the system will bring the school to the learner, rather than the learner to the school.

6.4. White Paper 6 also represents a language and conceptual step away from using the terms “disability,” “learning difficulties” or “learners with special education needs” to the more encompassing “barriers to learning and development.”⁶³ Using “learning barrier” stretches the concept beyond simple physical disability to include factors like poverty, language, family dynamics, negative attitudes, physical and sexual abuse, stereotyping of differences and an inflexible curriculum.⁶⁴ Thus, at its most basic level, White Paper 6 seeks to “enable education structures, systems and learning

*methodologies to meet the needs of all learners.”*⁶⁵

6.5. More specifically, government’s ‘inclusive education plan’ addresses the particularized problems of individuals with learning barriers through the creation of a three-tiered system that matches educational support with a learner’s level of learning barriers.⁶⁶

6.6. Learners who require low-intensive support are to receive such support in ordinary schools, those requiring moderate support are to receive such support in full-service schools, and those requiring high-intensive support are to receive such support in special schools.⁶⁷ At the crux of the plan is the creation of multi-level support teams—at the school level, district level, and special school level (primarily to serve as resource centers)—to provide support in curriculum, assessment and instruction in educating learners with disabilities.⁶⁸

6.7. It is proven that educating students with disabilities in separated settings “minimize[s], rather than maximize[s], their potential” and result in a general “lack of learning outcomes.”⁶⁹ A 2002 study found that students in inclusive programs received higher grades in language arts, mathematics, science and social studies than students in non-inclusive programs.⁷⁰ By providing an inclusive education the government is able to meet the needs of students with disabilities. Therefore, this approach to a basic education necessarily includes an inclusive education within its scope.

6.8. A significant body of research demonstrates that an inclusive education allows children with disabilities to be “more meaningfully engaged in their day-to-day lives and across settings.”⁷¹ Moreover, “when

⁶¹ See WP 6, p. 9.

⁶² See e.g., Murungi at 3173; Jama at 2.

⁶³ See WP 6 at 12.

⁶⁴ See e.g., Jama at 16.

⁶⁵ *Id.* at 6.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

⁶⁸ *Id.* at 18.

⁶⁹ *About Inclusive Education*, Nevada Partnership for Inclusive Education.

⁷⁰ Rea, P.J., McLaughlin, V.L. & Walther-Thomas, C. (2002). *Outcomes for Students with Learning Disabilities in Inclusive and Pullout Programs*. *Exceptional Children* 68 (2), 203-222.

⁷¹ Henninger, W.R., Gupta, S.S., 2014, *How Do Children Benefit from Inclusion?*, 37.

children with disabilities are included in general education settings, they are more likely to exhibit positive social and emotional behaviors at a level that is much greater than their peers who are relegated to programs that serve only children with disabilities.”⁷² Therefore, an inclusive education also falls under the “non-academic development” prong as it is essential to the development of a disabled child’s “life skills” and “capacity to enjoy the full range of human rights.”⁷³

6.9. Through two sets of guidelines, the *National Strategy on Screening, Identification, Assessment and Support* (SIAS) and the *Guidelines for Responding to Learner Diversity in the Classroom through Curriculum and Assessment Policy Statement*, the Department of Basic Education set forth its strategy for implementing the inclusive model into the South African education system.

6.10. SIAS defines learning barriers as “difficulties that arise within the education system as a whole, the learning site and / or within the learner him / herself which prevent access to learning and development for learners.”⁷⁴ Thus, not only must the Department of Education ensure that learners with physical disabilities are integrated into mainstream, full service or special schools, but that those learners with other barriers to learning, such as deficit disorder with or without hyperactivity, autistic spectrum disorders, severe allergies, dyslexia, specific learning barriers and behavioural disorders, are also accommodated and provided for in the ordinary schools.

6.11. The SIAS details the “process of identifying individual learner needs in relation to the home and school context, to establish the level and extent of

additional support that is needed” and the “process to enable access to and provide such support at different levels.”⁷⁵ In addition, the SIAS strategy “curbs the unnecessary placement of learners in special schools,” identifies the best learning sites for support, and “provides guidelines on the central role of parents and teachers in implementing the strategy.”⁷⁶

6.12. The *Guidelines for Responding to Learner Diversity in the Classroom through Curriculum and Assessment Policy Statement* provides guidance to school principals and teachers on “how to respond to learner diversity in the classrooms through ... curriculum” differentiation.⁷⁷ The principles advanced in the *Learner Diversity* policy statement were subsequently adopted in the *Department’s Curriculum and Assessment Policy Statement* (CAPS).⁷⁸

7. Implementation of law and policy

7.1. Despite the Department of Education’s commitment to provide all learners with an education, the government has floundered in implementing its inclusive education program. As a result, the government has perpetuated the “apartheidisation of inclusive education.”⁷⁹

7.2. Failure to successfully implement an inclusive education system can be ascribed to various factors, including: (a) the failure to develop fully-inclusive schools and special schools as resource centres; (b) failure to integrate learners with learning barriers in to ordinary schools; (c) lack of teaching and learning support; (d) lack of school based support teams; and (e) lack of trained teachers. We proceed to discuss some of these factors below.

⁷² *Id* at 38. See also Holahan & Costenbader, 2000; Strain, Bovey, Wilson, & Roybal, 2009.

⁷³ Committee on the Rights of the Child, General Comment No. 1: The Aims of Education, Article 29 (1) (2001), CRC/GC/2001/1, 2001, para. 2.

⁷⁴ SIAS, p7 (2014) by Department of Education.

⁷⁵ Dep’t of Basic Educ., *Draft Policy on Screening, Identification, Assessment and Support* (2014).

⁷⁶ Dalton, E.M., Mckenzie, J.A., Kahonde, C., 2012, *The Implementation of Inclusive Education in South Africa: Reflections Arising From a Workshop for Teachers and Therapists to Introduce Universal Design for Learning*, *African Journal of Disability* 1(1), Art. #13.

⁷⁷ Dep’t of Basic Educ., *Guidelines for Responding to Learner Diversity in the Classroom through Curriculum and Assessment Policy Statement* (2011).

⁷⁸ Dep’t of Basic Educ., *National Curriculum and Assessment Policy Statements* (2012).

⁷⁹ Ngwena, C., *A Case Study of Contradictions in Inclusive Education*, *African Disability Rights Yearbook* 2013, Ch. 7, 152.

7.2.1. Development of Fully-Inclusive Schools and Special Schools as Resource Centres

7.2.1.1. In *White Paper 6*, the Department set forth a plan to convert 500 primary schools to full-service schools over a 20-year period.⁸⁰ Full-service schools are essential to the Department's inclusive education plan as they create the second-tier of a three-tiered system that matches educational support with a learner's level of barriers to learning.⁸¹ Full-service schools are designed to "provide for the full range of learning needs among all ... learners" through "multi-level classroom instruction, co-operative learning, problem solving and the development of learners' strengths and competencies rather than focusing on their shortcomings only."⁸² These schools also serve as testing centres for the development of teaching practices for later system-wide application.⁸³

7.2.1.2. Despite the integral role full-service schools play in South Africa's inclusive education system, the Department had only converted 108 schools to full-service schools by 2011.⁸⁴ Moses Simelane, Director of Inclusive Education at the Department of Basic Education, admitted that the Department was "far from reaching the target" of converting 500 schools to full-service schools by 2021.⁸⁵

7.2.1.3. By February 2015, 791 schools had been designated for possible conversion to full-service schools. However, only 137 of those schools had been successfully converted—an increase of only 29 schools since 2011.⁸⁶ Moreover, very little progress had been made in converting schools in the Northern Cape and Limpopo.⁸⁷ As a result, "thousands of children with disabilities [a]re being sent to special schools far from their homes and many others [a]re in schools that c[an] not cater for their needs."⁸⁸

7.2.1.4. According to *White Paper 6*, special schools are to be converted into resource centres that provide professional support to neighbourhood schools in curriculum, assessment and instruction.⁸⁹ In order to achieve this goal, the Department is to "upgrade them to resource centres and train their staff to assume these new roles."⁹⁰ However, the South African Alternate Report found that "by April 2013, the Department of Basic Education had only made limited progress in supporting special schools to become resource centres."⁹¹

7.2.1.5. In a 2015 progress report on the implementation of *White Paper 6*'s inclusive education plan, the Department revealed that only 80 of the Country's 285 special schools had been converted into resource centres.⁹²

⁸⁰ Dep't of Basic Educ., *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001), 8.

⁸¹ *Id.* at 15.

⁸² *Id.* at 11, 19.

⁸³ *Id.* at 22.

⁸⁴ Bongani Nkosi, *Only 108 SA Schools Offer Inclusive Education*, Mail & Guardian Newspaper, December 6, 2011, <http://mg.co.za/article/2011-12-06-only-108-sa-schools-offer-inclusive-education>.

⁸⁵ *Id.*

⁸⁶ *Progress Report on Inclusive Education and Special Schools*, Portfolio Committee on Basic Education, 23 June 2015.

⁸⁷ *Id.*

⁸⁸ Bongani Nkosi, *Only 108 SA Schools Offer Inclusive Education*, Mail & Guardian Newspaper, December 6, 2011, <http://mg.co.za/article/2011-12-06-only-108-sa-schools-offer-inclusive-education>.

⁸⁹ Dep't of Basic Educ., *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001), 29.

⁹⁰ *Id.* at 30.

⁹¹ Tilley, Alison et al., *Alternate Report to the UN Committee on the Rights of the Child in response to South Africa's Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child*, South African Alternate Report Coalition, 2015, 36.

⁹² *Progress Report on Inclusive Education and Special Schools*, Portfolio Committee on Basic Education, 23 June 2015.



7.2.1.6. Curriculum delivery in many of the Country's special schools is substandard. The Department recently found that some special schools "are simply day care centres with little attention being given to ensuring that learners have access to the National Curriculum Statement on an equal basis with all other learners in the system."⁹³ In hopes of ensuring that special schools provide a quality education, the Department has developed a list of indicators to monitor the standard of curriculum delivery in special schools.⁹⁴

7.2.2. Integration of learners with learning barriers into mainstream schools

7.2.2.1. At its foundation, the Department's plan advances a model of inclusion that favors the integration of learners with learning barriers into the mainstream education

system.⁹⁵ However, the Department has failed to integrate the majority of disabled learners into mainstream schools.

7.2.2.2. In May of 2015, 597,953 children with disabilities were out of school.⁹⁶ This is a shocking increase from the 280,000 disabled children that were estimated to be out of school in 2001.⁹⁷ The lack of inclusion of disabled learners into mainstream schools can be attributed to problematic referrals, lengthy waiting lists and transportation issues.

7.2.2.3. Inadequate Screening and Problematic Referrals

7.2.2.3.1. School officials often make arbitrary and unchecked decisions about which students can enroll in mainstream schools and which students must be referred to special schools.⁹⁸

7.2.2.3.2. This has led to the widespread practice of placing children in special schools based on an assessment of their disability rather than on an assessment of their learning needs and the mainstream school's ability to accommodate those needs.⁹⁹

7.2.2.3.3. For example, a large number of students with Down syndrome continue to be referred to special schools without an appraisal of the mainstream's schools ability to accommodate their learning needs.¹⁰⁰

⁹³ *Id.* at 34.

⁹⁴ *Id.*

⁹⁵ Dep't of Basic Educ., *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001), 15. *Progress Report on Inclusive Education and Special Schools*, Portfolio Committee on Basic Education, 23 June 2015.

⁹⁶ Dep't of Basic Educ., *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001), 30.

⁹⁷ *Complicit in Exclusion*, South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities, Human Rights Watch, 2015, 2.

⁹⁸ Legal Resources Centre, *Submissions for the General Day of Discussion on the Right to Education for Persons with Disabilities*, 20 March 2015; The African Child Policy Forum, *Children with disabilities in South Africa: The hidden reality*, Addis Ababa: 2011; Dana Donohue and Juan Bornman, *The challenges of realising inclusive education in South Africa*, *South African Journal of Education*, vol. 34(2), (2014); Gerison Lansdown, *Disabled Children in South Africa: Progress in Implementing the Convention on the Rights of the Child*, Rights for Disabled Children, (2002), <http://www.daa.org.uk/uploads/pdf/SA%20Childrens%20report%20.pdf> (accessed August 5, 2015).

¹⁰⁰ *Complicit in Exclusion*, South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities, Human Rights Watch, 2015, 37.

7.2.2.3.4. In addition, the Human Rights Watch found that “10 of 70 children interviewed who attended mainstream or full-service schools, were waiting for a referral to a special school because their current schools could or would no longer accommodate them.”¹⁰¹

7.2.2.3.5. Schools’ reluctance to integrate learners with learning barriers contradicts *White Paper 6*’s goal of allowing such learners to attend mainstream schools while addressing their learning needs through reasonable accommodation.

7.2.2.3.6. It also contradicts the assessment process established in the *Screening, Identification, Assessment and Support* (SIAS) policy statement. The SIAS details the “process of identifying individual learner needs in relation to the home and school context, to establish the level and extent of additional support that is needed” and the “process to enable access to and provide such support at different levels.”¹⁰² The SIAS’ overarching goal is to “curb[] the unnecessary placement of learners in special schools.”¹⁰³

7.2.2.3.7. The lack of a systematic approach to identifying learners with learning barriers and determining the mainstream school’s ability to meet these needs can in part be attributed to the fact that the SIAS was only approved in December 2014.¹⁰⁴ In the 2015 Progress Report on Inclusive Education and Special Schools,

the Department advanced a plan to implement the SIAS to scale in 2015 by prioritizing educating district officials on the SIAS process.¹⁰⁵

7.2.2.3.8. If the current trend of simply referring children with learning barriers to special schools continues, it is estimated that 2,300 new special schools will have to be built to accommodate the 597,953 learners with learning barriers who are not enrolled in school.¹⁰⁶ The Department admits that because such an undertaking is not feasible, “a radically different approach needs to be followed to meet the needs of children and youth with learning barriers in an inclusive education system.”¹⁰⁷

7.2.2.3.9. Even more disheartening is the 15% of students with learning barriers that have yet to be identified and accommodated in the South African school system. The Department of Basic Education’s 2015 *Report on the Implementation of Education* found that 5.8% of children of school-going age had been identified with a learning barrier but only 1.01% of these children were enrolled in schools. The World Health Organization estimates that 20% of learners in any given schooling system experience barriers to learning.¹⁰⁸ Consequently, roughly 15% of students with barriers to learning are not accommodated in school.¹⁰⁹ The failure to identify students with learning barriers is one of the major factors contributing to South Africa’s high dropout rate among older students.¹¹⁰

^{101.} *Id.* at 34.

^{102.} *Draft Policy on Screening, Identification, Assessment and Support* (Department of Basic Education, 2014).

^{103.} Dalton, E.M., McKenzie, J.A., Kahonde, C., 2012, *The Implementation of Inclusive Education in South Africa: Reflections Arising From a Workshop for Teachers and Therapists to Introduce Universal Design for Learning*, African Journal of Disability 1(1), Art. #13.

^{104.} *Progress Report on Inclusive Education and Special Schools*, Portfolio Committee on Basic Education, 23 June 2015.

^{105.} *Id.*

^{106.} Dep’t of Basic Educ., *Report on the Implementation of Education, White Paper 6 on Inclusive Education*, (2015), 21.

^{107.} *Id.* at 13.

^{108.} *Id.*

^{109.} *Id.*

^{110.} *Id.*

7.2.2.4. Waiting Lists

7.2.2.4.1. Another factor hindering learners with learning barriers inclusion into mainstream schools are lengthy waiting lists. Due to the general trend of referring students to special schools and the disproportionate distribution of special schools across the country, lengthy waiting lists for students with learning barriers is a common occurrence. It is estimated that in 2015, 5,552 learners with learning barriers were on waiting lists.¹¹¹ In some cases, admission is delayed for years.¹¹²

7.2.2.4.2. Placing learners with learning barriers on waiting lists year after year violates section 3(6) of the *South African Schools Act* of 1996.¹¹³



7.2.2.4.3. If a school cannot admit a learner on the basis of the severity of the disability or nature of support required, such learners must be placed on a central database held by the Head of the Professional

Education Department in order to facilitate a school placement.¹¹⁴

7.2.2.4.4. However, many provinces have an insufficient number of special schools and the special schools they do have are disproportionately spread across the region. The shortage of special schools is most severe for specialized Autism Spectrum Disorder schools in rural areas. For example, in the Northern Cape the majority of special schools are located in Kimberley.¹¹⁵ Because the schools in Kimberley do not have enough hostel space to accommodate all the disabled learners who apply for admission, the Northern Cape is unable to place disabled children.¹¹⁶ For learners placed in special school hostels, the living situation has a negative impact on their quality of life. Not only do disabled children in these settings “become isolated from their families” but also a 2012 DWCPD study found that cases of abuse are prevalent.¹¹⁷

7.2.2.5. Transportation Issues

7.2.2.5.1. As a result of the trend of mainstream schools referring learners with learning barriers to special schools, these learners often have to travel great distances to access a school that will accommodate their learning needs. Of the students interviewed by Human Rights Watch, none of the learners received financial subsidies from the government for transportation costs.¹¹⁸ The additional transport costs to attend special schools often act as a barrier to education.¹¹⁹

¹¹¹ Dep't of Basic Education, *Report on the Implementation of Education, White Paper 6 on Inclusive Education*, 2015, p. 22.

¹¹² *Complicit in Exclusion*, South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities, Human Rights Watch, 2015, 42.

¹¹³ South African Schools Act (No. 84 of 1996).

¹¹⁴ Dep't of Basic Education, *Report on the Implementation of Education, White Paper 6 on Inclusive Education*, 2015, p. 22.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 24.

¹¹⁸ *Complicit in Exclusion*, South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities, Human Rights Watch, 2015, 28.

¹¹⁹ *Id.*



7.2.3. Teaching and Learning Support

7.2.3.1. The diverse learning needs of learners with learning barriers who have been integrated into mainstream schools are not accommodated. The *South African Alternate Report* found that learners with learning barriers are not reaching their full potential because of “poor curriculum delivery, unskilled educators, inflexible curriculum and the lack of commitment to inclusive education.”¹²⁰ The education system’s failure to accommodate learners can be attributed to a lack of appropriate learning materials, exclusion from mainstream classes, and inadequate support for learners.

7.2.3.2. Schools throughout South Africa lack the necessary learning materials to meet the diverse learning needs of learners with

learning barriers. For example, in some regions, blind children wait up to three years for braille textbooks.¹²¹ As a result, these children are unable to participate meaningfully in their education.

7.2.3.3. Even when learners with learning barriers are integrated into mainstream schools, they often are excluded from classes with their able-bodied peers. A 2014 case study found that despite its recent conversion into a full-service school, a local primary school continued to segregate children with disabilities into separate classes.¹²² The school’s conversion included infrastructure and support systems to accommodate disabled learners. More specifically, the conversion included a library, computer lab, ramps, and railings as well as frequent visits from specialists

¹²⁰ Tilley, Alison et al., *Alternate Report to the UN Committee on the Rights of the Child in response to South Africa’s Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child*, South African Alternate Report Coalition, 2015, 36.

¹²¹ *Complicit in Exclusion*, South Africa’s Failure to Guarantee an Inclusive Education for Children with Disabilities, Human Rights Watch, 2015, 47.

¹²² Mashiya, N., *How Inclusive is South African Inclusive Education? A Case Study of Three Foundation Phase Classes*, University of KwaZulu-Natal, School of Education, Early Childhood Development, 2014, 602-603.

(speech therapists, physiotherapists, psychiatrists, remedial teachers etc.).¹²³ Despite these accommodative measures, teachers reported “there is no progress if these [disabled] children are in the same class as normal children” because they “delay the whole learning process.”¹²⁴ Instead of attempting to better integrate disabled learners into mainstream classes, the school separated disabled children into their own classes.¹²⁵

7.2.3.4. This failure to integrate and accommodate disabled learners contradicts the very foundation of an inclusive education system—namely, the inclusion of learners with learning barriers *into mainstream classes*. Furthermore, teacher’s claims that inclusion “delays the whole learning process” are unfounded.¹²⁶ A substantial body of research demonstrates that an inclusive education increases both the quality and quantity of academic success for students with *and* without disabilities.¹²⁷ It is extremely disconcerting that the very schools that are designed to accommodate *all learners* in one class continue to segregate children based on disability.

7.2.3.5. South African’ schools are not providing learners with learning barriers with adequate levels of support to meet their diverse learning needs. Autism experts report that highly functioning children with autism do not receive adequate support in mainstream schools.¹²⁸ More specifically,

these children do not receive the dedicated attention necessary “to avoid them being left unaccompanied, which increases the risk of bullying and anxiety.”¹²⁹

7.2.3.6. In addition, Human Rights Watch found multiple instances in which disabled children were not incorporated into classroom activities.¹³⁰ For example, Phele, a 9-year-old disabled child, “sat in class with no engagement in daily classwork,” only “drawing throughout the day, with no apparent connection to the day’s lessons, while the teacher focuse[d] on getting on with the general curriculum.”¹³¹ A teacher’s role in an inclusive classroom should include “identification of learner strengths concurrently with the provision of assistance in overcoming particular weaknesses by differentiation of the curriculum as well as the methods used to deliver it.”¹³²

7.2.4. School-Based Support Teams and District-Based Support Teams

7.2.4.1. A case study on the implementation of inclusive education in primary schools in the Lejweleputswa Education District found that both school-based and district-based support teams are generally ineffective.¹³³ School based support teams are designed to “be involved centrally in identifying ‘at risk’ learners and addressing barriers to learning.”¹³⁴ However, school-based support teams in the Lejweleputswa

^{123.} *Id.*

^{124.} *Id.*

^{125.} *Id.*

^{126.} *Id.*

^{127.} See Goor, M., Schween, J. *Accommodating Diversity and Disability with Cooperative Learning* (1993); Udvari-Solner. & Thousand (1996).

^{128.} *Complicit in Exclusion, South Africa’s Failure to Guarantee an Inclusive Education for Children with Disabilities*, Human Rights Watch, 2015, 40.

^{129.} *Id.*

^{130.} *Id.* at 47.

^{131.} *Id.*

^{132.} Lebona, G.T., *The Implementation of Inclusive Education in Primary Schools in the Lejweleputswa Education District*, Central University of Technology, 2013, 64.

^{133.} *Id.* at 1.

^{134.} Dep’t of Basic Educ., *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001), 33.

District “lack[ed] knowledge of policies and guidelines for inclusion.”¹³⁵ The support teams also did not receive support “from fellow teachers who are supposed to take the responsibility for identifying learners with problems in his/her subject and collectively designing a support package for such learners.”¹³⁶ As a result, the school-based support teams were unable to fulfill their purpose.

- 7.2.4.2. District-based support teams are intended to provide an additional layer of support to educators in implementing and maintaining an inclusive education system. The primary function of these support teams is “to evaluate and through supporting teaching, build the capacity of schools ... to recognise and address severe learning difficulties and to accommodate a range of learning needs.”¹³⁷ However, the Lejweleputswa study found that the support offered by district-based support teams is minimal.¹³⁸ The district-support team took too “long to monitor progress and offer support to both the SBST [school-based support teams] and referred learners” for their support to be useful.¹³⁹

7.2.5. Training of Educators

- 7.2.5.1. Despite teachers’ central role in an inclusive education system, most of the country’s teachers are not capacitated to understand how a child’s disability affects their ability to learn.



- 7.2.5.2. NGO’s providing teacher training in public schools report that “teachers are not sufficiently qualified and equipped to teach children with disabilities, particularly in mainstream and full-service schools.”¹⁴⁰
- 7.2.5.3. Mambo Maligna, a professional who trains teachers on autism, said that she has “never encountered someone who has the knowledge on autistic children.”¹⁴¹
- 7.2.5.4. Without a basic understanding of a child’s disability, it is unsurprising that teachers are unable to modify their curriculum to address a disabled child’s unique learning needs.

¹³⁵ Lebona, G.T., *The Implementation of Inclusive Education in Primary Schools in the Lejweleputswa Education District*, Central University of Technology, 2013, 22.

¹³⁶ *Id.* at 152.

¹³⁷ Dep’t of Basic Educ., *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001), 47.

¹³⁸ Lebona, G.T., *The Implementation of Inclusive Education in Primary Schools in the Lejweleputswa Education District*, Central University of Technology, 2013, 115.

¹³⁹ *Id.*

¹⁴⁰ *Complicit in Exclusion*, South Africa’s Failure to Guarantee an Inclusive Education for Children with Disabilities, Human Rights Watch, 2015, 54.

¹⁴¹ *Id.* at 58.

7.2.6. The Equal Education Law Centre's Cases

The Equal Education Law Centre had been approached by several parents whose children have been affected by the above-mentioned implementation problems. Two such cases, are the cases of Susan* and Thandi*.

Susan* is 8 years old, attending grade 2. When she was 3 years old she suffered from Cerebral Cysticercosis. As a result, she had to undergo brain surgery. Susan* survived the operation, but according to her family, was never the same little girl anymore. One of the effects of the operation was that Susan* was hyperactive and had problems with concentration and memory. Susan* started her schooling in 2013, but didn't make any progress at school. At first her parents thought that it might just be her teacher, but later they learned that Susan* was experiencing learning difficulties at school. During her time in grade 1 Susan* could not make sense of numbers or form words out of letters and she could not master something as basic as writing of her own name. Her class teacher in consultation with her parents decided that it would be best if Susan* is held back in grade 1. In her Performance Report Susan's* grade 1 teacher stated that, (i) the school does not have the relevant learning material and resources to assist Susan*; (ii) Susan* is a slow learner and was unable to complete the prescribed curriculum; (iii) the school does not have the manpower and necessary skills to assist Susan*; (iv) the foundation phase grade 1 to grade 3 have between 42 – 45 learners and as a result they cannot provide Susan* with the needed one-on-one attention that she requires; (v) the school does not have the necessary facilities to assist Susan*; and (vi) the teacher will have to adapt her learning methods to suit Susan's* needs.

Thus, although Susan's* teacher was aware of her learning barriers, she was unable to provide Susan* with the required assistance. As a result, she was not making any progress at school and was not meeting the required outcomes for grade 1 in the 2013 academic year. Susan* was held back in grade 1.

However, she again did not meet the outcomes of grade 1 in the 2014 academic year. As such, Susan* was transferred to grade 2. Her parents relocated and enrolled her in a different school. They thought that her progress might improve now that she is older, but after engagement with her teacher they learned that Susan's* progress at school was not improving. After discussing Susan's* progress with her teacher, her teacher reported that she is hyperactive and cannot sit at her desk for long periods of time, and that because of the class size and various other challenges, she cannot provide Susan* with the assistance she requires to make progress. Susan's* parents were very concerned about the fact that she is not making progress at school. They try to assist Susan* by taking an active role in her schooling. They help her with homework and constantly engage with her class teacher to enquire whether there is anything they can do to assist her at home. They put up educational charts in her room for her to have constant visual stimulation, but despite all their efforts, Susan's* progress at school is not improving. Susan's parents are concerned as she is still only 8 years old but already developed a negative attitude towards school. Susan* constantly tells her parents that she does not want to attend school. Her parents are scared that she might run away from school one day.



Thandi* is a 16 year old HIV orphan. She was orphaned in 2003 when her mother passed away as a result of an HIV related illness. Thandi* was born prematurely in 2001 and was a very sickly baby, being admitted to the hospital frequently. In 2003 Thandi* moved to Eastern Cape to live with her great aunt. However, in 2008 she returned to live with her grandmother in Cape Town. Thandi* was struggling at school and the family felt that her needs will be better accommodated in Cape Town. Thandi* is now living in Phillipi with her grandmother, grandfather, her aunt and 4 cousins. Thandi* is stunned and microcephaly. In 2009, when she was 9 she was evaluated at the Red Cross Children's Hospital and her cognitive functioning was reported to be at a level of a 3.5 – 4 year old child. In 2009, Thandi* was also seen at a HIV neuro clinic. Her doctor wrote to the Western Cape Department of Education (WCED), and recommended that Thandi* had special educational needs. Thandi's* doctor enquired how the WCED would take the case forward. Thandi* was assessed at the Red Cross Pediatric Neuropsychology Clinic in August 2013. During the assessment it was found that

Thandi's overall performance can be characterised as slow and severely developmentally delayed. They found that while she was pushed into grade 3 at that time, she was functioning intellectually at a level lower than expected of a Grade 1 student, and that while Thandi* had some knowledge of the world, this was very limited as and she struggled with some basic information questions such as "what day follows Sunday" or "name some animals". In addition, it was found that Thandi's* speech, thought processing and behavior are markedly slow. It was recommended that Thandi* be placed in special schooling in order to help her learn in an environment fitted to her intellectual abilities. Further, that Thandi's* schooling will have to have a practical focus to the curriculum. Thandi* is now attending grade 5 at an ordinary public school. She has been on a waiting list for a special school for more than 6 years. Her grandmother is very concerned about her academic performance. Thandi* is a slow learner and is not making satisfactory progress at school. Thandi* is now 16 years old in grade 5 and cannot read, write or understand numbers.

“She has been on a waiting list for a special school for more than 6 years. Her grandmother is very concerned about her academic performance.”

8. CONCLUSION

South Africa has taken positive steps toward the development of policy frameworks for an inclusive education system. However, despite the South Africa's enabling policy framework and constitutional right to an inclusive education, the government has thus far failed to effectively implement an inclusive education system in South Africa. The Equal Education Law Centre, through its own cases, found that the lack of implementation

of the inclusive education law and policy framework is continuously failing learners such as Susan and Thandi, violating their rights to basic education and equality. While significant advocacy has been underway to advance the rights of learners with learning barriers and had made important inroads, much work is still to be done.

