

**"INCLUSION MEANS ACTUAL INCLUSION":  
TOWARDS INCLUSIVE ECD SERVICES FOR  
YOUNG CHILDREN WITH DISABILITIES IN SOUTH AFRICA**

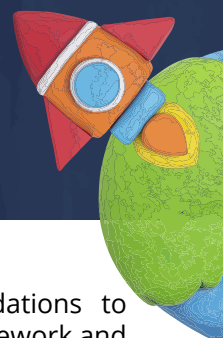




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# EXECUTIVE SUMMARY



Young children with disabilities in South Africa continue to be marginalised, discriminated against, and excluded from early childhood development ('ECD') services. Yet the vulnerable position of young children with disabilities means that access to inclusive ECD services is crucial. Early identification of barriers to learning and development, combined with appropriate interventions, allow children with disabilities an equitable opportunity to realise their full potential. As one ECD practitioner told us:

**"INCLUSION MEANS ACTUAL INCLUSION. IF AN ECD CENTRE HAS ONE CHILD WITH DOWN'S SYNDROME WHO IS LEFT TO SIT IN THE CORNER, THAT'S NOT INCLUSION. FOR US, IT MEANS ALL THE CHILDREN DOING THE SAME ACTIVITIES, TOGETHER. [...] WHEN WE ARE PLANNING ACTIVITIES, THIS IS ALWAYS A CENTRAL CONSIDERATION. 'HOW WILL EACH CHILD DO THIS?' IT'S A QUESTION THAT IS ALWAYS IN OUR MINDS."**

South Africa was one of the first countries to ratify the Convention on the Rights of Persons with Disabilities and is a party to multiple international and African treaties that seek to provide some measure of protection of the socioeconomic rights of children with disabilities. But how well do South Africa's international commitments translate into provision of inclusive, integrated ECD services on the ground? This is the key question this report seeks to address.

In this report, we set out findings from interviews conducted with parents of young children with disabilities and ECD practitioners. Based on these findings, we argue that the failures to translate international commitments into lived realities are two-fold. First, domestic law and policies – especially the Children's Act – are not sufficiently inclusive. Not only do they contain gaps, they also, in some cases, actively create barriers to the realisation of rights. Second, and perhaps more importantly, the inclusive laws and policies that do exist are not properly implemented. One practitioner summarised the problem as follows:

***"After 15 years, I still see no difference... There is still no database of inclusive centres, no funding and no mention of implementation of the National ECD Policy. It seems like grassroots has to remind government of its own policies. They only pay lip service to inclusion and make speeches but there is little evidence of implementation."***

We conclude by making ten recommendations to strengthen and improve the regulatory framework and its implementation to better serve young children with disabilities and their families. The recommendations are:

- 1 Reform existing ECD legislation to concretize the rights of children with disabilities. The Children's Act should define key terms such as 'inclusion' and 'disability'. Inclusivity should be a key consideration throughout the General Regulations Regarding Children and the associated norms and standards for ECD, with an emphasis on universal design and accessibility of inclusive ECD programmes and services.
- 2 Create a state legal obligation to provide and/or fund ECD programmes, including additional funding for children with disabilities. An obligation to fund inclusive ECD programmes must exist in primary legislation and must give effect to the provision in the NIECDP for "public funding to services for infants and children with disabilities, including additional programme funding, post-provisioning and infrastructure funding".
- 3 Make it easier to register as an inclusive ECD programme and to access funding, including by reforming the Children's Act.
- 4 Create a clearer and more detailed legislative mandate for proactive parent and family support.
- 5 Create regulations providing for a flexible compulsory school going age for children with disabilities.
- 6 Add early identification and inclusion to the training for ECD practitioners. There should be revisions to the curriculum content of ECD practitioner qualifications to ensure that practitioners have the skills to identify barriers to learning and development and differentiate their teaching to ensure all children are included in learning activities at the level of their development and ability.
- 7 Create a national integrated tracking and referral system. This tracking and referral system must have a legislative basis.
- 8 Create mechanisms to ensure coordination between different government departments. This mechanism must have a legislative basis.
- 9 Create a system for collection of disaggregated data to measure the extent, quality and impact of ECD services for children with disabilities. This system must have a legislative basis.
- 10 Improve government capacity to ensure delivery of inclusive ECD services to young children with disabilities.

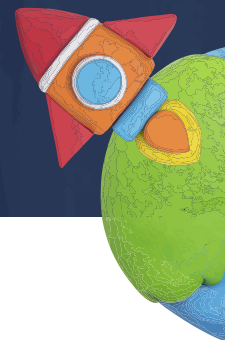
# ACRONYMS



<b>ACERWC</b>	African Committee of Experts on the Rights and Welfare of the Child
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>BELA Bill</b>	Basic Education Laws Amendment Bill
<b>CSTL</b>	Care and Support for Teaching and Learning
<b>DBE</b>	Department of Basic Education (national)
<b>DoH</b>	Department of Health (national)
<b>DSD</b>	Department of Social Development (national)
<b>ECD</b>	Early Childhood Development
<b>ECCE</b>	Early Childhood Care and Education
<b>EELC</b>	Equal Education Law Centre
<b>ELP</b>	Early Learning Programme
<b>IESA</b>	Inclusive Education South Africa
<b>NELDS</b>	National Early Learning and Development Standards for Children Birth to Four Years
<b>NGO</b>	Non-government Organisation
<b>NIECDP</b>	National Integrated Early Childhood Development Policy
<b>NQF</b>	National Qualification Framework
<b>SDG</b>	Sustainable Development Goal
<b>SASA</b>	South African Schools Act
<b>SIAS Policy</b>	Screening, Identification, Assessment, and Support Policy
<b>UN</b>	United Nations
<b>UN CRC</b>	United Nations Convention on the Rights of the Child
<b>UN CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UNICEF</b>	United Nations International Children's Emergency Fund
<b>WPRPD</b>	White Paper on the Rights of Persons with Disabilities
<b>WHO</b>	World Health Organization







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## INTRODUCTION

In 2021, UNICEF and the WHO recognized that across the world children with disabilities can be “disproportionately exposed to risk factors such as poverty; stigma and discrimination; poor caregiver interaction; institutionalization; violence, abuse and neglect; and limited access to programmes and services, all of which can have a significant impact on their survival and development.”<sup>1</sup>

The situation is no different for young children with disabilities in South Africa, who continue to face multiple layers of marginalisation and discrimination. In a recent paper, Professor Mildred Bekink observed that:

**“SOUTH AFRICAN CHILDREN WITH DISABILITIES AND THEIR FAMILIES ARE OFTEN EITHER OSTRACISED OR CONFRONTED BY BARRIERS, WHICH INCLUDE INADEQUATE LEGISLATION, POLICIES AND SERVICES, A LACK OF ACCESSIBLE ENVIRONMENTS, AND NEGATIVE ATTITUDES.”<sup>2</sup>**

One manifestation of this marginalisation and unequal treatment is a lack of access to inclusive early childhood development (‘ECD’) services. Yet, at the same time, the vulnerable position of children with disabilities means that access to ECD services is all the more important. This is an untenable catch-22.

The UN Special Rapporteur on the right to education has recently acknowledged the special importance of ECD services for children with disabilities. She said:

***“By ensuring good health and nutrition, play-based education, behavioural learning and social interaction early in life, ECCE gives children the opportunity to realize their full potential. While it benefits all children, it is more crucial to children from vulnerable groups and to those who have additional needs or difficulties. This can include children with disabilities, children from***

***linguistic, ethnic or cultural minorities, refugees and migrants, children escaping from emergency situations, the economically disadvantaged and children in rural areas.”<sup>3</sup>***

The last two decades have seen increased acknowledgment of and commitment to protecting the rights of young children with disabilities on the part of the South African government. This is evidenced by the signing and ratification of relevant international and regional treaties and by the development of domestic policies. Despite this acknowledgement, significant gaps remain in primary legislation, in the implementation of ECD policies and in actual access to quality, integrated and inclusive ECD services for young children with disabilities. In this report, we argue that the situation calls for legislative reform. However, it is equally if not more important to address gaps in implementation.

The report proceeds as follows: first, we set out our methodology. Second, we explore the concept of ‘inclusive ECD services’. Third, we set out South Africa’s international obligations to provide inclusive ECD services for children with disabilities. Fourth, we analyse the domestic regulatory framework for ECD in South Africa in light of these international obligations. Fifth, we discuss gaps in implementation and the barriers experienced by young children with disabilities and their families in accessing their rights to inclusive ECD services. Finally, we make some recommendations for inclusive regulatory reform for ECD in South Africa, as well as mechanisms needed to ensure adequate implementation.

## METHODOLOGY

To produce this report, we analysed the international law binding South Africa to identify the extent to which it includes state obligations to ensure access to inclusive ECD services for children with disabilities. We then analysed the domestic laws and policies for ECD to determine whether and to what extent they reflect and facilitate the domestication of South Africa’s international commitments. Finally, we looked at

1. WHO & UNICEF, Early Childhood Development and Disability: A discussion paper, 2021, available at [http://apps.who.int/iris/bitstream/handle/10665/75355/9789241504065\\_eng.pdf;jsessionid=A64B2CB84076ED876E5C4E206AB88F89?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/75355/9789241504065_eng.pdf;jsessionid=A64B2CB84076ED876E5C4E206AB88F89?sequence=1).

2. Bekink, M (2022) “The right of children with disabilities to early childhood development: Is South Africa complying with international law?”, *South African Journal on Human Rights*, 38:3-4, 192-214, available at <https://doi.org/10.1080/02587203.2022.2149421>, at page 193.

3. Report of the Special Rapporteur on the Right to Education, Koumbou Bolly Parry, September 2022, Page 4, [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR\\_Report\\_ECCE\\_A.77.324\\_Oct2022\\_EN.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Report_ECCE_A.77.324_Oct2022_EN.pdf).



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gaps in the implementation of the international and domestic regulatory framework. To identify these gaps, we drew on existing statistical research. We also draw on interviews conducted between 2021 and 2023 in the Western Cape with parents of young children with disabilities and the ECD practitioners who work with them.

To ensure a range of perspectives, we interviewed parents and practitioners working at: (1) ECD centres and organisations who we consider to be inclusivity leaders in South Africa, namely Inclusive Education South Africa (IESA)<sup>4</sup> and Chaeli Cottage, Plumstead, Cape Town; (2) settings specifically catering for children with disabilities; and (3) mixed settings, catering for some children with disabilities and some without. Our interviews covered urban, suburban and township settings. One limitation of our research is that we did not conduct interviews in rural settings. Further, our sample was limited to the Western Cape. Nonetheless, we consider that there is sufficient diversity within the sample to give offer some valuable insights into the perceptions of and challenges to accessing inclusive ECD services. The interviews were semi-structured and informed consent was given by all participants. In this report, all parents and children remain fully anonymous: parents' names, children's names and any identifying details are redacted. We do not give practitioner names, but we do identify their organisation and position.

## INCLUSIVE ECD SERVICES: WHAT DOES THIS MEAN?

Since at least 1994, there has been an emerging worldwide consensus in favour of inclusive education, meaning that

**"[A]LL CHILDREN SHOULD LEARN TOGETHER, WHEREVER POSSIBLE, REGARDLESS OF ANY DIFFICULTIES OR DIFFERENCES THEY MAY HAVE. INCLUSIVE SCHOOLS MUST RECOGNIZE AND RESPOND TO THE DIVERSE NEEDS OF THEIR STUDENTS."<sup>5</sup>**

This includes children with disabilities, and it also includes "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." It is widely considered to be more beneficial for all children to learn together in an inclusive setting than to be segregated in specialised settings.

This concept of inclusive education can and must be extended to ECD. Under section 91 of the Children's Act, ECD is defined as "the process of emotional, cognitive, sensory, spiritual, moral, physical, social and communication development of children from birth to school going age." ECD services are services "intended to promote ECD and are provided by a person, other than a child's parent or caregiver, on a regular basis to children up to school going age". The definition of ECD programme stipulates that it is a programme "structured within an ECD service". Generally speaking, ECD services are understood to be broader than ECD programmes. They include health services, such as de-worming and supplementary nutrition, child protection services, birth registration and more. ECD programmes tend to be centred around early learning opportunities and may include attendance-based ECD centres and non-centre based modalities such as play groups and toy libraries. A truly inclusive ECD programme would accommodate all young children, without exception. That being said, for the purposes of this report, we focus specifically on the inclusion of children with disabilities in ECD programmes.

The UN Committee on the Rights of Persons with Disabilities explains that a core feature of inclusive education is a 'whole person approach' which requires "the provision of support and reasonable accommodation and early intervention" in order for children to be able to reach their full potential.<sup>6</sup> They further clarifies that states are required to "take effective measures to provide habilitation and rehabilitation services within the education system, including healthcare, occupational, physical, social, counselling and other services" which "should begin at the earliest stage possible."<sup>7</sup> They also call on governments to support "the development of community-based

4. Inclusive Education South Africa is a registered NPO that has, since 1995, been committed to promoting and supporting positive models of inclusive education in schools, pre-schools and other centres of learning in South Africa. They have successfully worked in over 100 ECD Centres, trained over 6000 practitioners and developed a holistic programme to support the strengthening of inclusive ECD programmes throughout South Africa. For the purpose of this article, two of the ECD facilitators at IESA were interviewed. The facilitators gave informed consent to use data collected from the interviews in this report.

5. UNESCO (1994) The Salamanca Statement and Framework for Action on Special Needs Education.

6. Ibid, para 12.

7. Ibid, para 53.



rehabilitation that addresses early identification<sup>8</sup> and work “in coordination with relevant national bodies, Organizations of Persons with Disabilities (OPDs) and other Non-Governmental Organization (NGO) partners.”<sup>9</sup>

More recently, the UN Special Rapporteur on the right to basic education adapted the ‘four A’s’ framework when outlining the characteristics of access to inclusive, human-rights based ECD services. The four A’s are availability; accessibility; acceptability; and adaptability. Taking each of these in turn:

★ **AVAILABILITY** – “requires that staff be fully trained in play-based pedagogical methodologies, with sufficient teaching materials, equipment, mentoring and ongoing support, and that the location be safe and functional, including with access to safe drinking water and gender-separated sanitation facilities. Available education also considers the requirements of learners, such as teaching in local or minority languages, or flexibly travelling with nomadic populations.”

★ **ACCESSIBILITY** – “means that ECCE schools and programmes are physically and economically accessible to everyone and inclusive without discrimination. This involves acknowledging such factors as languages, gender, geographical location, poverty or social status that may lead to discrimination and including appropriate support or accommodations that respect those differences and, to the extent possible and as appropriate, celebrate rather than stigmatize them. Accessible education avoids ancillary or hidden fees, such as for books, stationary, uniforms or lunches, and provides targeted financial support as required. It includes accessibility measures for children with physical disabilities, qualified caregivers for children with developmental needs, multilingual caregivers and instructors who support minority language learners, and psychosocial support providers for children facing stress or harm from their home or broader war or emergency-based situations. Support for children often requires support for families to ensure that they are aware of and able to gain access to other forms of support, including social welfare care, which may be underused by migrant or refugee families.”

★ **ACCEPTABILITY** – “refers to the form and substance of education, including its curricula and teaching methods, being relevant, culturally appropriate and of good quality. The State, in consultation with teachers and parents, has an obligation to set and enforce those standards, both in public and private educational settings. This includes due attention to the linguistic, cultural and religious needs of children, in particular for minorities, migrants or refugees.”

★ **ADAPTABILITY** – “demands that education be flexible, adapting to the needs of changing societies and communities and responding to those of students within their diverse social and cultural settings. This may include providing local language instruction for minorities, migrants and refugees, as appropriate, and making the curriculum culturally appropriate and relevant, rather than relying on a single dominant narrative.”<sup>10</sup>

Our parent and practitioner interviews corroborate and supplement the international thinking on the concept of inclusivity. On the importance of inclusivity and what it means in practice, one parent we interviewed spoke about the need to place children with disabilities in mainstream ECD programmes wherever possible:

**“EVEN THOUGH THEY [CHILDREN] HAVE DISABILITIES AND CHALLENGES, THEY SHOULDN'T BE ISOLATED AND EXCLUDED AND PLACED IN DIFFERENT SCHOOL, UNLESS THEY REALLY DO HAVE SEVERE NEEDS.”**

Another parent explained why she felt it was important for her child to be in an inclusive centre:

**“I WANTED HIM TO BE IN A PLACE WHERE THERE ARE CHILDREN WHO ARE ABLE TO DO THINGS 'NORMALLY'. I WANTED HIM TO LEARN FROM OTHERS. I DIDN'T WANT HIM TO SEE HIMSELF AS DIFFERENT AND VIEW THAT NEGATIVELY, AND NOT PUSH HIMSELF AND THRIVE.”**

8. Ibid.

9. Ibid.

10. Report of the Special Rapporteur on the right to education, A/77/324, pages 13-14.



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Inclusion does not only benefit the child with a disability. A parent at an inclusive ECD centre shared how valuable it had been for her able-bodied child to attend the centre:

*"To bring my child into this environment was so needed. Especially in the world we're living in now. I wanted my little boy to see what it is like and feel what it is to be in a wheelchair, and for someone to be included, even though you're not verbal, even if you can't talk, even if you can't walk."*

*The difference in my son is huge. The teacher at his new school said he is a very special boy. She said that if we can only get boys like him in this world, the world would be a different place. He would go and help children with special needs without the child even needing to ask. He would take the child by the hand and say "come, show me what you want to play with."*

Where I'm from, where I stay, you don't get that. You exclude those type of people. If you're in a wheelchair, people look at you differently. Now, my son can go into the world and see things differently. He knows that just because you're in a wheelchair, it doesn't mean you're not bringing anything."

A third parent spoke about inclusivity as a way to foster understanding of difference:

*"I think human beings can be quite cruel. When we say children are cruel to each other, I think it's because parents are not educating them enough about differences. I would hate [my daughter] to be singled out as a child that's different. Even though my other two children grew up in the same household, with the same parents, they developed differently from each other. They walked at different times; they talked at different times. One child is better at certain things than other. That's the law of nature. Everyone is different, whether they have disabilities or not."*

*My main wish for my child is for her to live as independently as her abilities will allow. I want her to have access to the same opportunities as other kids. I want others who see my daughter to accept her and to understand that maybe there are some things she can do that their children can't. I want there to be no difference between your child and mine. I accept, there are some things she may never do. I just don't want her to be stigmatised [...]*

*This condition is out of her hands and out of ours. No amount of money could change her physically. She cannot defend herself verbally or physically from bullying. If we don't educate kids as to these differences, they will ridicule my daughter and they will ridicule other children who are different."*

*I just think inclusivity means being fair and equitable to everyone. What's she's going through, it's not because of anything she did."*

## PROMISING PRACTICE: CHAEI COTTAGE – INCLUSIVE ECD CENTRE

We visited and interviewed practitioners and parents at Chaeli Cottage in Plumstead, Cape Town. Chaeli Cottage provides an excellent example of an inclusive ECD Centre embracing and living out the Four A's. The ECD centre has been running for more than 10 years and, as of 2023, approximately 20 children were enrolled. Children are typically aged between three and six years. Chaeli Cottage aims to have a 50/50 split between able-bodied children and disabled children, though the principal noted that it is sometimes harder to attract able-bodied children. Chaeli Cottage will in principle accept any child with any kind of disability. The class sizes at Chaeli Cottage are relatively small, with about eight children per class. Every day, Chaeli Cottage has two teachers and three facilitators. There are also three therapists who each come once a week: an occupational therapist, a physiotherapist, and a speech therapist.



Figure 1: Physio bed at Chaeli Cottage ECD centre



Practitioners at Chaeli Cottage gave us examples of how they include children with disabilities in day-to-day activities, which are adapted depending on the child's needs. The principal of Chaeli Cottage said:

*"Inclusion means actual inclusion. If an ECD centre has one child with Down's Syndrome who is left to sit in the corner, that's not inclusion. For us, it means all the children doing the same activities, together.*

*For example, earlier today, all the children made volcanoes. Some did it completely on their own; some did it with hand-over-hand facilitation. But all children participated. Even if we have to demonstrate the whole activity, we let the child make choices. For example, we ask, 'What colour would you like to use?' When we are planning activities, this is always a central consideration.*



*"How will each child do this?' It's a question that is always in our minds."*

She went on to describe how children at Chaeli Cottage also learn how to implement inclusive practices:

**"WE DON'T TEACH INCLUSION, WE LIVE IT. CHILDREN DON'T DO WHAT YOU SAY; THEY DO WHAT YOU DO."**

*If a child maybe hasn't seen a wheelchair before, they might look [askance]. But then they love it – we have wheelchairs that they can use for play, and it's one of their favourite activities. Everything is for everybody here.*



Figure 2: Wheelchair accessible playhouse with raised sandpit

*The able-bodied children and children with disabilities support one another. One little girl is a mothering figure. For example, if she sees another child struggling with scissors, she asks, 'Can I help you with the cutting?' Sometimes I intervene and say, 'No. Thank you, but let him do it.' Other times I allow her to intervene. Our children naturally developed that instinct, because they see us helping where it is needed."*

Other practitioners at Chaeli Cottage similarly told us about how they adapt the same activity to suit children with different abilities, using methods such as hand-

over-hand facilitation:

*"We have a lot of kids who can't draw by themselves or can't use a paintbrush on their own. Those that can, I will give them a paintbrush to paint or give them crayons to colour. For those that can't, we do hand-over-hand, so they get that experience of holding a paintbrush or holding a crayon.*

*I'll give scissors to those that can use them, or we do a bit of tearing for those that can't use scissors.*

*With threading, we do some hand-over-hand. Or sometimes, with those that struggle with balance, I might*





When children reach school age, inclusive ECD programmes can assist with the transition. The Division for Early Childhood of the Council for Exceptional Children defines “transition” as the “events, activities, and processes associated with key changes between environments or programs during the early childhood years and the practices that support the adjustment of the child and family to the new setting.” This includes transitions into early intervention programmes or inclusive ECD centres and from these into school. These transitions are particularly important for young children with disabilities to ensure continuity in support and interventions. They require intentional collaboration between ECD practitioners and caregivers and between ECD practitioners and primary school teachers.

There is a close connection between early identification and smooth transitions to school. If a child’s needs have been accurately identified early on, it will be much easier to find them a suitable school placement.

*hold the string steady for them so they can thread the beads. We want them to get that experience of holding – of different textures.”*

At Chaeli Cottage, the in-house therapists play a key role in facilitating transitions to school:

Another crucial aspect of inclusive ECD services for children with disabilities are effective systems for early identification and referral. At Chaeli Cottage, the in-house therapists are the “information-sharing point of contact”. They “build up connections with the hospitals and this helps children to access the help they need”. However, at other settings, without in-house therapists, early identification and referrals can be more difficult.

*“Plotting out the pathway of ‘where to from here’, early on, is something the centre helps with. It’s a journey for everybody – and we walk that journey together. The therapists are also very helpful in this. We’re so fortunate with the team we have.*

*Some children will go to mainstream schools, others will go to inclusive schools such as Pinelands North, and others still will need to go to special needs schools.”*



Figure 4: Padded story time area



Figure 5: Padded play mat



The importance of inclusive ECD services is recognised by international treaty bodies and in South Africa's own policies. The UN Committee on the Rights of the Child in its General Comment 7 reiterated the need for prioritizing inclusive ECD service provision over segregation or institutionalisation of young children with disabilities:

**“EARLY CHILDHOOD IS THE PERIOD DURING WHICH DISABILITIES ARE USUALLY IDENTIFIED AND THE IMPACT ON CHILDREN'S WELL-BEING AND DEVELOPMENT RECOGNIZED. YOUNG CHILDREN SHOULD NEVER BE INSTITUTIONALIZED SOLELY ON THE GROUNDS OF DISABILITY. IT IS A PRIORITY TO ENSURE THAT THEY HAVE EQUAL OPPORTUNITIES TO PARTICIPATE FULLY IN EDUCATION AND COMMUNITY LIFE, INCLUDING BY THE REMOVAL OF BARRIERS THAT IMPEDE THE REALIZATION OF THEIR RIGHTS.”<sup>11</sup>**

This view is supported in South Africa's White Paper on the Rights of Persons with Disabilities (WPRPD) under Pillar 4, where it sets out the benefits of inclusive ECD programmes:

- ★ “Inclusion provides a platform for learning opportunities that do not exist in settings where there are only children with disabilities;
- ★ There are opportunities for observational learning and interactions with peers without disabilities;
- ★ Children with disabilities tend to engage in higher levels of play when they are with children without disabilities;
- ★ Inclusion at preschool level has been found to increase social contact between children with and without disabilities and has the potential to impact on the attitudes of children without disabilities towards their peers with disabilities. The experience of being together provides the opportunity to learn important life skills, including dealing with difference and recognition that in different respects we are all dependent on one another; and

- ★ Early identification and appropriate referral and access to intervention enhances optimal development.”<sup>12</sup>

As a consequence, the WPRPD directs that children with disabilities must have equitable access to all ECD programmes and facilities requiring that “mainstream ECD programmes and facilities are made accessible for children with disabilities, i.e. that infrastructure; attitudes, equipment and activities do not hinder the participation of children with disabilities. Thus, building plans, playgrounds, equipment, toys and ECD practitioner training comply with universal design norms and standards.”

In what follows, we analyse the international and domestic frameworks for inclusive ECD services in more detail.

## THE INTERNATIONAL FRAMEWORK FOR INCLUSIVE ECD SERVICES

In this section, we consider the international framework for inclusive ECD services, as applicable in South Africa. South Africa was one of the first countries to ratify the UN Convention on the Rights of Persons with Disabilities (UN CRPD) and is a party to multiple international and African treaties that seek to provide some measure of protection of the socioeconomic rights of children with disabilities.

Aside from the UN CRPD, the most significant among these are the United Nations Convention on the Rights of the Child (UN CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). These treaties and their significance in the context of ECD services for children with disabilities have recently been analysed by Professor Mildred Bekink.<sup>13</sup> We discuss each of the treaties in turn, drawing and building on Bekink's analysis.

### United Nations Convention on the Rights of the Child (UN CRC)

Article 6 of the UN CRC protects a child's right to life, survival and development. Under Article 6(2), South Africa is committed to ensuring “to the maximum extent

11. UN Committee on the Rights of the Child, General Comment 7, 2005, Para. 36 d.

12. White Paper on the Rights of Persons with Disabilities, 2015, Pillar 4.

13. Bekink, M (2022) “The right of children with disabilities to early childhood development: Is South Africa complying with international law?”, South African Journal on Human Rights”, 38:3-4, 192-214, available at <https://doi.org/10.1080/02587203.2022.2149421>.



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possible, the survival and development of the child". The inclusion of the word 'development' is important. To fulfil its obligations under Article 6, it would not be enough for South Africa to address infant mortality, for example. Article 6 goes beyond a mere right to life and survival. Rather – and especially when read with Article 27 – it encompasses physical, mental, spiritual, moral and social development. For this reason, Article 6 has been described by Julia Sloth-Nielsen and Sue Philpott as the 'nucleus' of the right to ECD in South Africa,<sup>14</sup> and this position has also been endorsed by Bekink.<sup>15</sup>

The UN CRC also includes other relevant rights. The right to education is protected by Articles 28 and 29. Admittedly, Article 28 only explicitly covers primary, secondary and higher education. It does not explicitly include a right to early learning or pre-primary education. However, Article 29 states that "the education of the child shall be directed to... [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential". In light of this, Professor Sandra Fredman and others have argued that Article 29 could be interpreted to include early childhood care and education.<sup>16</sup>

This interpretation is strongly reinforced by general comments on the UN CRC. In particular, General Comment 7, 'Implementing Child Rights in Early Childhood' is instructive. In General Comment 7, the Committee "interprets the right to education during early childhood as beginning at birth and closely linked to young children's right to maximum development".

Importantly, the UN CRC also specifically recognises the rights of children with disabilities. In particular, Article 23(1) enjoins states to "recognize 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 participation in the community." In our view, this provides implicit recognition of the importance of inclusivity and buttresses the argument that children with disabilities have a right to inclusive ECD services.

Under Article 23(2) states must "recognize the right of the disabled child to special care" and "shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child."

Article 23(3) provides that states must ensure that a child with disabilities "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".

Finally, Article 2 of the UN CRC protects children against discrimination. States must "respect and ensure" the rights in the UN CRC "without discrimination of any kind" and "irrespective" of the characteristics of the child including, amongst other things, any disability they may have.

Bekink notes that Article 23 has been criticised, not least because it gives children a conditional, resource-dependent right – rather than an absolute right – to special care. Nonetheless, she concludes that the CRC was an important milestone in the recognition of the rights to children with disabilities:

**"ALTHOUGH THE CRC HAS BEEN CRITICISED FOR NOT IMPROVING THE RIGHTS OF DISABLED CHILDREN – INCLUDING THE RIGHT TO ECD, AS INDICATED ABOVE – IT IS THE FIRST HUMAN RIGHTS INSTRUMENT TO EXPLICITLY REFERENCE CHILDREN WITH DISABILITIES, SETTING THE TONE FOR SUBSEQUENT INTERNATIONAL DOCUMENTS ON THE RIGHTS OF THESE CHILDREN. AS SUCH, IT IS OF SIGNIFICANT VALUE."<sup>17</sup>**

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14. Sloth-Nielsen J and Philpott S, "The intersection between article 6 of the UN Convention on the Rights of the Child and early child development" (2015) 26 Stellenbosch Law Review 295, at page 301.
  15. Bekink, M (2022) "The right of children with disabilities to early childhood development: Is South Africa complying with international law?", *South African Journal on Human Rights*, 38:3-4, 192-214, available at <https://doi.org/10.1080/02587203.2022.2149421>, at page 197.
  16. Fredman, S, Donati, G, Richter, LM, Naicker, SN, Behrman, JR, Lu, C et al., 2022, "Recognising the right to early childhood education as a human right in international law", *Human Rights Law Review*, 2022, 22, 1-20. In their usage, the term early childhood care and education encompasses early childhood development, at page 7.
  17. Bekink, M (2022) "The right of children with disabilities to early childhood development: Is South Africa complying with international law?", *South African Journal on Human Rights*, 38:3-4, 192-214, available at <https://doi.org/10.1080/02587203.2022.2149421>, at page 201.





We agree that the UN CRC has value. Although it could be clearer and more explicit, one could argue that the UN CRC implicitly includes a right to early childhood care and education and – especially when Article 29 is read with Article 23(1) and Article 2 – this arguably encompasses a right to inclusive ECD services to which children with disabilities are entitled without discrimination. That being said, the UN CPRD goes much further than the UN CRC in protecting the rights of children with disabilities and is much more explicit about the state’s duties to ensure access to inclusive ECD services.

### UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities (UN CRPD) does not exclusively apply to children or early childhood development; it concerns the rights of all persons with disabilities. However, one of the eight principles of the UN CRPD is “[r]espect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.” In addition to this general principle, Article 7 is devoted to the rights of children with disabilities. Perhaps most importantly for our purposes, Article 7(1) requires states to “take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.”

Bekink notes that – unlike Article 23 of the UN CRC – Article 7 of the UN CRPD does not contain any progressive realisation clause. States must take “all necessary measures” to ensure that children with disabilities have equal enjoyment of rights and freedoms, and this is not subject to “available resources”. Arguably, then, Article 7 of the UN CRPD not only complements but strengthens Article 23 of the UN CRC and addresses some of the criticisms levelled against the latter.

Article 24 is also important. It concerns education. General Comment 4 of the Committee on the Rights of Persons with Disabilities makes clear that Article 24 enshrines a right to inclusive education. It also emphasises inclusive education “at all levels”, including “pre-school” as well as primary, secondary, and post-secondary education. It should be noted that General Comment 4 frames the state’s duties to provide inclusive education in terms of ‘progressive realisation’. That being said, there are some things that states must do immediately, as part of their “minimum core

obligations” to meet the “minimum essential levels” of the right. This includes non-discrimination:

**“NON-DISCRIMINATION APPLIES FULLY AND IMMEDIATELY TO ALL ASPECTS OF EDUCATION AND ENCOMPASSES ALL INTERNATIONALLY PROHIBITED GROUNDS OF DISCRIMINATION. THE OBLIGATION TO ENSURE NON-EXCLUSION FROM EDUCATION FOR PERSONS WITH DISABILITIES THEREFORE HAS IMMEDIATE EFFECT. STATES PARTIES ARE REQUIRED TO ELIMINATE STRUCTURAL DISADVANTAGES IN ORDER TO ACHIEVE EFFECTIVE PARTICIPATION AND EQUALITY FOR ALL PERSONS WITH DISABILITIES. THUS, THEY MUST TAKE URGENT STEPS TO REMOVE ALL LEGAL, ADMINISTRATIVE AND OTHER FORMS OF DISCRIMINATION THAT IMPEDE THE RIGHT OF ACCESS TO EDUCATION.”**

Taken together, Article 7 and Article 24 of the UN CRPD mean that states are required to take all necessary measures – without any caveat relating to resource constraints – to immediately ensure that children with disabilities have equal enjoyment of the right to inclusive pre-school education.

### African Charter on the Rights and Welfare of the Child (ACRWC)

Like Article 6 of the UN CRC, Article 5 of the African Charter on the Rights and Welfare of the Child (ACRWC) also protects a child’s right to life and development. Under Article 5(2), states must “ensure, to the maximum extent possible, the survival, protection and development of the child”. The ACRWC also includes a right to education under Article 11 and stipulates that education shall be directed to “the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential”, amongst other things.

Article 26 offers children protection against discrimination, and states are enjoined to “individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practicing racial, ethnic, religious or other forms of discrimination”. Although it is not explicit, this is best understood as encompassing discrimination on the



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basis of disability; especially given the ongoing stigma against children with disabilities globally and within the African region.

In addition to the protections from discrimination under Article 26, Article 13 accords special rights to children with disabilities. Article 13(1) is particularly significant and states that:

**"EVERY CHILD WHO IS MENTALLY OR PHYSICALLY DISABLED SHALL HAVE THE RIGHT TO SPECIAL MEASURES OF PROTECTION IN KEEPING WITH HIS PHYSICAL AND MORAL NEEDS AND UNDER CONDITIONS WHICH ENSURE HIS DIGNITY, PROMOTE HIS SELF-RELIANCE AND ACTIVE PARTICIPATION IN THE COMMUNITY."**

The provisions of the ACRWC are supplemented by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the Protocol). Article 28 specifically concerns children with disabilities, and Article 28(4) sets out the types of legislative, policy and other measures that states are required to take to realise the rights of children with disabilities. Among the most relevant to the provisions of inclusive ECD services are Articles 28(4)(c), (h), (i), and (j) of the Protocol. Article 28(4)(c) requires states to take measures ensuring the life, survival, protection and – importantly – the *development* of children with disabilities. Article 28(4)(h) requires states to take specific measures to protect children with disabilities who require more intensive support. Article 28(4)(i) requires states to take measures ensuring that children with disabilities have effective access to education and recreational opportunities in settings most conducive for them to achieve the *fullest possible social inclusion*, individual development and moral and cultural development, while Article 28(4)(j) requires states to take measures fostering in all children *from an early age* an attitude of respect for the rights of persons with disabilities. In our view, these provisions provide very strong support for inclusive ECD services for children with disabilities.

It is clear, then, that South Africa has international obligations to ensure that children with disabilities have access to inclusive ECD services. But research has shown that it is equally clear that these international commitments do not translate into provision of inclusive, integrated ECD services on the ground. The NIECDP stated that:

*"Only a small proportion of children with disabilities (4 to 5%) are estimated to be attending early childhood development programmes offered at partial care facilities. Analysis of the profile of Care Dependency Grant (CDG) beneficiaries in 2006 found that only 24 per cent of children aged birth to 6 years attended an early childhood development centre or child-minding group. Home- and community-based early learning opportunities are also not widely available for children with disabilities."*<sup>18</sup>

The NIECDP dates from 2015. Unfortunately, there are no up-to-date and reliable estimates of the number of children with disabilities in South Africa, nor are there any up-to-date and reliable figures on access to ECD programmes for children with disabilities. Indeed, the lack of reliable and disaggregated data has repeatedly been highlighted by international treaty bodies in their concluding observations to the South African state.<sup>19</sup> This represents a serious problem for planning and facilitating universal access. It is also indicative of the low priority afforded to fulfilling the rights of children with disabilities, and the gaps in abilities to accurately identify disabilities and developmental delays.

It is notable that the DBE's ECD Baseline Assessment 2022 did not include any accurate estimate of the number of children with disabilities at ECD programmes, "mostly due to the fieldworker expertise required for such an undertaking". ECD principals involved in the assessment were not generally capacitated to identify disabilities or developmental delays, either. They were therefore asked to provide information about the number of children who have difficulty in seeing, hearing, walking, holding a crayon, communicating or learning. The estimates provided were extremely low: 0.1% of children were identified as having difficulty seeing; 0.1% were identified as having difficulty hearing;

18. National Integrated ECD Policy, 2015, at page 44.

19. Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its First Periodic Report on the Implementation of The African Charter on the Rights and Welfare of the Child, March 2019, at paras. 28C and D; UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of South Africa, CRPD/C/ZAF/CO/1 (23 October 2018), at page 13; UN Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa, CRC/C/ZAF/CO/2 (27 October 2016), at page 12.



0.2% were identified as having difficulty walking; 0.6% were identified as having difficulty holding a crayon; 0.6% were identified as having difficulty communicating; and 0.9% were identified as having difficulty learning. Despite the challenges involved in data collection, this does seem to suggest many children with disabilities continue to lack access to an ECD programme.

This picture was confirmed in interviews with parents of young children with disabilities who struggled to find ECD centres or programmes that would include their children. Where centres were willing to admit their children, many were ill-equipped to offer them tailored programmes or interventions suited to their specific disabilities. What is going wrong? In the next sections, we argue that the failures to translate international commitments into lived realities are two-fold. First, domestic law and policies – especially the Children’s Act – are not sufficiently inclusive. Not only do they contain gaps, they also, in some cases, actively create barriers to the realisation of rights. Second, and perhaps more importantly, the inclusive laws and policies that do exist are not properly implemented.

## DOMESTIC LAWS AND POLICIES: AN ANALYSIS OF THE FLAWS AND GAPS

In this section, we consider the flaws and gaps in the domestic laws and policies, in light of South Africa’s international commitments.

The existing regulatory framework for ECD includes the Constitution, primary legislation, secondary legislation (such as regulations and norms and standards), and policies. While the rights contained in the Constitution are vital and form the bedrock of the South African political and legal system, primary legislation is required to concretize these rights. Secondary legislation is better-suited to more detailed, context-specific requirements, as it is easier to amend and can therefore be adapted as circumstances change. For example, primary legislation contains the overall scheme for the registration and monitoring and inspection of ECD programmes, while secondary legislation contains more detailed registration requirements. Policies, while offering a valuable statement of governmental plans and intentions, are not legally binding. Therefore, essential, rights-protecting measures should not generally be contained only in policies.

As we will explain further in this section, one of the main problems with the regulatory framework is that key provisions intended to protect and promote the rights of children with disabilities to inclusive ECD services are contained only in policies, and not in law.

Another fundamental problem is that the regulatory framework is complicated, fragmented and inconsistent. There are a plethora of laws and policies regulating ECD, and they sometimes conflict with one another.

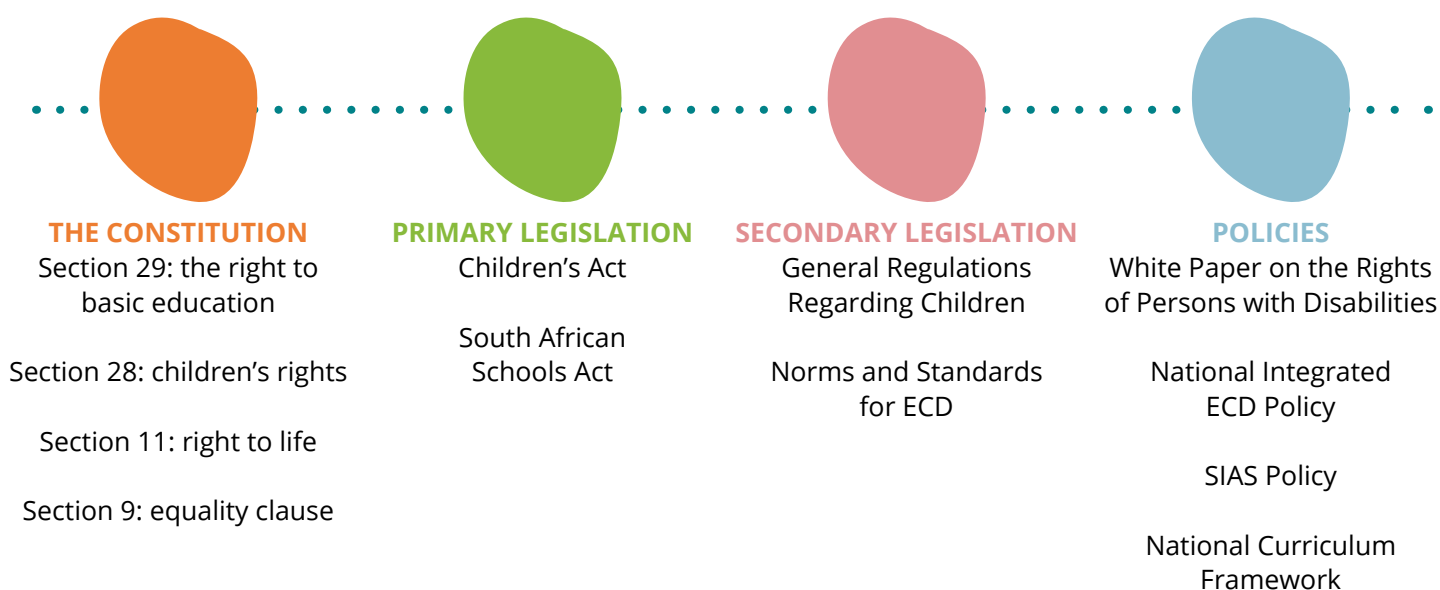


Figure 6: Different types of law and policies relating to ECD



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The table below sets out some of the key laws and policies regulating ECD, with a special focus on those that have particular relevance for children with disabilities. The table also includes forthcoming and proposed amendments to key legislation.

DATE	LAW OR POLICY	DESCRIPTION
1996	The Constitution of South Africa	The Constitution contains a number of rights that are relevant to ECD. These include: <ul style="list-style-type: none"> <li>• Section 9 – Section 9 protects the right to equality, including of persons with disabilities.</li> <li>• Section 11 – Section 11 protects the right to life.</li> <li>• Section 28 – Section 28 gives every child the right to basic nutrition, shelter, basic health care services and social services, amongst other things.</li> <li>• Section 29 – Section 29 gives everyone the right to a basic education.</li> </ul>
1996	South African Schools Act	The South African Schools Act covers the funding and governance of schools. Of particular significance for the purposes of this report are the provisions dealing with compulsory school going age, which would be amended by the Basic Education Laws Amendment Bill (see further below).
2005	Children's Act	The Children's Act protects the rights of children and provides a framework for their care and protection and the promotion of their well-being. Of particular significance for the purposes of this report are Chapters 5 and 6. Chapter 5 deals with partial care, and Chapter 6 deals with ECD, with a focus on ECD programmes. Importantly, Chapters 5 and 6 contain requirements for partial care facilities and ECD programmes to register with government. If these requirements are met, a partial care facility or ECD programme becomes eligible for discretionary funding, by way of an ECD subsidy of R17 per eligible child per day for centre-based programmes.
2010	General Regulations Regarding Children	The General Regulations Regarding Children were passed pursuant to the Children's Act. They include more detailed registration requirements for partial care facilities and ECD programmes. Annexed to the regulations are norms and standards for partial care and norms and standards for ECD.
2014	Screening, Identification, Assessment and Support Policy	The Screening, Identification, Assessment and Support Policy contains standard procedures for identifying, assessing and providing programmes for learners who require additional support. It is aimed at improving access to quality education for vulnerable learners who experience barriers to learning and children of compulsory school-going age who are not in school due to their disability or other barriers.



DATE	LAW OR POLICY	DESCRIPTION
2015	White Paper on the Rights of Persons with Disabilities	<p>ECD is one of six focus areas to strengthen access to economic independence and a life of dignity for persons with disabilities.</p> <p>Directives specific to ECD are:</p> <ul style="list-style-type: none"> <li>• Children with disabilities must have equitable access to all ECD programmes and facilities.</li> <li>• Disability-specific intervention and support services must be developed.</li> </ul> <p>The WPRPD also stipulates that a national integrated referral and tracking system must be developed to ensure, amongst other things, that all children with disabilities are enrolled in appropriate ECD and compulsory education programmes.</p>
2015	South African National Curriculum Framework for Children: Birth to Four Years	<p>The National Curriculum Framework for Children: Birth to Four Years provides guidance for those developing programmes and working with babies, toddlers and young children from birth to age four. The National Curriculum Framework sets out six Early Learning and Development Areas:</p> <ul style="list-style-type: none"> <li>• Well-being</li> <li>• Identity and belonging</li> <li>• Communication</li> <li>• Exploring mathematics</li> <li>• Creativity</li> <li>• Knowledge and understanding of the world</li> </ul> <p>It contains a detailed definition of 'disability' and also guidance on how to include children with disabilities and developmental delays.</p>
2015	National Integrated ECD Policy	<p>The National Integrated ECD Policy sets out an 'essential package' of ECD services which goes well beyond early learning and also includes nutrition support, health services, child protection, parent and family support.</p> <p>Its long-term goal is that, by 2030, a full comprehensive age- and developmentally stage-appropriate quality ECD programme is available and accessible to all infants and young children and their caregivers.</p> <p>In the National Integrated ECD Policy, there is a strong focus on inclusivity and access to ECD services for children with disabilities.</p>
2020	Children's Amendment Bill 2020	<p>The Children's Amendment Bill 2020 would make changes to the Children's Act, including: amending the definition of an abandoned child and the definition of an orphan; adding new provisions relating to the care of abandoned or orphaned children; extend the children's court jurisdiction; and adding new provisions relating to children in alternative care.</p> <p>An earlier version of the Children's Amendment Bill 2020 contained additional provisions relating to children with disabilities, but these have now been removed.</p>

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DATE	LAW OR POLICY	DESCRIPTION
2021	Presidential Proclamation	The Presidential Proclamation transferred responsibilities under the Children’s Act in relation to ECD from the national Department of Social Development to the national Department of Basic Education. It was accompanied by provincial proclamations, which transferred responsibilities from the provincial departments of social development to the provincial departments of education. These changes took effect on 01 April 2022. The Department of Basic Education now has primary responsibility for registering, monitoring, and funding ECD programmes.
2022	Basic Education Laws Amendment Bill	The Basic Education Laws Amendment (BELA) Bill has now been passed by Parliament and will amend the South African Schools Act. Significantly for the purposes of this report, South African Schools Act will now contain a definition of ‘basic education’, which will now encompass Grade R up to Grade 12. Grade R attendance will also become compulsory for children who will turn six in that school year.
2022	Children’s Amendment Bill 2022	The Children’s Amendment Bill 2022 would primarily make changes to the provisions for ECD, contained in Chapter 6 of the Children’s Act. One of the main objectives of the proposed amendments is to simplify the registration system for ECD programmes.

In what follows, we analyse these key laws and policies and set out their main flaws and gaps, when it comes to providing an enabling environment for inclusive ECD services for children with disabilities.

## The Constitution

The South African Constitution contains a number of rights that are highly relevant to ECD. In our view, a right to holistic, inclusive ECD services can be constructed out of these various rights.

Admittedly, the Constitution does not expressly recognise ECD as a right, nor does it make particular reference to the right to access inclusive ECD services on the part of young children with disabilities. Julia Sloth-Nielsen, Sue Philpott, and Mildred Bekink have all gone as far as to suggest that South Africa’s Bill of Rights does not contain a right to ECD.<sup>20</sup> Instead, in their view, the Constitutional obligation to provide ECD services is derived from South Africa’s ratification of the

CRC (particularly Article 6 which, as explained above, protects a child’s right to life, survival and development) and from section 231(4) of the Constitution, which provides that an international agreement becomes law in the Republic of South Africa when it is enacted into law by national legislation. Sloth-Nielsen and Philpott argue that Article 6 of the CRC has been ‘enacted into law’ by Chapter 6 of the Children’s Act, which covers ECD.<sup>21</sup> Support for this view comes from section 2(c) of the Children’s Act, which states that one of its objects is “to give effect to the Republic’s obligations concerning the wellbeing of children in terms of international instruments binding on the Republic”. However, and as we will explain further below, Chapter 6 of the Children’s Act does not go far enough to domesticate South Africa’s international obligations. Some of the main problems include: the fact that key concepts, such as ‘inclusion’ and ‘disability’ are missing, poorly defined and/or used inconsistently; the lack of state obligations to fund inclusive ECD programmes for children with

20. Sloth-Nielsen J and Philpott S, “The intersection between article 6 of the UN Convention on the Rights of the Child and early child development” (2015) 26 Stellenbosch Law Review 295, at page 314 and Bekink, M (2022) “The right of children with disabilities to early childhood development: Is South Africa complying with international law?”, South African Journal on Human Rights”, 38:3-4, 192-214, available at <https://doi.org/10.1080/02587203.2022.2149421>, at page 206.

21. Sloth-Nielsen J and Philpott S, “The intersection between article 6 of the UN Convention on the Rights of the Child and early child development” (2015) 26 Stellenbosch Law Review 295, at page 313.



disabilities; and the very burdensome two-step registration process for ECD programmes.

Further, it is worth noting that South Africa's Bill of Rights also contains a right to life, protected by section 11. Arguably, this ought to be interpreted to include a child's right to development, in light of Article 6 of the CRC as well as other international treaties discussed above. Under section 39(1)(b), a court when interpreting the Bill of Rights must have regard to international law. Hence, when interpreting the right to life under section 11, the courts must have regard to the broader right to life, survival and development under Article 6 of the CRC, as well as the right to life and development under Article 5(2) of the ACRWC.

Moreover, the Bill of Rights includes other provisions that are highly relevant to ECD. Section 29 guarantees the right to a basic education and, on some views, this extends to early learning. Further, section 28 guarantees children the right to health care, nutrition and social services, all of which are part of the essential package of ECD services as set out in South African policies, especially the NIECP (see further below). While these sections do not explicitly mention children with disabilities, it is clear that they are intended to apply to *all* children living in South Africa.

Finally, the Bill of Rights contains an equality clause, under section 9. This offers children specific protection against discrimination on the basis of disability. Section 9(2) further states that equality includes "the full and equal enjoyment of all rights and freedoms."

Even so, the existence of a right to inclusive ECD services could be made clearer and more explicit within the Bill of Rights. There may be value in reforming the domestic legal framework in this way.

Further, even if one accepts that the Bill of Rights does include a right (or rights) to inclusive ECD services, its realisation requires effective action on the part of the state. Such action would be supported and facilitated by more detailed primary and secondary legislation, which concretize and clarifies the nature of the state's obligations and creates a stronger basis for accountability. As will be explained below, detailed

primary and secondary legislation to enable the provision of inclusive ECD services is currently lacking.

### **The South African Schools Act, 1996**

The South African Schools Act makes it compulsory for children to attend school between the ages of seven and 15 years.<sup>22</sup>

However, following an announcement by the President in the 2019 State of the Nation Address, South Africa is in the process of shifting towards two years of compulsory pre-school.<sup>23</sup> Now, the Basic Education Law Amendment Bill has been passed by Parliament and will make Grade R compulsory. Parents will now be required to send their child to school starting in Grade R. Children should enter Grade R at the start of the school year in which they turn six.

Lowering the compulsory school-going age is likely to have benefits for at least some learners with disabilities. This is because it will create new duties to ensure access to learning opportunities for young children. For example, under sections 3(3) and 3(5) of SASA, the MEC has a duty to ensure that there are enough school places for learners of compulsory school-going age. Further, under the quintile system, compulsory schooling is provided free of charge by the South African government. This means that, by making pre-primary education compulsory, access to free early learning will be improved, including for children with disabilities. Further, the BELA Bill offers an opportunity to act upon the African Committee of Experts on the Rights and Welfare of the Child recommendation that South African government "[f]ocus on the early identification of barriers to learning and intervene with appropriate support in the earlier years."<sup>24</sup>

However, it is important to note that access alone does not guarantee inclusion and quality early learning opportunities. And, while extending free and compulsory schooling to children aged five may help to facilitate early identification and intervention, this will not follow as an automatic consequence. We make recommendations below as to how early identification and intervention can be strengthened and improved. It should also be noted that, in recognition of the fact that some children with disabilities may benefit from

22. South African Schools Act, section 3(1).

23. State of the Nation Address by the President of the Republic of South Africa, President Cyril Ramaphosa, February 2019, accessed at <https://www.stateofthenation.gov.za/assets/downloads/sona-2019-speech.pdf>.

24. Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its First Periodic Report on the implementation of the African Charter on the Rights and Welfare of the Child, March 2019, Para 27 G).



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entering and exiting school at a different time from their peers, the Minister for Basic Education has a specific duty under section 3(2) of SASA to determine the ages of compulsory attendance at school for learners with “special education needs”. However, the problem with section 3(2) is that, in light of the many different types of disability, a uniform approach to the compulsory school going age for children with disabilities is not desirable. This may explain why the duty has not yet been fulfilled. It would be difficult, perhaps impossible, to determine a single compulsory school going age for all children with disabilities. If the Minister were to act on section 3(2), it should be to promulgate regulations containing flexible age ranges, based on the needs and best interests of each learner, which will allow for adequate differentiation between children with different disabilities. We also consider that, for the purposes of section 3(2) of SASA, the term “special education needs” should either be adequately defined or, if the intention is to regulate school going age for learners with disabilities in particular, it should be replaced with the term “disability” and this term should be defined consistently across the Children’s Act and SASA.

### The Children’s Act, 2005

The Children’s Act is the primary piece of legislation regulating the rights of children in South Africa. Prior to April 2022, most of the responsibilities in relation to ECD lay with the national and provincial Departments for Social Development. Since April 2022, and by virtue of the function shift, many of these responsibilities have now been transferred to the DBE and provincial education departments.

The Children’s Act, and the associated General Regulations Regarding Children have come under fierce criticism for the onerous and cumbersome way in which they regulate ECD. Many of these criticisms are relevant to the provision of ECD services generally; they are not specific to children with disabilities. However, as explained above, children with disabilities have a heightened need to access ECD services. Hence, any barriers the Children’s Act presents to the provision of ECD services will be particularly problematic when it comes to children with disabilities.

For the purposes of this report, four problems with the Children’s Act are particularly pertinent in so far as they

hinder access to ECD services for young children with disabilities.

First, while the Act contains some provisions relating to children with disabilities, there is a lack of clear guidance as to how the particular needs of young children with disabilities should be met.

For example, section 11 of the Children’s Act requires due consideration be given to “making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have” and “providing the child and the child’s care-giver with the necessary support services.” In acknowledgement of the need for integrated ECD services, section 92(1) requires consultation between Ministers of Education, Finance, Health, Provincial and Local Government and Transport to develop a comprehensive strategy “aimed at securing a properly resourced, co-ordinated and managed early childhood development system, giving due consideration to children with disabilities or chronic illness.”<sup>25</sup> Similarly, regulation 27 of the General Regulations Regarding Children requires that the skills possessed by an applicant for registration of an early childhood development programme must include the ability to provide programmes appropriate to the needs of the children to whom the services are provided, including children with disabilities, chronic illnesses or other special needs. However, the Children’s Act contains no definition of the terms “special needs” or “disability”. Nor does it contain a properly developed concept of “inclusion” or “inclusive ECD programmes”. And no further detail or guidance is given as to what the obligations under sections 11, and 92(1) and regulation 27 entail. These provisions are therefore vague and ambiguous and do not set concrete standards against which compliance can be assessed.

Given the scant and superficial reference to children with disabilities within the Children’s Act, it cannot, in our view, be said to have met the obligation to domesticate international law, insofar as it relates to the rights of young children with disabilities to inclusive, quality ECD service and programmes. Prior to the development of the National Integrated Early Childhood Development Policy (NIECDP) in 2015, this was compounded by the lack of further guidance in any of the existing guidelines or policies.

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25. Children’s Act, section 92(1).





The 2012 Diagnostic Review of the ECD Sector noted:

**"THE ECD NORMS AND STANDARDS DEVELOPED IN TERMS OF THE CHILDREN'S ACT ARE SILENT ON THE NORMS AND STANDARDS NECESSARY FOR CHILDREN WITH DISABILITIES; THE GUIDELINES FOR ECD SERVICES DEVELOPED BY THE DSD AND UNICEF LIST THE RIGHTS OF CHILDREN WITH DISABILITIES BUT PROVIDE NO GUIDANCE ON HOW TO SECURE THESE RIGHTS IN AN ECD SERVICE CONTEXT. EDUCATION WHITE PAPER 5 ON ECD IS SILENT ON CHILDREN WITH DISABILITIES, AND THE NATIONAL EARLY LEARNING AND DEVELOPMENT STANDARDS FOR CHILDREN BIRTH TO FOUR YEARS (NELDS) PROVIDES MINIMAL GUIDANCE ON CHILDREN FACING BARRIERS TO LEARNING."**

It should be noted that the National Curriculum Framework for Children: Birth to Four Years builds on the NELDS and does contain some further guidance on the inclusion of children with disabilities. Further, the NIECDP does assist in clarifying the state's role in ensuring that children with disabilities have access to ECD services. However, it is important to note that the NIECDP is just a policy and does not have the binding status of law. For further analysis of the NIECDP and National Curriculum Framework, see below.

A second major problem with the Children's Act is the lack of any state obligation to provide or fund inclusive ECD programmes. Sections 78(1) and 93(1) use the discretionary "may", instead of "must", when it comes to funding requirements, thus giving provincial MECS a power but not a duty to fund and/or provide ECD programmes. Admittedly, sections 78(4) and 93(4) of the Children's Act require that, to the extent that discretionary funding of partial care facilities and ECD programmes is made available, it *must* be prioritised to make facilities accessible to children with disabilities. These are important provisions – though, as we will explain in the next section, there is little evidence that such funding has in fact been made available to the sector to support the inclusion of young children with disabilities in mainstream ECD programmes.

Third, the Children's Act contains a very burdensome, two-step registration process for early learning settings. Due to overlapping definitions within the Children's Act, an ECD centre taking care of more than six children will need to register as both a partial care facility and an ECD programme. Further, the registration requirements for partial care facilities – and, therefore, for most ECD centres – are unduly onerous. For example, the General Regulations Regarding Children stipulate that an application for registration must be accompanied by documents including a constitution, a business plan and a building plan. The consequence is that ECD centres face a long and arduous registration journey. Most do not successfully complete the registration journey or – knowing that insurmountable challenges lie ahead – may not even try. According to the ECD Census 2021, only 40% of ECD centres are registered.

Compounding this problem is the fact that, currently, the discretionary funding mandated by the Children's Act is only made available to registered centres, in the form of the ECD subsidy.

The barriers to registration and funding are likely to have a particularly detrimental impact on children with disabilities. If a centre serving an under-resourced community cannot register or access state funding, there is a greater risk that children with disabilities will be excluded, as the centre will seriously struggle to meet their additional support needs.

A fourth problem with the Children's Act is that it makes limited provision for parent and family support outside of the context of prevention and early intervention. Prevention and early intervention programmes are more reactive than proactive: they are aimed at protecting children who have been identified as being at risk and at mitigating potentially harmful behaviour. Little provision is made for proactive capacity building and support for parents and families in situations where the family has not been identified as vulnerable. And no provision is made for programmes that equip parents and families of children with disabilities with the knowledge and skills they need.

The Children's Act is currently undergoing a process of amendment. Unfortunately, at least one opportunity to improve the way to protect and promote the rights of children with disabilities has been missed: an earlier version of the Children's Amendment Bill 2020 contained additional provisions relating to children with disabilities, but these have now been removed. There is





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another set of amendments to the Children's Act that the DBE is currently working on with the assistance of a Technical Task Team, sometimes known as the Children's Amendment Bill 2022. As far as we are aware, this additional set of amendments – as currently drafted – does little improve the lot of children with disabilities. While it would simplify the registration process, and would thereby help more ECD programmes to register and access state funding, it would not introduce state obligations to fund or directly provide inclusive ECD programmes, and it would not define and properly integrate concepts like 'disability' and 'inclusion' into the Children's Act.

### Screening, Identification, Assessment and Support Policy, 2014 (SIAS Policy)

While the Screening, Identification, Assessment and Support Policy (SIAS Policy) applies primarily to learners of school going age, it acknowledges the need for a "smooth transition of learners who have additional support needs from ECD to Grade R and Grade 1."

The SIAS Policy outlines the role, functions and responsibilities of ECD service providers, recognising that they know the children well and can provide useful information to the receiving school regarding strategies that can be used to support the child in an educational setting.

In particular, the SIAS Policy contains a 'Learner Profile: Grade R -12', which must be completed for every child upon entering school and must be updated every year until the child leaves school. Information contained within the learner profile may include information from the Road to Health Booklet and any assessments of the child's support needs or actual support the child received prior to entering school.

In principle, this could help significantly with transitions to school. However, implementation has been lacking. For example, in the 2017 Child Gauge, Sue Philpott and Judith McKenzie noted "a lack of collaboration and synergy continues to prevent a seamless transition for children with disabilities from one sector to another."<sup>27</sup>

### White Paper on the Rights of Persons with Disabilities, 2015 (WPRPD)

Pillar 4 of the White Paper on the Rights of Persons with Disabilities, 2015 (WPRPD) states that:

**"ACCESS TO RELEVANT INFORMATION, EARLY IDENTIFICATION AND COMMUNITY-BASED INTERVENTION SERVICES ACROSS GOVERNMENT DEPARTMENTS AND SPHERES OF GOVERNMENT, AND INCLUSIVE EARLY CHILDHOOD DEVELOPMENT OPPORTUNITIES, IS REQUIRED TO UNLOCK THE POTENTIAL OF CHILDREN WITH DISABILITIES."**

Further, to support the vision of seamless service delivery for children with disabilities, the WPRPD also mandates the development of a national integrated referral and tracking system.<sup>28</sup> The WPRPD stipulates that the seamless system must:

- ★ Identify children at high risk of, or with developmental delays and/or disabilities through Road-to-Health health screening programmes and refer them to relevant accessible services;
- ★ Register all children between the ages of 0-18 years on a centralised database;
- ★ Ensure that children with disabilities on the database are assessed and have access to an individualised developmental support and treatment programme and social assistance benefits;
- ★ To ensure that children with disabilities remain on this programme until the age of 18 years;
- ★ Ensure that all children with disabilities are enrolled in appropriate ECD and compulsory education programmes; and
- ★ Ensure that parents receive timely, appropriate and accessible information to enable them to take decisions in the best interest of their children.

This kind of system has not yet been introduced. As it currently stands, the state of the data on children with disabilities is very poor, and parents struggle to access information and support. We discuss this further in the next section ('Gaps in implementation and access').

It should be noted that the WPRPD in its definition of ECD extends the age range of ECD up to 8 years for children with developmental delays or disabilities: *"The composite cognitive, emotional, physical, mental, communicational, social and spiritual development of children that takes place from conception until they enter formal schooling (i.e. Grade R) or reach the age of 8 years (in the case of children with developmental delays*

27. Philpott, S and McKenzie, J, 'Welcoming all children: The inclusion imperative' in the South African Child Gauge 2017, page 88.

28. White Paper on the Rights of Persons with Disabilities Implementation Matrix, 4.1.3, 2015



*and/or disabilities for whom entry into formal schooling is delayed), whichever occurs first.”*

In our view, this definition of ECD implies that children with disabilities could enter formal schooling as late as the age of 8. As we explain above, while we think that a uniform approach to the compulsory school going age for children with disabilities is not desirable and that some flexibility is required, we also caution against a delayed entry to school for children with disabilities. Importantly, definitions of ECD should be consistent across the regulatory framework.

### **National Curriculum Framework: Birth to Four Years, 2015**

As mentioned above, the National Curriculum Framework builds on the NELDS, and contains some useful guidance on the inclusion of children with disabilities in ECD programmes.

The National Curriculum Framework contains a detailed definition of disability:

*“Disabilities can be intrinsic or within the child herself, for example physical (the loss of a limb or paralysis of a part of the body or a medical condition); sensory (loss of hearing or sight); intellectual (for example, a learning difficulty).*

*Disabilities can be caused or made worse by poverty, violence, unstable family life and abuse.*

*A child is disabled when the people in her environment do not take into account her physical or mental differences and do not cater for them in respectful ways.”*

It also contains a definition of ‘early identification’, and developmental guidelines, examples of activities to support development, and ‘watch points to act upon’ for toddlers and young children at risk.

‘Early identification and intervention of barriers to learning, development and participation’ is defined as follows:

*“A barrier is anything that stands in the way of a child being able to learn. Barriers to learning are broader than disability; they include extrinsic barriers like hunger, abuse, as well as systemic barriers for example large classes and lack of resources and support services.*

*Early identification of barriers to learning and development refers to screening and other approaches*

*to identify early the signs of a challenge in any aspect of child development.*

*Early intervention is the action taken to address identified barriers to learning and development and includes all the inter-sectoral services available to support the child and her family.”*

There are developmental guidelines, examples of activities and ‘watch points’ relating to each of the six Early Learning and Development Areas: Well-being; Identity and belonging; Communication; Exploring mathematics; Creativity; Knowledge and understanding of the world. Many of the ‘watch points’ are phrased in clear, concrete terms and include, for example:

- ★ inability to make judgements about safety (for example not noticing traffic)
- ★ destroys own belongings and those of others
- ★ does not make eye contact with you by three months of age
- ★ does not watch or follow an object with the eyes by three months
- ★ unable to grasp writing tools such as crayons and pencils

While this offers a helpful starting point to assist practitioners with early identification, the National Curriculum Framework acknowledges that “[f]urther guidance is required for detailed informed observation of children’s development” and suggests that this “will be gained in courses, workshops, and by reading about and discussing special needs.”

### **National Integrated Early Childhood Development Policy, 2015 (NIECDP)**

The National Integrated Early Childhood Development Policy, 2015 (NIECDP) was an attempt to provide a comprehensive and inclusive policy aimed at ensuring universal, equitable access to quality ECD programmes and integrated services in South Africa.

On the meaning of “universality”, the NIECDP states:

**“THERE IS GENERAL AGREEMENT THAT THE UNIVERSALITY OF THE RIGHT MEANS THAT ALL YOUNG CHILDREN ARE ENTITLED TO EARLY CHILDHOOD DEVELOPMENT SERVICES, REGARDLESS OF THEIR RACE, ETHNICITY, SOCIOECONOMIC STATUS, HEALTH, DISABILITIES OR ANY OTHER FACTOR.**



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### **THIS REQUIRES THAT THE GOVERNMENT IS RESPONSIBLE FOR TAKING ALL APPROPRIATE LEGISLATIVE, ADMINISTRATIVE AND OTHER MEASURES NECESSARY TO SECURE THE REALISATION OF THE UNIVERSAL EARLY CHILDHOOD DEVELOPMENT RIGHTS OF ALL CHILDREN."**

The NIECDP defines a holistic basket of ECD services including nutrition, water and sanitation, early learning, social assistance, play and recreational facilities. To achieve universal access to the full basket of services, it envisages an overarching, multi-sectoral enabling framework, inclusive of national, provincial and local spheres of government.

To achieve the 2030 objective of universal access to inclusive ECD services for all infants and young children from birth until the year before they enter school or turn 7, the policy stipulates the following requirements:

- ★ location of additional public funding to ECD services for infants and children with disabilities, including additional programme funding, post-provisioning and infrastructure funding;
- ★ guidance for the design of ECD for children with disabilities, including clear guidance and norms on which children should be able to access mainstreamed ECD and specialist support;
- ★ norms and standards for accessible and appropriate public infrastructure applying universal design standards for identified inclusive and/or specialised centres of ECD service delivery;
- ★ qualified practitioners;
- ★ capacity across all spheres of government;
- ★ a series of indicators to be measured and disaggregated data to be collected to measure the extent, quality and impact of ECD programmes and services for children with disabilities.

The NIECDP was developed through a process of extensive sectoral consultation. The strong lobby for creating a policy that was universal and inclusive by design is evident. Through the NIECDP, government undertakes to prioritise the development, funding and implementation of ECD programmes and services for vulnerable groups. This includes the provision of universal and developmentally appropriate early

learning opportunities for young children from birth, as well as the inclusion and support for children with disabilities within all ECD programmes. The development of a national multi-sectoral ECD guideline to secure universal inclusive ECD services by 2017 was mandated.

Given the intentionality around developing a policy that was inclusive by design, the provisions in the NIECDP are broadly compliant with international law standards, in that they promote the protection and inclusion of young children with disabilities in ECD programmes and services.

However, it should be noted that the NIECDP was developed before the shift of the ECD function to the DBE. Hence, it does not reflect new departmental mandates and requires updating.

Moreover, and despite the virtues of the NIECDP, the South African regulatory framework when taken *as a whole* does not, in our view, adequately protect the right to inclusive, quality ECD services for young children with disabilities.

In its concluding observations on the initial report of South Africa, the UN Committee on the Rights of Persons with Disabilities expressed concern about "the lack of legislation to give full effect to the right to inclusive education for all children with disabilities in line with general comment No.4 (2016) on the right to inclusive education."<sup>29</sup> In addition the UN Committee on the Rights of the Child noted a similar concern over the lack of "[a] comprehensive law and policy to realize the rights of children with disabilities with clear baselines, time frame and indicators for the implementation and mechanisms for monitoring their implementation."<sup>30</sup> Both committees recommended the development of legislation to remedy this.

To date, none of the NIECDP, WPRPD, or SIAS Policy have been developed into legislation. They remain as policy documents setting our government's intentions, but without legal enforceability or allocations of funding. None of these policies provide a sufficiently strong basis for holding government to account.

29. UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of South Africa, CRPD/C/ZAF/CO/1 (23 October 2018), at page 4.

30. UN Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa, CRC/C/ZAF/CO/2 (27 October 2016), at page 12.





## GAPS IN IMPLEMENTATION AND ACCESS

In the previous section, we explained that, despite its flaws, the domestic framework does place some obligations on the state in respect of ensuring access to inclusive ECD services. Both the NIECDP and WPRPD set out in some detail the steps that must be taken. However, interviews conducted with parents of young children with disabilities and practitioners in ECD centres make plain that the lived realities on the ground do not reflect these policy commitments.

### Lack of inclusive ECD programmes

The UN CRPD clearly obligates states to ensure inclusive early learning opportunities for young children with disabilities. The NIECDP and WPRPD reflect this obligation, and the National Curriculum Framework offers guidance on how this can be done. But the reality remains very different. Very few mainstream ECD centres across the country are inclusive centres.

Young children with disabilities are either referred to one of the few segregated, specialist ECD centres catering for children with disabilities or remain at home. Most mainstream, community-based ECD centres simply do not accept young children with disabilities. One parent reflected on attitudinal barriers that stood in the way of her son accessing inclusive ECD centres:

*“There’s nothing wrong with them; we just need to find out how they learn and find a way to cater for that. It’s so affirming. We will cater. That’s what I love. That attitude. That attitude is not there in most creches. When I grew up, the attitude to children with disabilities was: they’re less than. They don’t have potential.”*

*I come for the perspective that there’s the image of God there. There’s a gifting, that will benefit him, benefit his home, benefit his community. He’s not a waste. I need to find out how he can add value in his own life, in his family, in his community.”*

Another parent described a lack of knowledge of different forms of communication, and the way this prevents a child’s needs from being understood, even if they are admitted to a mainstream ECD centre:

**“THERE IS CHILD I KNOW WHO UNDERSTANDS BUT WHO CAN’T SPEAK. HE GETS ANGRY AND FRUSTRATED AND**

**PUSHES PEOPLE AWAY. I TRAINED MY SON TO SAY ‘I AM HUNGRY’ OR ‘I NEED WATER’ USING GESTURES. WITH OTHERS, THEY DON’T KNOW HOW TO HANDLE SUCH THINGS. SOME KIDS WOULD RATHER COMMUNICATE WITH SIGN LANGUAGE, BUT WE DON’T KNOW HOW TO DO THAT.”**

Where a child with disabilities is initially accepted to a mainstream ECD centre, the placement is often unsuccessful, with the centre deciding that they cannot accommodate the child’s needs. A parent described experiences of this kind:

*“Last year, he was at three different centres in total. Two weren’t registered, but they were looking after kids and teaching them. They were very informal...”*

*On the second day, she returned my money and said she can’t actually take care of him. It was weird – there were a lot of other kids in her care. I do accept those kids were different. They were quiet and would sit still. But [my child] was running up and down and required constant supervision.*

*The third one, I thought would be better. It’s a bigger centre, it was registered. I was also paying more money. But then the principal called me and said it’s better that he goes to another school. She said it’s not even about his speech – it’s that he was so hyperactive. He was having outbursts and throwing toys and everything... They couldn’t cope with his needs. Because of his ADHD, he got aggressive. They said they couldn’t handle it.*

*The principal told me it was best that he went to a special centre, and she referred me to the speech therapist.”*

The vast majority of ECD programmes are privately owned and run and, while they must register with the DBE (formerly with the DSD), there is no enforced requirement of inclusivity and no support for centres to be inclusive. Speaking about the situation just before the function shift, a practitioner at IESA reflected:

*“After 15 years, I still see no difference in the way DSD facilitates inclusion in ECD centres. There is still no database of inclusive centres, no funding and no mention of implementation of the National ECD Policy. It seems like grassroots has to remind government of its own policies. They only pay lip service to inclusion and make speeches but there is little evidence of implementation.”*



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In the ECD Baseline Assessment 2022, conducted by the DBE in 545 registered and unregistered centres, it was found that the majority of centres were not adequately equipped to offer accessible, quality early learning opportunities for young children with disabilities. The report stated:

*“Although only rudimentary measures of access for children with disabilities were included in the questionnaire, it is evident that ELPs still have many improvements to make. Fieldworkers rated only half of the classrooms they observed as being accessible for children with disabilities or having enough light for children who may have difficulty seeing. Only 13.7% of ELPs had a wheelchair ramp, 16.7% had suitable toilets and just over a quarter (26.9%) did not have anything in place to be more accessible for children with disabilities.”<sup>31</sup>*

Many centres indicate a willingness to include children with disabilities, but simply don't know where to access the support they need to do so and say that there are no available government service or resources to assist.<sup>32</sup> This results in young children not receiving the support they need from an early age, often resulting in longer term learning difficulties and poor learning outcomes in formal schooling.

### Practical barriers to registration

In the preceding section, we described some of the burdensome registration requirements contained in the Children's Act and the General Regulations Regarding Children. Our interviews reveal that there are additional barriers to registration imposed at a municipal level, beyond those contained in the legislation.

As mentioned above, Chaeli Cottage is an example of best practice in the provision of inclusive ECD services. But even Chaeli Cottage had a long and difficult journey to registration, with additional requirements imposed prior to municipal building approval being obtained. The principal explained:

*“It took us five years to get registered. Until two weeks ago, we were conditionally registered. The minute you say it's an inclusive school, they come here with nonsense. They made us change the bathroom even though it was perfectly adequate – at a cost of R60,000. And we've only*

*ever had Chaeli use it once (who isn't even an attendee of the school). They required written policies that are pages and pages long. At least give people a template! In the end, the principal of Jacob's Ladder [another ECD centre] helped by sharing her policy. The DBE could help by promoting a partnership scheme, for example, where registered ECD centres share resources with unregistered ECD centres. At the moment, these very burdensome requirements just encourage ECD centres to pretend they're not inclusive! Less well-resourced centres have no hope of complying.”*

As is so often the case, the additional requirements imposed on Chaeli Cottage related solely to wheelchair access. As the director of the Chaeli Campaign noted, “this is laughable given that all of our young wheelchair users are in nappies and don't make use of the toilet in any event!” A failure to recognise the different needs of children with different disabilities risks making additional ‘inclusivity’ requirements into a purely tick box exercise – with no proper attention being paid to principles of universal design. Given the burdensome registration requirements, which differ from one municipality to the next, it is not surprising that the majority of ECD programmes are not registered.

While acknowledging the difficulties in getting registered, one parent emphasised its importance in ensuring a safe environment for children:

*“Centres should be registered. Not everyone is capable of opening a centre. So there are these informal places that are not equipped. ECD is essential. For them to have a foundation is very, very important. It sets the tone for school. To have teachers that are not trained and not qualified is very bad.*

*I've explored other centres in my area. At some, the children are just left with the neighbour. They just sit there all day. The fees they charge are ridiculous. And they're offering the children nothing..*

*I understand that it's hard to get registered, but it's also important for safety.”*

If the purpose of registration requirements is to ensure the safety of young children with disabilities, the requirements should be set out in national regulations

31. ECD Baseline Assessment: Technical Report, DBE, 2022, at page 17.

32. Interview with IESA ECD Facilitator, 22 September 2021.



and should be well thought through using the principles of universal design. Proper consideration must be given to the specific needs of young children with disabilities. Government should not impose unnecessarily expensive adaptations on a centre which do not serve a valid purpose.

### Inadequate funding

To the extent that discretionary funding of ECD programmes is provided by the government, it must be prioritised to make programmes available to children with disabilities.<sup>33</sup> However, it is clear that this is not translating into additional funding for centres who include children with disabilities. With regard to ECD subsidy, the amount for centre-based programmes is R17 per eligible child per day and no additional amount to the per learner subsidy is provided for young children with disabilities.<sup>34</sup> The value of the ECD subsidy is widely considered to be inadequate, especially for children with disabilities. One practitioner put it succinctly:

**"FINANCIAL HELP WOULD GO A LONG WAY TO MAKE IT EASIER FOR EGDS – ALL EGDS, NOT JUST INCLUSIVE EGDS."**

A parent who had struggled to get her child placed in a suitable ECD programme noted that some centres lack toys, books, and other resources, and said simply:

**"CENTRES NEED SUPPORT TO GET REGISTERED AND SHOULD ALSO GET FUNDING. THE R17 IS NOT ENOUGH."**

Inadequate funding has been identified as one of the most significant challenges to the implementation of inclusion. In South Africa, the DSD, prior to the function shift, did not prioritise funding for ECD services for young children with disabilities – despite the obligations imposed by the Children's Act. The DBE has continued with the same funding model for ECD, though has acknowledged the need to re-examine funding to the sector. However, these discussions have not necessarily focussed on a need to rethink funding for programmes including young children with disabilities.

The low value of the ECD subsidy means that centres must either charge parents more or find alternative sources of funding for any reasonable accommodations they need to make.<sup>35</sup> Storbeck and Moodley argue that whilst progressive policies are important, "not having a specific budget for children with disabilities means that the needs of these children may be neglected."<sup>36</sup> This has certainly proven to be the case.

In this regard, the African Committee of Experts on the Rights and Welfare of the Child recommended South Africa "[p]ut in place mechanisms to ensure accountability for actions (*including budget allocations and expenditure*) undertaken to protect the rights of children with disabilities [emphasis added]."<sup>37</sup>

### Lack of intersectoral and intergovernmental coordination to support early identification of disabilities

Because of the holistic nature of ECD, it is essential that different government departments coordinate their efforts to provide ECD services. Post-function-shift, the DBE has primary responsibility for ECD, but other departments, such as the DSD and DoH, also play a crucial role. Coordination is even more important when it comes to ECD services for children with disabilities. At least in principle, many disabilities can be identified in the early years of a child's life. Early identification is absolutely critical, as it allows for access to early intervention services to support optimal development. Often, disabilities are first identified when young children come into contact with the health services or ECD centres. Thereafter, it is essential that information as to the child's learning and developmental is transferred seamlessly between the different services they use and that referrals for assessment and intervention can occur easily. To achieve this requires efficient inter-departmental and inter-sectoral coordination.

Currently, South Africa lacks effective coordination mechanisms between different government departments. On paper, there is an Inter-Ministerial Committee, Interdepartmental Committee and an Intersectoral Forum for ECD. These coordinating mechanisms meet with varying degrees of regularity

33. Section 93(4)(b) of the Children's Act.

34. Richter et al, Diagnostic review of the Early Childhood Development Sector, 2012, at page 40.

35. Interviews with IESA ECD Facilitators, 22 September 2021

36. Strobeck, C & Moodley, S ECD policies in South Africa – What about children with disabilities? In Journal of African Studies and Development Vol. 3(1), pp. 1-8, January 2011

37. Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of The Republic of South Africa on its First Periodic Report on the implementation of the African Charter on The Rights and Welfare of the Child, March 2019, Para 28.





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and efficiency, and they are lacking a clear legislative mandate and set of responsibilities, particularly in relation to the provision of services to young children with disabilities.

With this in mind, the UN Committee on the Rights of the Child recommended that South Africa should “[i]mprove inter-sectoral coordination to provide integrated services to children with disabilities and their families and caregivers”.<sup>38</sup> Similarly, the African Committee of Experts on the Rights and Welfare of the Child recommended emphasised the need for “inter-departmental and inter-sectoral coordination and collaboration” to “ensure that existing barriers preventing children with disabilities from accessing needed services are removed.”<sup>39</sup>

Unfortunately, however, effective integration and coordination of services across different departments has yet to be achieved. This manifests in serious practical challenges for ECD centres and parents when they attempt to access services for young children with disabilities. Many parents and practitioners have shared that referral to the DoH is particularly challenging, with waiting periods for assessment of up to 18 months.<sup>40</sup> One mom expressed her frustration with the long delays between appointments and referrals by stating:

**“IT HASN'T BEEN AN EASY JOURNEY AS A PARENT. WHEN IT COMES TO ACCESSING GOVERNMENT SERVICES THERE ARE LONG DELAYS. THE HEARING TEST WAS OVER A YEAR AGO, WE ARE STILL WAITING FOR THE SPEECH ASSESSMENT. I STILL DON'T KNOW EXACTLY WHAT IS WRONG WITH MY CHILD, SO I DON'T KNOW WHAT COMES NEXT. WITHOUT A DIAGNOSIS, I DON'T KNOW WHERE HE SHOULD GO.”**

These delays mean that young children are losing important time for early intervention. Practitioners also point out that the Road to Health Booklet, which is designed to keep track of a young child's healthcare

needs and should be a useful source of information, is often not completed at the local clinic.<sup>41</sup>

In addition, families of children with disabilities face significant challenges to meet the transport and sometimes accommodation costs to attend assessments, evaluations and routine habilitation or rehabilitation services. As a result, young children, do not complete assessment processes and have inconsistent if any habilitation or rehabilitation services. A single working mom described the challenges with having to take time out to travel to specialist services not available at the local government hospital.

*“If they could have those speech therapies and OT's here near me. If they were closer, it would be more manageable, then it wouldn't mean your whole day. Even for children it's too much for them – you can't expect them to sit from 6am to 4pm for one hour of speech therapy. You get to speech therapy, they're already losing it. It's just too much.”*

All of the parents interviewed expressed frustration at the lack of coordination of services and a scarcity of information about what services are available and how to access them. Parents felt they have to spend a lot of time and a lot of effort navigating “the system”. One parent pleaded:

*“Give us a resource. A single point of contact who is accessible, in our area or district, who would be the link between the government; the school; and me and my family. Where we are now, I've got us here by myself. There's no one holding my hand and saying, 'Here, this is the support you can access'.”*

Another parent expressed frustration at being sent from the proverbial pillar-to-post:

*“It was a whole back and forth. Somerset Hospital sent me to Red Cross hospital, and back again. After going up and down and up and down, I finally got a call from Red Cross after a year. There were different reports. The psychologist said he's too young. The audiologist said there's nothing wrong with his ears. The OT and the speech therapist said that my area falls under Red Cross. When I got the call, I was so happy.”*

38. UN Committee on the Rights of the Child, Concluding observations on the second periodic report of South Africa, CRC/C/ZAF/CO/2 (27 October 2016), at page 12.

39. Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of The Republic of South Africa on its First Periodic Report on the implementation of the African Charter on The Rights and Welfare of the Child, March 2019, Para 28.

40. Interview with IESA ECD Facilitator, 22 September 2021.

41. Interview with IESA ECD Facilitator, 22 September 2021.



### Lack of inclusivity training for practitioners

Given the importance of early identification of barriers to learning and development and early intervention, it goes without saying that ECD practitioners should have the necessary skills to not only screen for and identify barriers to learning and development, but also to adapt their activities and programmes to meet the learning and development needs of young children with disabilities.

As explained above, the National Curriculum Framework gives some guidance in this regard. However, it is not accompanied by the necessary training to allow practitioners to act on the guidance and ensure that it translates into practical interventions on the ground.

The current NQF training programmes contain scant if any specific content relating to the identification of and interventions for barriers to learning and development. One IESA facilitator noted that even though the ECD Practitioner NQF Level 5 training course offers some content on inclusive education, this is only 'book knowledge' and practitioners need support to develop the skills to implement this knowledge in practice. She noted that one centre that had been successful in developing these skills, had the buy-in and support from the principal who arranged a monthly staff development session on a Saturday to entrench learning. However, she noted that the high staff turnover in ECD Centres also limited the ability of a centre to develop expertise in its staff.

One parent described the difficulties presented by a lack of training, especially when it comes to the inclusion of children with disabilities:

**"AT ONE OF THE ECD CENTRES I TRIED, THE TEACHERS ARE VERY, VERY YOUNG, THEY'RE STILL GETTING THEIR ECD QUALIFICATIONS. THEY'RE NOT TRAINED OR EQUIPPED TO DEAL WITH CHILDREN WHO CAN'T SPEAK OR WHO HAVE OUTBURSTS. WHERE MY SON IS NOW, THE STAFF ARE A BIT OLDER AND THEY HAVE THEIR ECD QUALIFICATIONS."**

Another parent highlighted that the lack of inclusivity training is compounded by high teacher to child ratios and a lack of teaching assistants:

**"TEACHERS DON'T HAVE THE SKILLS NOR THE CAPACITY TO DEAL WITH THIS. THEY DON'T HAVE THE SUPPORT. THERE'S 33 IN THE CLASS AS ONE ADULT."**

### Lack of government-provided parent and family support programmes

Despite the emphasis that the NIECDP places on the role of government to provide support, capacity development, counselling and resources to parents and primary caregivers to strengthen nurturing relationships, no evidence of these programmes came to light in interviews with parents or practitioners.

To the contrary, most parents felt that if any such programmes did exist, they were not aware of nor able to access them. Most parents and practitioners noted that support for parents came primarily from NGOs. Whether or not these NGOs were provided with government funding to perform these services was not clear.

One single mom spoke poignantly about her struggle to access parenting classes or other forms of support:

*"This whole experience has affected me a lot, mentally and emotionally. There was no stability, going from centre to centre. Also, being told that he needs to go to a special needs school makes you question yourself. No one could actually explain to me what was going on.."*

*At Red Cross hospital I asked, "Do you have anything for me? Are there any classes I can do?" But there's no pamphlet, no classes, nothing. As a single mom, there's no support. At those private hospitals, you have parenting classes. But the public hospitals don't have that.*

*He's settled down a lot now he's older. But when he was younger it was tough. People don't know what's going on on the inside. One of the neighbours called social services. But they saw I am just here by myself, working, feeding him, trying to look after him. They said they would give me support and guidance. But I never heard from them again. I would say that there's no support from social services, no classes, nothing. They said I could get a grant. I tried to call them. The switchboard operator said they'd call me back, but they never did. So eventually I gave up."*



## TOWARDS INCLUSIVE ECD SERVICES FOR YOUNG CHILDREN WITH DISABILITIES IN SOUTH AFRICA

### Difficulties transitioning from ECD programmes to school

In South Africa, guidance as to the seamless transition from ECD to school is lacking in the regulatory framework. This translates into difficulties on the ground. Even where a mainstream ECD centre has included a child with disabilities, ordinary schools in the surrounding area are often unwilling to do the same. Even where an ordinary school does agree to include the child, the transfer of valuable insights into their learning support from the ECD centre to the school rarely takes place. Primary school teachers lose valuable time, redoing the whole process of assessment before support is put in place.

One parent spoke about the anxiety that can accompany the transition to school, and the lack of accurate information, guidance and support:

*“When he is five years old, he can go to school. There’s a bit of a knowledge gap with the ECD centre. They said he can only go when he’s six. But I’d actually be happy for him to stay at this ECD until he’s six. He needs time to prepare. The speech therapy can take some time to work. I wouldn’t want him to feel pressured or left out.”*

*When everyone said he had to go to special school, I thought ‘What are his options? Will he ever go to university? Does he have some future?’ It would be nice to have information about this, to understand the different pathways.”*

The ongoing frustration of parents can be summed up in this story from an IESA facilitator:

**“A YOUNG CHILD WITH DOWN SYNDROME WAS INCLUDED IN AN ECD CENTRE AND DID EXTREMELY WELL. THE PARENTS HOPED TO CARRY ON WITH THEIR VISION OF AN INCLUSIVE EDUCATION FOR THEIR CHILD, BUT AFTER A YEAR OF REJECTIONS FROM ORDINARY SCHOOLS THEY**

### RECOMMENDATIONS FOR REFORM TO PROMOTE AND PROTECT THE RIGHTS OF YOUNG CHILDREN WITH DISABILITIES IN SOUTH AFRICA TO INCLUSIVE ECD SERVICES

The ECD Baseline Assessment 2022 acknowledged that improvements are needed when it comes to inclusive ECD services for children with disabilities. One of the five key recommendations is to “[i]mprove the accessibility of ELPs [early learning programmes] for children with disabilities”. The recommendation is fleshed out as follows:

*“In terms of accessibility for children with disabilities, ELPs still have many improvements to make. Practitioners need to receive training on the identification and support of children with disabilities, ELPs need guidance on low-cost solutions in making their facilities accessible for children with disabilities and closer collaboration with the local health workers needs to be fostered to ensure efficient referrals are made of children who are at risk of developmental delays.”<sup>42</sup>*

To ensure young children with disabilities are given the necessary access to early intervention and support, sufficient to allow them to develop their full potential, the regulatory framework must be intentional, explicit and inclusive. Systems and services should adhere to the principles of universal design and access and should therefore be regulated by a framework that is itself inclusive by design.

To date, none of the policy provisions relating to young children with disabilities in the NIECDP and the WPRPD have been developed into primary or secondary legislation. This has seriously hampered their efficacy. The NIECDP and WPRPD lack legal enforceability and do not create state obligations to provide the necessary funding. This has directly translated into a lack of adequate service provision.

There are currently no proposed amendments to the Children’s Act which would significantly strengthen or concretize the legal entitlements of young children with disabilities to inclusive ECD services.

42. ECD Baseline Assessment: Technical Report, DBE, 2022, at page 51.



In order to remedy this – and to comply with international law and with the recommendations of international and regional treaty bodies – South Africa needs to reform its ECD legislation to give effect to the rights of young children with disabilities and as well as putting in place effective measures to ensure implementation of the legislation. Our recommendations are set out in the table below.

NUMBER	RECOMMENDATION	JUSTIFICATION
1	<p>Reform existing ECD legislation to concretize the rights of children with disabilities.</p> <p>The Children’s Act should define key terms such as ‘inclusion’ and ‘disability’. Inclusivity should be a key consideration throughout General Regulations Regarding Children and the norms and standards for ECD, with an emphasis on universal design and accessibility of inclusive ECD programmes and services.</p>	<p>While the Constitution arguably contains an implicit right to inclusive ECD services, that can be constructed out of various other rights, there may be value in amending the Constitution to make this clearer and more explicit.</p> <p>Further, the Children’s Act is the main piece of legislation regulating ECD, but it pays very limited attention to the rights of children with disabilities. This is likely to be contributing to the gaps in the actual provisioning of inclusive ECD services on the ground.</p>
2	<p>Create a state legal obligation to provide and/or fund inclusive ECD programmes, including increases to the ECD subsidy for children with disabilities.</p> <p>An obligation to fund inclusive ECD programmes must exist in primary legislation and must reflect the provision made in the NIECDP for “public funding to services for infants and children with disabilities, including additional programme funding, post-provisioning and infrastructure funding”.</p>	<p>Sections 78(1) and 93(1) of the Children’s Act use the discretionary “may”, instead of “must”, when it comes to funding requirements, thus giving provincial MECs a power but not a duty to fund and/or provide ECD programmes.</p> <p>The current ECD subsidy is only available to registered or conditionally registered programmes. The amount for centre-based programmes is R17 per eligible child per day and no additional amount to the per learner subsidy is provided for young children with disabilities.</p> <p>Inadequate funding has been identified as one of the most significant challenges to the implementation of inclusion. The creation of a new legal duty to provide and/or fund ECD programmes, including additional funding for children with disabilities, would likely help to address this.</p>
3	<p>Make it easier for inclusive ECD programmes to register and to access funding, including by reforming the Children’s Act.</p>	<p>The Children’s Act currently contains very burdensome registration requirements. According to the ECD Census 2021, only 40% of ECD centres are registered. Compounding this problem is the fact that, currently, the discretionary funding mandated by the Children’s Act is only made available to registered centres, in the form of the ECD subsidy.</p> <p>The barriers to registration and funding are likely to have a particularly detrimental impact of children with disabilities. If a centre serving an under-resourced community cannot register or access state funding, there is a greater risk that children with disabilities will be excluded, as the centre will seriously struggle to meet their additional support needs.</p> <p>The registration system is in dire need of reform.</p>



## TOWARDS INCLUSIVE ECD SERVICES FOR YOUNG CHILDREN WITH DISABILITIES IN SOUTH AFRICA

NUMBER	RECOMMENDATION	JUSTIFICATION
4	Create a clearer and more detailed legislative mandate for proactive parent and family support, with a focus on support for families of children with disabilities.	Parents of children with disabilities and the practitioners who work with them report a dearth of state provided or state funded capacity building and support programmes. The lack of clear and explicit mandate in the primary legislation is likely to be a contributing factor.
5	Create regulations providing for a flexible compulsory school going age for children with disabilities.	The Minister of Basic Education has a specific duty under section 3(2) of SASA to determine the ages of compulsory attendance at school for learners with “special education needs”. In light of the many different types of disability, a uniform approach to the compulsory school going age for children with disabilities is not desirable. Hence, if the Minister were to act on section 3(2), it should be to promulgate regulations containing flexible age range, based on the needs and best interests of each learner, which will allow for adequate differentiation between children with different disabilities.
6	Add early identification and inclusion to the training for ECD practitioners.  The curriculum content of ECD practitioner qualifications should be revised to ensure that practitioners have the skills to identify barriers to learning and development and differentiate their teaching to include all children in learning activities at the level of their development and ability.	Although the National Curriculum Framework offers some guidance on early identification and inclusion, practitioners require training on how to implement the guidance, and to supplement its contents.
7	Create a national integrated tracking and referral system. This tracking and referral system must have a legislative basis.	The WPRPD mandates the development of a national integrated referral and tracking system. However, this kind of system has not yet been introduced. As it currently stands, parents struggle to access information and support from different government departments with no clear system for tracking referrals. Information does not flow seamlessly from one department to another, and parents feel they are being sent from pillar-to-post, having to start from scratch with each new service provider. Diagnosis is delayed and intervention progress is lost as a result.
8	Create mechanisms to ensure coordination between different government departments. This mechanism must have a legislative basis.	It is essential that different government departments coordinate their efforts to provide ECD services. Relevant departments include not only DBE but also DSD and DoH, amongst others. Coordination is even more important when it comes to ECD services for children with disabilities. Early identification of disabilities is absolutely critical, as it allows for access to early intervention services to support optimal development. Thereafter, it is essential that information as to the child’s learning and developmental is transferred seamlessly between the different services they use and that referrals for assessment and intervention can occur easily.



NUMBER	RECOMMENDATION	JUSTIFICATION
		<p>Currently, South Africa lacks effective coordination mechanisms between different government departments. There is an Inter-Ministerial Committee, Interdepartmental Committee and an Intersectoral Forum for ECD. However, insufficient use has been made of these committees, and they are lacking in a clear and legislative mandate and set of responsibilities.</p>
9	<p>Create a system for the collection of disaggregated data to measure the extent, quality and impact of ECD services for children with disabilities. This system must have a legislative basis.</p>	<p>In recognition of the importance of accurate data to inform planning, access to and provision of inclusive ECD services, and noting with concern the lack of such systems in South Africa, international treaty bodies have unanimously urged the government to improve data collection systems.</p> <p>The African Committee of Experts on the Rights and Welfare of the Child recommended in 2019 that the state “bolster data collection efforts on the prevalence of disability amongst children in order to account for all children with disabilities and to give a more accurate profile of the support that they require” and “[e]nsure that children below the age of five are included in the disability prevalence data and other disability related data collections”.</p>
10	<p>Improve government capacity to ensure delivery of inclusive ECD services to young children with disabilities.</p>	<p>The WPRPD states that “[e]quitable service delivery requires well-run and effectively coordinated state institutions with skilled and accountable public servants, as well as functional institutional mechanisms to facilitate effective and efficient cooperative governance. It goes on, “[p]ublic institutions therefore need to ensure that they develop in-house capacity to mainstream disability considerations effectively across all programmes and services.” All government departments responsible for aspects of inclusive ECD service delivery must therefore be intentional about ensuring employees are trained “on strategies and measures to ensure equality of outcome for persons with disabilities in their programmes.”</p>

