



SUBMISSION ON THE RIGHT TO EDUCATION FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA TO THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

MARCH 2015

SUMMARY OF SECTION27'S SUBMISSION

SECTION27 is a public interest law centre. Two interventions by SECTION27 highlight the systemic failure of the South African government to adequately provide for learners with disabilities. In particular, many learners with disabilities are not getting access to an education. These learners are not being screened and placed in appropriate schools, and in many instances are not in any schools. Even where learners are placed in schools the failure to accommodate their needs means that they do not have meaningful access to education because they are not provided with, for instance, accessible learning materials, appropriately qualified teachers and safe and accessible infrastructure. The ongoing failure to prioritise special needs education, and a lack of understanding of the needs of learners with disabilities, has resulted in the inadequate budgeting and provisioning for learners with disabilities. Finally, there is a lack of expertise amongst teachers and other staff at special needs schools, as well as officials within education departments responsible for developing and implementing policies to accommodate learners with special needs.

1. THE WORK OF SECTION27

SECTION27 is a public interest law centre that has a national and international reputation for defending and advancing human rights in South Africa. In particular, SECTION27 is one of a small number of public interest organisations in South Africa that have begun to work to draw attention to, and pursue legal remedies to address the poor quality of education in the majority of South Africa's public schools.¹ Much of the litigation and advocacy that has occurred in this regard has been in terms of the right to basic education guaranteed in Section 29(1)(a) of the South African Constitution.

SECTION27 has recently also become more involved in cases addressing issues of access to education in respect of the needs of the most vulnerable and marginalised learners such as learners with disabilities and migrant learners.

SECTION27 therefore welcomes the opportunity to make this submission to the Committee on the Rights of Persons with Disabilities (the "Committee"). The submission draws on two particular interventions of SECTION27 in highlighting some of the systemic concerns in respect of access to education in South Africa for learners with disabilities.

2. THE LEGAL FRAMEWORK PROTECTING THE RIGHT TO EDUCATION OF DISABLED LEARNERS

¹ The most notable intervention by SECTION27 in this regard has been the litigation to ensure the textbook delivery to all schools in the Limpopo Province of South Africa. See *Section 27 & Others v Minister of Education & Another; Basic Education for All & Others v Minister of Basic Education & Others* 2014 (4) SA 274 (GP)

2.1 The Convention on the Rights of Persons with Disabilities

South Africa ratified the Convention on the Rights of Persons with Disabilities (the “CRPD”) and its Optional Protocol without reservation in 2007. The South African government is therefore obliged to respect and implement the rights of persons with disabilities as set out in the CRPD. Article 24, in particular sets out state party obligations in respect of the right to education for persons with disabilities.

2.2 The right to basic education

Section 29(1)(a) of the Constitution states: “Everyone has the right to a basic education, including adult basic education.” The right is an unqualified socio-economic right in that it is not qualified by the terms “progressive realisation” or “available resources” as is the case with other socio-economic rights in the South African Constitution, such as the right to health or the right to housing. South Africa’s constitutional court has noted that this means that the right to basic education is an “*immediately realisable*” right.² Thus, unlike as is in the case of the qualified socio-economic rights, an individual has a direct claim in respect of the right and the state is under a direct duty to do everything within its power to provide a quality education to all learners as soon as possible.³

The Education White Paper 6 on Special Needs Education: Building an Inclusive Education and Training System (the “White Paper 6”) published by the Department of Basic Education in 2001 outlines the South African Government’s strategy in respect of the education of learners with disabilities.⁴ Underpinning this strategy is the notion that the provision of education is based on the level of support that the learner needs to overcome the learning barriers that she or he is experiencing. Thus, learners requiring low level support would attend ordinary schools where teachers are trained to meet their needs; learners in need of moderate support would attend full-service schools that are equipped and supported to provide for a greater range of learning tools than could be accommodated at ordinary schools; and learners who require high levels of support would attend special schools. As such the policy embodies the principles of inclusive education outlined in Article 24(2)(b) of the CRPD.

² *Governing Body of the Juma Masjid Primary School & Another v Ahmed Asruff Essay NO and Others* 2011(8) BCLR 761 (CC) para 37

³ This is in contrast to the South African constitutional court’s socio-economic rights jurisprudence in respect of the qualified socio-economic rights that requires only that government programmes must be reasonable. The court has further set out the criteria for what it considers reasonable.

⁴ White Paper 6 was the post-apartheid response to meeting the needs of learners with disabilities. Under apartheid, predominantly white learners benefitted from special needs education and support. The education system during this time also failed to provide for the diverse learning needs of learners. The White Paper therefore sought to rectify these shortcomings in the education system.

Section 3(1) of the South African Schools Act 84 of 1996 (the “Schools Act”) provides for compulsory education for children between the ages of 7 and 15 or until a learner reaches Grade 9, whichever occurs first. Section 3(3) of the Schools Act requires that the Member of the Executive Council (the “MEC”) responsible for education in each province must ensure that there are enough school places for every learner of compulsory school-going age in the province for which that MEC is responsible.

Section 12 (4) of the Schools Act further obliges MECs in a province to ensure that education for learners with special needs be provided, where reasonably practicable, at ordinary public schools, and to provide relevant educational support for such learners. In addition, in terms of section 12(5), the infrastructure at public schools must be accessible to learners with physical disabilities.

This is echoed in the National Uniform Minimum Norms and Standards for Public School Infrastructure, prescribed under section 5A of the Schools Act. Regulation 6 requires that where schools cater for learners with disabilities, the infrastructure must be suitable to accommodate them. This includes buildings, access ways, indoor and outdoor facilities, signage, communication and other services. However, the deadline for compliance with these provisions appears to be unduly long, that is, the provisions must only be complied with by 2030.

In the case of the *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Another*⁵ the applicants alleged that state provisioning for profoundly and severely intellectually disabled children was less than that allocated to other children, including children with mild to moderate disabilities. The South African government argued that it had budgetary constraints and given the many competing demands in South Africa it had to make rational and difficult policy choices that in this case resulted in the exclusion of children with profound and severe intellectual disabilities. The court rejected this argument finding that the rights of the learners to a basic education had been infringed. The court held further that available funding ought to be spread fairly amongst all learners.

2.3 The prohibition against discrimination

Section 9 of the Constitution prohibits the state from unfairly discriminating against any person on various listed grounds, including disability. Section 9(2) requires the state to take positive

⁵ 2011 (5) SA 87 (WCC)

measures to protect or advance the rights of particularly vulnerable groups. Section 9(4) further requires that the state enact national legislation to prevent unfair discrimination.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the “PEPUDA”) was enacted to give effect to this latter provision in the Constitution. Section 9 of PEPUDA provides that “no person may unfairly discriminate against any person on the ground of disability”. Such discrimination includes the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

In the case of *Lettie Hazel Oortman v St Thomas Aquinas Private School and Bernard Langton*⁶ the complainant’s daughter, a learner with physical disabilities attended an ordinary school in the town of Witbank, as there was no school in the area for learners with disabilities. While some changes had been made to the school to accommodate the learner, these were insufficient to her needs and she eventually left the school. The complainant then made an application to the equality court alleging that by not providing all the necessary facilities to the learner, the school had discriminated against her. The equality court held that the school may not refuse to re-admit the learner and that, furthermore, the school was obliged to take all reasonable steps to remove all obstacles that the learner faced. This included the building of ramps to facilitate access to classrooms and the toilet allocated to the learner.

2.4 The right to human dignity

Section 10 of the Constitution states that “everyone has inherent dignity and the right to have their dignity respected and protected”.

2.5 The efficacy of the legal and policy framework

In a Twenty Year Review of Disability in South Africa (the “Twenty Year Review”) developed within the Office of President of South Africa, it is noted that the provision of education for learners with disabilities requires “urgent attention”. It attributes the failure to adequately provide for these learners to the failure in the implementation of White Paper 6. The failure to implement White Paper 6 is further attributed to an “incrementalist stance” adopted by government to the implementation of the policy. The Twenty Year Review notes that such a stance is inconsistent with the obligation to “immediately realise” the right to basic education for learners with

⁶ Equality Court Case 1/2010 (December 2010)

disabilities.⁷ This characterisation of the problem is also articulated in the baseline country report produced by the South African government on the implementation of the CRPD in South Africa.⁸

The Twenty Year Review notes further that the successful implementation of Education White Paper 6 requires the transformation of mainstream schools as well as special schools, neither of which has occurred adequately.⁹

The Twenty Year Review notes too that, to date, compulsory school attendance for children with disabilities has not effectively been monitored and enforced. It cites data from the General Household Survey (the “GHS”) produced by Statistics South Africa which suggests that an astoundingly high number of eligible learners with disabilities are not receiving any education. That is, of a figure of 703 159 children identified as living with a disability, only 111 619 attended special schools, while 124 535 attended ordinary schools.¹⁰ While figures differ between reports and, while concerns as to the accuracy of the various data-bases are noted, there is nevertheless consensus that there continues to exist a high number of eligible but out-of-school children with disabilities.¹¹

Thus, while the constitutional protection of the rights of learners with disabilities is strong, the policy framework necessary for the enforcement of the rights of these learners remains inadequate. Moreover, the “incrementalist stance” for the provisioning for special needs education is not in accordance with the South African government’s constitutional obligations. This is further borne out by the experience of the work of SECTION27 described below.

3. SECTION27 CASE STUDIES

3.1 Access to education for learners with disabilities in KwaZulu-Natal

SECTION27 has since January 2014, been working to ensure access to appropriate schools for learners with physical and/or intellectual disabilities in a deeply rural, poor community called Manguzi in Northern KwaZulu-Natal.

⁷ The Presidency “Twenty Year Review South Africa 1994 -2014 – Background Paper: Disability” (2014)

⁸ See Department of Women, Children & People with Disabilities “Baseline country report to the United Nation on the implementation of the Convention on the Rights of Persons with Disabilities in South Africa (2013) 28

⁹ The Presidency (note 7 above)

¹⁰ Ibid 28

¹¹ Compare for example with the figures in the most recent state country report. The figures in the Review suggest that there are 467 005 out-of-school disabled learners. The most recent South African state country report on the CRPD cites a figure of 480 036 out-of-school disabled learners. The Government of South Africa “Initial country report to the United Nations on the implementation of the Convention on the Rights of Persons with Disabilities: 2008-2012 (2013) 37-38

After attempting to engage the KwaZulu-Natal Provincial Department of Education (the “Department”) for almost a year to place a group of 17 children in schools appropriate to their needs, SECTION27 threatened to litigate against the Department. Following this threat, SECTION27 obtained an undertaking from the Department that the children would be accommodated at Sisizakele Primary School (“Sisizakele”) as part of a larger group of learners with disabilities that would be offered a place at that school. While the Department has averted litigation in the placement of the 17 children, serious concerns remain:

- Access to education for learners with disabilities is a chronic problem in that area, and a more long-term solution is necessary to address this issue. We have been advised by Siphilisa Isizwa, a Disabled People’s Organisation (DPO) that we have been collaborating with, that there is a group of 50 learners which they are aware of that require placement at special schools. Moreover, based on SECTION27’s experience in the Manguzi area, and the discussions SECTION27 has had with the principal of Sisizakele about the school’s waiting list, we believe that hundreds of learners with disabilities are denied their right to basic education.
- Another concern is that the admission of the learners at Sisizakele in 2015 has exacerbated an already severe shortage of staff at the school. The policy framework for special needs education in KwaZulu-Natal accords a weighting to each learner based on his or her particular disability. In 2014 there were approximately 157 learners with moderate to serious disabilities. The weighted enrolment of these learners was 553,5. In terms of the framework therefore, in 2014, 17 teacher posts ought to have been allocated to the school. However, there were only 8 teachers at the school. In 2015 the learner enrolment has increased to 201 but only 12 teacher posts have been allocated to the school. Moreover, while there are 12 posts allocated to the school, the new teachers are yet to begin teaching at the school. Sisizakele therefore continues to operate with a teaching staff of 8.
- Noteworthy too are the findings of a report commissioned by SECTION27 in 2014 on resource allocation in special needs education with a special focus on Sisizakele. The report notes the limited teaching capacity available at the school, as well as the lack of support services such as psychologists, nurses or therapists. The report notes further the decreased budgetary allocation for special needs education in the province amidst

projected increases in learner enrolment and teachers for the 2015/2016 and 2016/2017 financial periods.¹²

SECTION27 is currently working to gather information in respect of other learners with disabilities in the area that have not been appropriately placed. We are also attempting to engage the Department on the current post provisioning for the school.

3.2 Learners with visual impairments

SECTION27 is working in partnership with the South African National Council for the Blind, Blind SA, the Orientation and Mobility Action Group, and the South African Braille Authority on the right to education for learners with visual impairments.

SECTION27 has recently completed site visits to all 22 government schools for the blind, which are located in all 9 of South Africa's provinces. The purpose of these visits was to gather detailed information on access to education for learners with visual impairments. While the nature and extent of the challenges differs from school to school, the common challenges include the following:

- Limited availability to textbooks, workbooks and teachers' guides in accessible formats, including Braille and large print. As a result of a failed tender process in 2012, there are presently no textbooks at all available to the significant majority of schools.
- Many teachers at schools for the blind are not literate in Braille, in elementary Braille, and even more are not literate in contracted Braille. Teachers are appointed to schools through a redeployment process which does not require any expert knowledge on the education of visually impaired learners, and most provincial departments of education provide no training for teachers, who are forced to learn on the job.
- There is a severe problem with staff shortages in respect of both teaching and non-teaching staff.
- Learners with visual impairments at many schools do not have access to orientation and mobility training, which is key to their education and independence.
- Some schools do not have access to basic equipment such as brailing machines and computers with appropriate software for use by visually impaired persons. There are

¹² Penny Parenzee "Brief Overview of resource allocation/expenditure on special needs education: focus on KZN department of education & Sisizakele special needs school." (2014) ON PAR DEVELOPMENT

significant challenges with the adaptation and brailing of some standardised examination and test papers. Many schools report that compulsory test and exam papers arrive late and/or in print. The result is that either visually impaired learners do not write certain standardised assessments, to their detriment, or they write exams in non-ideal circumstances, such as having teachers read questions to them.

The Department of Basic Education has, at times, shown a commitment to addressing these challenges. However, SECTION27's observation is that there is an absence of urgency in doing this. Moreover, government officials largely lack the expertise to manage the education of learners with visual impairments. Many schools indicate that officials with which they interact have little or no knowledge about the needs of learners with visual impairments and simply respond to requests for assistance from schools by indicating that the schools themselves are the experts.

The following examples help illustrate the low level of knowledge amongst some government officials. A principal at a school for both the visually and hearing impaired conveyed to us that a department official who had been coming to the school for many years recently asked "how are the blind learners getting on with their sign language?" Many schools also report that officials are shocked to discover that it is possible for visually impaired learners to use computers.

SECTION27 is currently preparing a detailed report on the state of education for visually impaired children. The report will set out the challenges faced by schools for the blind, and highlight some recommended interventions. We will also be including a thorough analysis of the budget allocated to special needs education. Although SECTION27's initial mandate was to investigate the availability of orientation and mobility practitioners and Braille textbooks at schools for the visually impaired, our preliminary investigations indicate more systemic problems. To comprehensively address these problems requires that the right to basic education for visually impaired learners include the right to a functioning education system and policy environment aimed at assisting learners with disabilities and which is properly understood and implemented by departmental officials.

4. CONCLUDING COMMENTS

Within the context of the systemic concerns highlighted above, SECTION27 hopes that that the Committee will call on the South African government to:

- Prioritise the right to education of learners with disabilities within the context of the South African government’s constitutional obligation to “immediately realise” the right to education of learners with disabilities, and the obligation not to discriminate against learners with disabilities.
- Such prioritisation must include the establishment of improved policies and procedures for the screening and placement of all eligible learners.
- Such prioritisation must also include improved budgeting and provisioning in all areas of special needs education, including provisioning of schools and infrastructure, adequate teacher and support staff provisioning and training, and the provision of learning materials such as Braille textbooks. It must also include the adequate training of teachers, support staff and government officials working in the area of special needs education.

SECTION27 further recommends that as there are currently very few cases being brought to protect the rights of learners with disabilities in South Africa, the Committee should call on civil society organisations working in South Africa to more pro-actively engage the constitutional framework protecting learners with disabilities to protect and advocate for the rights of disabled learners.¹³

¹³ In the baseline country report produced by the South African government on the implementation of the CRPD, the report notes: “Despite several measures taken, there are still too few legal actions against ordinary schools which exclude learners with disabilities and refer them to segregated special schools without any steps having being taken to introduce reasonable accommodation.” Department of Women, Children & People with Disabilities (note 8 above) 29