

A constitutional perspective on the rights of children with disabilities in an educational context*

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1 Introduction

It is estimated that there are 500-650 million people living with disabilities in the world and of these people, 150 million are children.¹ In Africa, less than 10% of children with disabilities are attending school.² The rights of children with disabilities are a human rights and social justice issue.³ This paper critically evaluates the rights of children with disabilities⁴ from a South African constitutional perspective.

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¹CRC Committee 'General comments on the rights of children with disabilities' (2006) para 1. It seems the situation has worsened: The Report of the Secretary-General of the UN states that 'over 1 billion people, or approximately 15% of the world's population, are living with some form of disability': A/66/128 paras 6 and 19.

²UNESCO Nairobi Office *Fact book on education for all* (2006) 74. Some sources aver that only 2% attend school in developing countries: Combrinck 'The hidden ones: Children with disabilities in Africa and the right to education' in Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 299.

³UN High Commission on Human Rights 'Human rights of persons with disabilities' Resolution 2000/51, which recognised disability as a human rights issue.

⁴The notion of disability is explained by means of three theoretical models, namely the medical, social and human rights model: The medical model focuses on the person's 'impairments' and cures. The social model locates the 'problem' outside the individual and in society where society is constructed to deal with different people. (The National Department of Basic Education embraces the social model: *Report on the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in education* (July 2010) para 2.) The human rights model addresses the state's response to socially created obstacles to ensure respect for the dignity and equal rights of all people: Combrinck in Sloth-Nielsen (ed) (n 2) 300-302. Disability is described in the General Comments to the CRC (n 1) as follows: 'Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (para 7). Also

The aim is to establish whether, after eighteen years of democracy,⁵ South Africa has succeeded in building a genuinely inclusive and enabling environment in the educational context that values differences while respecting inherent dignity and equality. The focus will be on children with severe and profound intellectual disabilities.⁶

2 Constitutional rights

2.1 *The right to education*

The right to education is said to be both the most important right of children with disabilities and the right most frequently denied.⁷ It has been said that education has more than a qualification function; that it also fulfils the needs of all human beings⁸ and this is absolutely true with reference to the education of severely and profoundly disabled children. It is an important fundamental human right⁹ because it unlocks the exercise and enjoyment of other fundamental rights.¹⁰ It is an

see Akinbola 'The right to inclusive education in Nigeria: Meeting the needs and challenges of children with disabilities' (2010) 10 *AHRLJ* 457 at 461.

⁵Maitufi 'Children, young persons and school law' in Robinson (ed) *The law of children and young persons in South Africa* (1997) 235; Van der Vyver 'Constitutional protection of children and young persons' in Robinson (ed) *The law of children and young persons in South Africa* (1997) 265 at 266; Veriava and Coomans 'The right to education' in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) 57 at 60.

⁶Section 1(xxxvi) of the Mental Health Care Act 17 of 2002 defines 'severe and profound intellectual disability' as a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care.

⁷Kilkelly 'Disability and children: The Convention on the Rights of the Child (CRC)' in Quinn and Degener (eds) *Human rights and disability* (2002) 123; Combrinck in Sloth-Nielsen (ed) (n 2) 299; Akinbola (n 4) 459.

⁸Bekink and Bekink 'Children with disabilities and the right to education: A call for action' 2005 *Stell LR* 125. Also an 'empowerment right', see Woolman and Fleisch *The Constitution in the classroom* (2009) 117-118; *Minister of Home Affairs v Watchenuka* 2004 4 SA 326 (SCA) para 36. See *The School Governing Body of the Grahamstown Amasango Career School v The Member of the Executive Council for Education, Eastern Cape* unreported case no 3838/2009 (ECG) of 2010-08-11 para 37 and paras 44-55 in the context of special schools and the right to basic education.

⁹Included in the constitutions of at least 59 countries and even when not constitutionally entrenched, still recognised as a legal right of fundamental importance: *Brown v Board of Education of Topeka* 347 US 438 (1954); Veriava and Coomans in Brand and Heyns (eds) (n 5) 57. In the US there is no federal right to education but there is a strong tradition of support for public schools as evidenced by the recognition of the right to education in all fifty state constitutions: The Advocates for Human Rights 'The right to education in the United States' available at <http://www.answers.com/topic/state-constitutions-and-individual-rights> (accessed on 2012-05-22).

¹⁰Such as political, economic, social and cultural rights: Bekker 'The right to education in the South African Constitution: An introduction' in Mashava (ed) *A compilation of essential documents on the right to education* Economic and social rights series vol 2 (2000) 1; Veriava and Coomans in Brand and Heyns (eds) (n 5) 57; Malherbe 'Education rights' in Boezaart (ed) *Child law in South Africa*

unqualified and composite right demanding priority.¹¹ This constitutional right creates a positive right, that basic education must be provided for every person, and not merely a negative right, that such a person should not be obstructed in pursuing his or her basic education.¹² The right to basic education is immediately realisable and justiciable.¹³ Furthermore education is a functional area of concurrent national and provincial competence.¹⁴

When the rights of children with disabilities are at stake, section 29 of the South African Constitution has to be examined in this specific context. The section states the following:

- (1) Everyone has the right
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
 - (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
 - (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

(2009) 399. For a full exposition of s 29 of the Constitution, see Woolman and Bishop 'Education' in Woolman *et al Constitutional law of South Africa* (2011) (2nd ed) 57-i to 57-95.

¹¹Van Bueren *The international law on the rights of the child* (1995) 233-255; Veriava and Coomans in Brand and Heyns (eds) (n 5) 62; Combrinck in Sloth-Nielsen (ed) (n 2) 404.

¹²*Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 9 referring to s 32(a) of the interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993); *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC) 90.

¹³Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution); *Governing Body of the Juma Masjid Primary School v Essay* 2011 7 BCLR 651 (CC) para 37. See Lake and Pendlebury 'Children's right to basic education' (2008/2009) *South African Child Gauge* 19.

¹⁴Section 104 read with schedule 4 of the Constitution. For the purpose of this paper only national legislation will be examined.

In the context of disability,¹⁵ section 29(1) obliges the government to provide basic education (including adult basic education) to *everyone*.¹⁶ The unqualified and absolute¹⁷ nature of the right requires that the state implement measures and make budgetary allocations to give effect to the right as a matter of priority.¹⁸ This subsection should be read with section 12¹⁹ of the Schools Act 84 of 1996 which provides that education for learners with special needs should, where reasonably practicable, be provided at ordinary public schools provided that the relevant support services for such learners are made available.²⁰ The Schools Act also obliges the Member of the Executive Council responsible for education in a province to take all reasonable measures to ensure that physical facilities at public schools are accessible to persons with disabilities.²¹ Section 29(2) requires education to be provided in a language that ensures effective and equitable access to that education, which may include sign language²² and braille. In terms of section 29(3), individuals or organisations may establish independent educational institutions. Organisations providing services, such as education to children with disabilities are a common occurrence.²³ Section 29(4) stipulates that the state may provide subsidies in these instances.²⁴

¹⁵Rights must be interpreted in their context, ie the textual, social and historical context: *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 22; Veriava and Coomans in Brand and Heyns (eds) (n 5) 60.

¹⁶Own emphasis, ie to abled and disabled alike. See Bekink and Bekink (n 8) 132.

¹⁷But still subject to the general limitations clause in the Bill of Rights s 36.

¹⁸In particular with reference to primary education: compare 29(1)(a) to 29(1)(b); Veriava and Coomans in Brand and Heyns (eds) (n 5) 62; Bekink and Bekink (n 8) 133-134; Woolman and Bishop (n 10) 57-14.

¹⁹The South African Schools Act 84 of 1996 recognises two types of schools, namely public (ss 12-33) and independent (ss 45-51) schools. Three types of public schools may be provided: ordinary public schools, schools for learners with special education needs and gender specific schools, s 12(3) and s 12(6).

²⁰Section 12(4) of the South African Schools Act 84 of 1996. See also ss 22-25 of the Admission Policy for Ordinary Public Schools published in GN 2432 GG 19377 1998-10-19 (in terms of s 3(4)(i) of the National Educational Policy Act 27 of 1996) which makes provision for learners with special needs to be accommodated in ordinary schools where 'reasonably practical'. See General Comment no 13 of the Committee on ESCR that education must be available, accessible, acceptable and adaptable. See also Lake and Pendlebury (n 13) 20; Malherbe in Boezaart (n 10) 402.

²¹Section 12(5) of the South African Schools Act. See also s 4(b) of the National Education Policy Act 27 of 1996. Section 4(d) then builds on s 4(b) by guaranteeing the physically disabled child an education to maximise his or her potential. It has been convincingly argued that s 4(d) is in itself discriminatory in that it only provides for the physically disabled, but not for children that are challenged in any other way: Bekink and Bekink (n 8) 137.

²²Section 6(4) of the South Africa Schools Act. A recognised sign language has the status of an official language for the purposes of learning at public schools. See also s 3 of the Constitution.

²³As in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

²⁴See ss 45 and 48 of the Schools Act. The Amended National Norms and Standards for School Funding GN 869 GG 29179 2006-08-31 refers to White Paper 6 *Special Needs Education* (in s 4) for the funding policy relating to learners with special needs.

2.2 *The right to dignity*

Human dignity has been described as ‘the touchstone of the new political order [in South Africa] and ... fundamental to the new Constitution’.²⁵ Dignity is both a fundamental principle or value underlying human rights and a right in itself.²⁶ Human dignity is not only a moral value but is also a means of understanding what it is to be a bearer of rights.²⁷ All children have a right to human dignity.²⁸ This is the right to be considered as they are complete human individuals with inherent worth despite being different from adults and one another.²⁹ This right to be respected as an individual is an indispensable part of human rights values.³⁰ It goes hand in hand with the right to equality.³¹ The principle of dignity requires that all human beings are empowered to enjoy the benefits of society on an equal basis.³²

2.3 *Equal protection and non-discrimination*

Equality before the law and equal protection of and benefit from the law address instances where persons are classified and the law differentiates between such legally classified groups, such as is the case with children.³³ [T]he guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.³⁴ When interpreting equality, the context is very important: Equality as a component of justice means that one has to treat equals equally and those who are unequal, differently – provided that the basis of differentiating between the two categories of persons is relevant to

²⁵O'Regan J in *S v Makwanyane* 1995 6 BCLR 778 (CC) par 329, referring to the 1993 Constitution.

²⁶Basser ‘Human dignity’ in Riouw, Basser and Jones (eds) *Critical perspectives on human rights and disability law* (2011) 21. See s 1 of the Constitution where dignity is a foundational value and art 10, where it is a right: *Dawood v Minister of Home Affairs*; *Shalabit v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* [2000] ZACC 8, 2000 8 BCLR 837 para 35. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 2 SA 1 (CC).

²⁷Basser in Riouw, Basser and Jones (eds) (n 26) 36.

²⁸One of the unalienable rights. See Malherbe ‘The impact of constitutional rights on education’ in Boezaart (ed) *Child law in South Africa* (2009) 420 at 425 on the impact of human dignity on education in general.

²⁹Woodhouse *Hidden in plain sight: The tragedy of children's rights from Ben Franklin to Lionel Tate* (2008) 35; Basser in Riouw, Basser and Jones (eds) (n 26) 17-20.

³⁰Basser in Riouw, Basser and Jones (eds) (n 26) 17.

³¹*Id* 34.

³²*Id* 22.

³³Section 9(1): ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’. The preamble of the South African Schools Act 84 of 1996 reiterates the fundamental values of equality and non-discrimination. See Malherbe in Boezaart (ed) (n 28) 421-425 on the impact of the equality principle on education in general.

³⁴*Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC) para 20. See also s 1 of the US Constitution: Fourteenth Amendment.

the purpose served by the distinction.³⁵ Children with disabilities are not to be treated the same as children without disabilities. However, differentiating between those with and those without disabilities must fully accommodate the needs of each category. In the education context this means that one has to provide education to children with disabilities that conforms with the demands of human dignity and the special needs of these children. When dealing with vulnerable and marginalised children, section 9 of the Constitution³⁶ has an even more prominent role to play.³⁷ Section 9(2) furthermore sanctions affirmative action in education that would give preference to previously disadvantaged persons or categories of persons, such as the disabled child.³⁸ Section 9(3) of the Constitution prohibits unfair discrimination, directly or indirectly, by the state based on, *inter alia*, age and disability.³⁹ Section 9(4) prohibits unfair discrimination on the same grounds by any person other than the state⁴⁰ and section 9(5) creates a rebuttable presumption that discrimination based on either age or disability (among other things) is unfair.

The right to equality goes far beyond equal treatment before the law and non-discrimination.⁴¹ It includes equal access, equal resources and equal opportunities. Equal access to education is being denied when the language of learning and teaching is inappropriate, when the curriculum is inflexible, when the built environments are unsafe or inaccessible, the support services inadequate and legislation inadequate or non-existing.⁴² Access is a prerequisite for participation.⁴³ Equal resources mean that the state has to spend the same amount of money on the education of all children. If more money is spent on the education of a specific category of children, the differentiation has to bear a

³⁵Van der Vyver and Joubert *Persone- en familiereg* (1991) 57.

³⁶Which includes equal access to educational institutions: Malherbe in Boezaart (ed) (n 10) 405.

³⁷See s 29(1) and 29(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, read with item 2 of the Schedule, that unfair exclusion of learners from educational institutions, including learners with special needs, is an unfair practice.

³⁸Bekink and Bekink (n 8) 135.

³⁹Reiterated in s 5(1) of the Schools Act 84 of 1996. See also *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T) 233-234 and in the US, *Pennsylvania Association for Retarded Children v Commonwealth of Pennsylvania* 334 F Supp 1259 (1971). However, instances of discrimination and exclusion are frequently reported in the media, eg the case where a Durban teenager with special needs was for more than 2 years shunned, isolated from his peers and forced to take lessons alone in a separate building of Kenmont School: available at <http://www.iol.o.za/news/crime-courts/father-successfully-fights-school-body> (accessed 2012-05-26).

⁴⁰In this instance the proscription must be further sanctioned through national legislation aimed at either preventing or prohibiting the discrimination.

⁴¹Woodhouse (n 29) 39.

⁴²See Pendlebury 'Meaningful access to basic education' (2008/2009) *South African Child Gauge* 24-27.

⁴³Jones 'Inclusion, social inclusion and participation' in Rioux, Bassier and Jones (eds) *Critical perspectives on human rights and disability law* 57 at 60.

rational connection to a legitimate government purpose.⁴⁴ Even if it has a rational basis, it might nevertheless amount to discrimination.⁴⁵ Equal opportunity is understood as a consequence of removing the legal and institutional barriers that stand in the way of people.⁴⁶

2.4 Children's rights

The South African Constitution is renowned for its specific provision for children and the rights provided to children over and above the fundamental rights guaranteed to all persons.⁴⁷ In the context of education for children with disabilities the child's right to basic nutrition, shelter, basic health care services and social services⁴⁸ has to be considered because the presence of such a child in a family contributes to poverty and many times to extreme poverty as the mother has to devote all her time to care for the child.⁴⁹ In the context of education for children with severe and profound disabilities, the child's right to be protected from maltreatment, neglect, abuse⁵⁰ or degradation has to be considered.⁵¹ The Bill of Rights dictates that a child's best interests are of

⁴⁴*Harksen v Lane* 1998 1 SA 300 (CC).

⁴⁵*Harksen v Lane* para 54 per Goldstone J.

⁴⁶Rioux and Riddle 'Values in disability policy and law: Equality' in Rioux, Bassier and Jones (eds) *Critical perspectives on human rights and disability law* 37 at 44.

⁴⁷In s 28.

⁴⁸Section 28(1)(c) of the Constitution. For a full exposition of this subsection, see Friedman, Pantazis and Skelton 'Children's rights' in Woolman *et al Constitutional law of South Africa* (2009) vol 3 (2nd ed) 47-9 to 47-18.

⁴⁹The family will have access to a care dependency grant (in terms of the Social Assistance Act 13 of 2003) of R1, 200 (GN 256 GG 35189 2012-03-29), which is often the only income of the family: *Draft Framework for a Policy on the Education of Learners with Severe and Profound Intellectual Disability* Department of Basic Education (August 2011) para 17. See also Resolution 66/124 adopted by the General Assembly on 'High-level meeting of the General Assembly on the realization of the Millennium Development Goals and other internationally agreed development goals for persons with disabilities' which noted that persons with disabilities face a greater risk of living in absolute poverty and that 80% of these persons live in developing countries.

⁵⁰In the Children's Act 38 of 2005, "abuse", in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes –

- (a) assaulting a child or inflicting any other form of deliberate injury to a child;
- (b) sexually abusing a child or allowing a child to be sexually abused;
- (c) bullying by another child;
- (d) a labour practice that exploits a child; or
- (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.

'[N]eglect' is defined in relation to 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'. These acts are criminalised in the Act (s 305(3)) and carry severe penalties (s 305(7)).

⁵¹Section 28(1)(d). For a full exposition of this subsection, see Friedman, Pantazis and Skelton 'Children's rights' in Woolman *et al* (n 48) 47-18 to 47-28.

paramount importance in every matter affecting that child.⁵² It has been found that the best interests standard creates a right that is independent of those specified in section 28(1) of the Constitution.^{53 54}

3 International norms and standards

The right to education is widely recognised in various major international and regional human rights instruments.⁵⁵ Under both the Convention on the Rights of the Child⁵⁶ and the African Charter on the Rights and Welfare of the Child,⁵⁷ states have the obligation to ensure that primary education is available to *all* children.⁵⁸

Likewise, all human rights instruments affirm human dignity⁵⁹ and address discrimination.⁶⁰ It is significant that the CRC was the first human rights treaty

⁵²Section 28(2). See *Laerskool Middelburg v Departementshoof, Mpumalanga* 2003 4 SA 160 (T) 177-178 for the application of this principle in the education context.

⁵³*Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 17. The application of s 28(2) of the Constitution in the education context has been dealt with extensively already: eg by Visser 'Some ideas on the "best interests of the child" principle in the context of public schooling' 2007 *THRHR* 497-500; Davel 'Best interests of the child: A conceptualisation and guidelines in the context of education' in Jones-Parry R (ed) *Commonwealth education partnerships 2007* (2007) 222-226; Mawdsley *et al* 'The best interest of the child: A United States and South African perspective' 2010 *Journal of Juridical Science* 1-23.

⁵⁴Other constitutional rights that might be relevant are the right to freedom and security of the person (s 12), the right to privacy (s 14), the right to freedom of association (s 18), language and culture (ss 30 and 31) and just administrative action (s 33).

⁵⁵See, eg, the Universal Declaration of Human Rights (1948) (UDHR), art 26; the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), arts 13 and 14; the International Convention on the Elimination of All Forms of Racial Discrimination (1966), art 5(e)(v); the Convention on the Rights of the Child, 1989 (CRC), arts 28 and 29; the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1952), art 2 Protocol 1; the American Declaration of the Rights and Duties of Man (1948), art 12; the Additional Protocol to the American Convention on Human Rights ('San Salvador Protocol') (1988), art 13; the African Charter on Human and Peoples' Rights (1981), art 17. See also UN High Commission on Human Rights 'CESCR General Comment no 13: The Right to Education (art 13)'. Also see Akinbola (n 4) 464-466. It is noteworthy that the right to education is specifically acknowledged for children with severe disability: Rule 6.4 of the Resolution Adopted by the General Assembly A/RES/48/96 'Standard rules on the equalization of opportunities for persons with disabilities – Part 2' of 1994-03-04.

⁵⁶Articles 23(2), art 28(1)(a) and art 29. Also see CRC Committee 'General comments on the rights of children with disabilities' (2006) paras 62-67. Both the CRC and the ACRWC have been dealt with extensively in a previous publication and the information will not be repeated here, see Boezaart 'The Children's Act: A valuable tool in realising the rights of children with disabilities' (2011) *THRHR* 264 at 265-267 and 269-271.

⁵⁷Articles 11(1), 11(2)(a), 11(3)(a) and 11(3)(e).

⁵⁸See also art 15 of the Revised European Social Charter.

⁵⁹See the UDHR, art 1; the International Covenant on Civil and Political Rights (ICCPR), preamble and art 10 and the ICESCR, art 13. The latter article deals with education.

⁶⁰Article 1(1) of UNESCO Convention against Discrimination in Education (1960); art 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966); African Charter on the Rights and Welfare of the Child (1990) art 3.

explicitly prohibiting discrimination against children on the basis of disability.⁶¹ The CRC Committee also issued General Comments on the rights of disabled children to provide guidance to states to implement the rights of children with disabilities in a comprehensive manner.⁶² Equality is likewise a globally accepted norm.⁶³

South Africa recently⁶⁴ ratified the Convention on the Rights of Persons with Disabilities (CRPD)⁶⁵ but has not yet adopted legislation to enact the provisions of this document.⁶⁶ The CRPD clarifies the obligations and legal duties of states to respect and ensure the equal enjoyment of all human rights by all persons with disabilities.⁶⁷ Many of the general principles⁶⁸ governing the operation of the CRPD have a direct bearing on the education context, such as:

- respect for the evolving capacities of the child with disabilities;⁶⁹
- the right of the child with disabilities to preserve his or her identity;⁷⁰

⁶¹General Comment no 9 'The rights of children with disabilities' (2006) para 2. Until the adoption of the Convention on the Rights of People with Disabilities, the Convention on the Rights of the Child (CRC) was the only international human rights treaty that acknowledged 'disability' as a status, art 2 prohibiting discrimination on the basis of disability. See art 23 on the rights of children with disabilities. Moore, Melchior and Davis "'Me and the 5 P's': Negotiating rights-based critical disabilities studies and social inclusion' (2008) 16 *International Journal of Children's Rights* 249 at 254 argue that in the disability discourse, the four P's of the CRC (provision, protection, prevention and participation) should be five P's, adding 'perception'. Perception includes experiencing inner worth and identity. These are formed by lived experiences of individuals living with disabilities and are shaped and re-shaped through social constructs and public policy.

⁶²2006-09-29. See CRC Committee 'General comments on the rights of children with disabilities' (2006) para 5.

⁶³The United Nations General Assembly adopted the *World Programme of Action concerning Disabled Persons* (UN GA Res 37/52) in 1982. On 1993-12-20 the General Assembly adopted the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (UN GA Res 48/96). In 1998 the United Nations Commission on Human Rights adopted Resolution 98/31 *Human Rights of Persons with Disabilities*. See further Rioux 'Bending towards justice' in Barton (ed) *Disability, politics and the struggle for change* (2001) 34-48.

⁶⁴2007-11-30. The Department of Basic Education published a report, *Report on the Implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Education* in July 2010 in which the social model of disability is embraced: para 2.

⁶⁵On 2012-03-21 153 states have signed and 106 states have ratified the Convention: Resolution adopted by the General Assembly 66/229 'Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto' para 1.

⁶⁶The importance of international law in the context of the rights of disabled children, has been dealt with in another publication (Boezaart and Skelton 'From pillar to post: Legal solutions for children with debilitating conduct disorder' in Grobbelaar-du Plessis and Van Reenen (eds) *Aspects of disability law in Africa* (2011) 107 at 119-120) and will therefore not be repeated here.

⁶⁷United Nations *From exclusion to equality: Realizing the rights of persons with disabilities* (2007) 5. See Eijgenraam 'Gelijke kansen voor iedereen. De rechten van kinderen met een handicap' (2008) 3 *Tijdschrift voor de Rechten van het Kind* 10-12 for a discussion on whether the CRPD will enhance the rights of children with disabilities in the Netherlands.

⁶⁸Set out in art 3.

⁶⁹Article 3(h).

⁷⁰Article 3(h) and art 24(1)(b).

- full enjoyment of all human rights and freedoms of children with disabilities on an equal basis with other children;⁷¹
- full and effective participation and inclusion;⁷² and
- accessibility.⁷³

Article 24 of the CRPD deals with the right to education in detail. Article 24(1) obliges States Parties to ensure an inclusive education system at all levels without discrimination and on the basis of equal opportunity. Article 24(2) obliges States Parties to ensure that children are not excluded from free and compulsory primary education on the basis of disability⁷⁴ and to have access to an inclusive, quality and free primary and secondary education on an equal basis with others.⁷⁵ Reasonable accommodation of the individual's requirements must be provided for.⁷⁶ Children with disabilities must receive the support required, within the general education system, to facilitate their effective education.⁷⁷ States Parties have to provide effective individualised support measures that maximise academic and social development, consistent with the goal of full inclusion.⁷⁸ Section 24(3) explores full and equal participation even further setting out the measures to be taken by States Parties in this regard. These measures include *inter alia* facilitating the learning of braille and sign language and the promotion of the linguistic identity of the deaf community.⁷⁹ To this end States Parties are required to take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or braille, and to train professionals and staff who work at all levels of education.⁸⁰

4 Inclusion

Education was the one component of community life in South Africa where remedial action was especially needed to achieve transformation.⁸¹ In special

⁷¹Articles 4, 7(1) and 24(1)(a).

⁷²Articles 3, 19, 24(1)(c) and 30.

⁷³Articles 3 and 9.

⁷⁴Article 24(2)(a). On art 24 see Akinbola (n 4) 469-470.

⁷⁵Article 24(2)(b).

⁷⁶Article 24(2)(c).

⁷⁷Article 24(2)(d).

⁷⁸Article 24(2)(e).

⁷⁹Article 24(3)(a)-(b). See *Report on the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Education* (July 2010) para 22.7 on a curriculum for South African sign language for introduction into the system in 2011.

⁸⁰Article 24(4). Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities. Article 24(5) addresses the provision of tertiary education, vocational training, adult education and lifelong learning for people with disabilities without discrimination and on an equal basis with others.

⁸¹See the White Paper *Education and training in a democratic South Africa: First step to develop a new system* (1995-03-15) at 67; the National Education Policy Act 27 of 1996; the South African Schools Act 84 of 1996; Van der Vyver in Robinson (ed) (n 5) 310 and 320; Bekink and Bekink (n 8) 125.

needs education the segregation on the basis of race was extended to incorporate segregation on the basis of disability.⁸² However, integration or mainstreaming of all children with disabilities poses its own risks. In such a system the integrated child could be left to cope on his or her own with little or no support or individual attention and thus separated from his or her peers.⁸³ The shortcomings of integration have led to the development of the notion of inclusive education.⁸⁴ The following definition of 'inclusion' is provided by UNESCO's Guidelines:⁸⁵

Inclusion is seen as a process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education. It involves changes and modifications in context, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children.

Inclusive education accepts that all children have a right to attend their local community/ public school – this does not depend on the abilities of the child or the preferences of the teacher.⁸⁶ Inclusion is concerned with the identification and removal of barriers.⁸⁷ It implies adapting the system to accommodate the child⁸⁸ and includes *inter alia* adapting curricula, additional instructional support and a continuum of such support, reviewing assessment procedures, utilising appropriate technology to aid communication, learning and mobility.⁸⁹

The government's response in relation to the education of children with disabilities is embodied in White Paper 6 *Special Needs Education: Building an Inclusive Education and Training System*.⁹⁰ The White Paper acknowledged that

However, see Rioux in Barton (ed) *Disability, politics and the struggle for change* (2001) 34-35 who indicates that the struggle for the rights of people with disabilities forms part of the earliest political history of Canada.

⁸²White Paper at 9. 'Specialised' education in segregated institutions is rooted in the medical model. See (n 4) and Combrinck in Sloth-Nielsen (n 2) 304.

⁸³Combrinck in Sloth-Nielsen (ed) (n 2) 305.

⁸⁴CRC Committee 'General comments on the rights of children with disabilities' (2006) para 67. Also see Akinbola (n 4) 462.

⁸⁵Guidelines for Inclusion: Ensuring Access to Education for All UNESCO (2005) 13.

⁸⁶Stubbs *Inclusive education where there are few resources* (2004) 21. See also 'The Salamanca Statement and Framework for Action on Special Needs Education' adopted by the World Conference on Special Needs Education: Access and Quality held in Salamanca, Spain, 1994-06-7-10 para 26.

⁸⁷Guidelines for Inclusion: Ensuring Access to Education for All UNESCO (2005) 15.

⁸⁸Combrinck in Sloth-Nielsen (ed) (n 2) 305.

⁸⁹'The Salamanca Statement and Framework for Action on Special Needs Education' paras 28-34.

⁹⁰Dated July 2001. At that stage 64, 603 learners with disabilities were accommodated in 380 special schools in South Africa while 280,000 learners with disabilities or impairments were unaccounted for. The average per learner expenditure was R17 838: White Paper 9, 13 and 15. However, there were huge disparities in the distribution of learner expenditure, ranging from R11 049 in Gauteng to R28 635 in the Western Cape: White Paper at 15.

different learning needs arise from a range of factors including physical, mental, sensory, neurological and developmental impairments and differences in intellectual ability.⁹¹ It also acknowledged that the learners who are most vulnerable to barriers to learning and exclusion in South Africa are those with disabilities,⁹² in spite of the fact that the South African Schools Act provides that public schools must admit learners and serve their educational needs without any discrimination.⁹³ The White Paper envisages a model of inclusive education where learners are not categorised or excluded from a school as a result of intellectual disability. Instead, the policy makes provision for basic education to these learners at three types of schools, namely special schools, full-service schools (ordinary public schools that have the capacity to accommodate learners with mental disabilities), and mainstream schools. The school at which a child is enrolled depends on the need of the specific child.⁹⁴ Children with severe intellectual disabilities whose needs are greatest should be able to access support at special schools on a full-time or part-time basis. Special schools provide education to learners who require intense levels of support, such as accommodation in settings requiring secure care or specialised programmes with high levels of support.⁹⁵

Special schools will also provide particular expertise and support, especially professional support in curriculum, assessment and instruction as part of the district support team to neighbourhood schools, in particular full-service schools.⁹⁶

⁹¹White Paper at 17.

⁹²White Paper at 18.

⁹³Section 5(1). See *Report on the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Education* (July 2010) para 5 where the Department admits that further legislation will be required to ensure that the education rights of children with disabilities are not limited and that reasonable accommodation is clearly defined with a view to promoting equality of educational opportunities.

⁹⁴See the Regulations on the Mental Health Care Act (GG 27117 2004-12-15) in ch 10 on educational programmes, which oblige the National Department of Education to, after consultation with the National Department of Health and the National Department of Social Development, establish educational programmes for mental health care users admitted at health establishments (reg 44(1)). The decision about where a mental health care user must receive educational support should (according to reg 44(2)) be based on assessing and determining the intensity of support needed and where such support can be reasonably provided. This assessment has to be conducted by a committee consisting of a representative of the Provincial Department of Education, the National Department of Health and the National Department of Social Development (according to reg 44(3)). The same committee also deals with exemptions from compulsory education resulting from a person being mentally ill or intellectually disabled (according to reg 44(5)). The final placement of a user must be approved by the head of the Provincial Department of Education concerned (according to reg 44(4)).

⁹⁵White Paper at 15.

⁹⁶White Paper at 18. In the United States, special education programmes were made mandatory in 1975 when Congress passed the Education for All Handicapped Children Act (EHA). The EHA was later modified to strengthen protection of persons with disabilities and renamed the Individuals with Disabilities Education Act (IDEA) and in 2004 reauthorised by the Individuals with Disabilities Education Improvement Act (20 USC 1400) (IDEIA). Federal laws require states to provide special

It is envisaged that the professional staff at such a special school should run training workshops and produce learning materials in their district for other educators on how to provide additional support in the classroom to visually-impaired learners.⁹⁷ An important aspect in overcoming barriers to learning is the development of flexible curricula and assessment.⁹⁸

White Paper 6 proposes a qualitative upgrading of the services of special schools and a focus on the training of staff for their new roles.⁹⁹ This process of upgrading would take place once an audit of the programmes, services and facilities in all 378 special schools and independent schools is completed.¹⁰⁰ White Paper 6 proposes the designation and conversion of about 500 out of 20,000 primary schools to full-service schools, beginning with the 30 school districts that are part of the national District Development Programme.¹⁰¹ The target is to convert at least one such school in at least each school district in the country.¹⁰² A central feature of building an inclusive education and training system as proposed in the White Paper was the enrolment of the approximately 280,000 children with disabilities that are of school-going age but who are not yet accommodated in the school system.¹⁰³

Given the funding constraints, the White Paper proposed that a realistic time frame for the attainment of the inclusive education and training system is 20 years.¹⁰⁴ There is a detailed implementation plan comprising immediate to short-term steps (2001-2003); medium-term steps (2004-2008); and long-term steps (2009-2021).¹⁰⁵ However, in view of the limited financial resources available for the education and training of individuals with barriers to learning, the White Paper targeted those with the greatest need on the basis of poverty/income/socio-economic status.

At this stage, it can be noted that the government has gone a long way to realising inclusive education as set forth in the White Paper. In 2005 the National Department of Education developed the National Strategy on Screening, Identification, Assessment and Support ('the SIAS Strategy'). This is directed at determining the nature and level of support required by learners with special education needs. It also outlines the procedures to ensure that all learners with moderate and high levels of need such as learners who are disabled and receive social security grants, are admitted to schools and receive the necessary support.

education consistent with federal standards as a condition of receiving federal funds.

⁹⁷White Paper at 21.

⁹⁸White Paper at 20 and 30.

⁹⁹White Paper at 21.

¹⁰⁰White Paper at 41.

¹⁰¹White Paper at 22-22.

¹⁰²White Paper at 39.

¹⁰³White Paper at 30 and 38.

¹⁰⁴White Paper at 38-39.

¹⁰⁵A three-pronged approach to funding was proposed: White Paper at 40 and 42-43.

In June 2005 the National Department of Education published three sets of guidelines for the implementation of White Paper 6. In November 2007 the National Department of Education published guidelines to ensure that all special schools become fully functional and contain the preparatory steps for the development of special schools as special school resource centres. However, the admissions policies of existing special schools for children with severe intellectual disability are currently still such that they often refuse admission to learners who are profoundly disabled. Furthermore, the procedures outlined in the South African Schools Act¹⁰⁶ are not systematically applied and no register of children who have been exempted is held by Heads of Departments.¹⁰⁷ The Department of Basic Education proposes that the most successful short-term strategy seems to be to link existing special care centres to special schools as satellites, involving staff of special care centers in all development programmes of the Department of Education and sending teachers to establish, implement and monitor structured curriculum programmes at the special care centres, even if it is initially on a part time basis.¹⁰⁸ This process should then lead to incorporating the centers into the special schools.

However, guidelines, policies, norms and standards cannot qualify as law,¹⁰⁹ and only a law of general application can limit rights.

5 Exclusion

Against this backdrop the Western Cape Forum for Intellectually Disability, a body corporate which has as its members non-governmental organisations that care for 1,000 severely and profoundly intellectually disabled children in the Western Cape, had to bring an application to court to enforce the constitutional rights of these children.¹¹⁰ The facts revealed that children with severe (IQ levels of 20-30) or profound (IQ levels of less than 20) intellectual disabilities are not admitted to special schools or to any other government school.¹¹¹ Neither the national government nor

¹⁰⁶Chapter 2 s 4.

¹⁰⁷*Draft Framework* (n 49) para 15.

¹⁰⁸*Draft Framework* (n 49) para 19.

¹⁰⁹Currie and De Waal (eds) *The Bill of Rights hand book* (2005) 169.

¹¹⁰*Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).

¹¹¹However, there is no legal justification for using IQ as a test for admission to special schools. Where schools are making use of this measure they are acting illegally: *Draft Framework* (n 49) Appendix C. IQ testing has been replaced by other measures of assessing and classifying the severity of a disability. The most important tool is the International Classification of Functioning, Disability and Health, known as the ICF. In the ICF, disability is presented as an expression of difficulties that arise as a result of a combination of personal, health related, functional and environmental factors. Each person's experience of disability is viewed as unique and severity fluctuates depending on the nature and interaction of all the factors. Age, gender, place and type of residence, family support and duration of problems are just a few examples of possible variables. The ICF is used as a tool for the assessment of disability internationally.

the provincial government provides schools for such children in the Western Cape.¹¹² It is estimated that there are 1,500 severely or profoundly disabled children in the Western Cape.¹¹³ The only education available to such children is at Special Care Centres, run by non-governmental organisations, such as that of the applicant. Currently the government's only contribution to the education of these children is a subsidy paid to the organisations involved.¹¹⁴ The financial support is less than what the government provides for the education of children who are not so disabled. In the Western Cape the Department of Health pays an annual subsidy of R5 092 per child for children with severe or profound intellectual disabilities who attend Special Care Centres; R6 632 per child per annum for children who attend mainstream schools and R26 767 per child per annum on children with mild to moderate intellectual disabilities who attend special schools. The parties were *ad idem* that children with severe or profound intellectual disabilities are able to benefit from education and that such children have needs which are much greater than those of children who do not have this degree of disability.¹¹⁵

The applicant contended that since the government's provision for children with severe or profound intellectual disabilities is:

- (1) much lower than that provided for other children;
- (2) inadequate to cater for the educational needs of these children; and
- (3) only made available where a non-governmental organisation provides such facilities,

the policy and practice of the respondents infringes the rights of these children in respect of their right to education, to equality, human dignity and their right to protection from neglect and degradation. The respondents, the national and provincial governments replied that any such differentiation, if it existed, was linked to a legitimate government purpose and therefore justifiable for its rational connection to a legitimate government purpose.¹¹⁶

The respondents' defense was basically twofold: The SIAS Strategy and Policy expounded in White Paper 6 indicate how government is dealing with children with disabilities. The scarcity of resources is to blame for the fact that only some of these children receive an education. The right to education is one of many other socio-economic rights. The respondents thus urged the court to soften the budgetary impact of an unqualified reading of section 29(1)(a) of the Constitution.¹¹⁷

¹¹²The government admits that '[e]specially in the rural areas, no provision is made for care for Children with Severe and Profound Intellectual Disability (CSPID)': *Draft Framework* (n 49) para 16.

¹¹³Paragraph 48.

¹¹⁴By the Department of Health.

¹¹⁵Paragraph 3 at 89-90.

¹¹⁶Paragraph 4 at 90.

¹¹⁷Paragraph 17 at 95.

The court indicated that White Paper 6 or the current implementation of government policy makes no provision for children with severe or profound intellectual disabilities to be accommodated for in special schools at present. As to when some of the affected children may be admitted to special schools, the respondents say that they will only be admitted if they are able to 'acquire sufficient skills' or if they 'achieve the minimum outcome and standards linked to the grade of education'. Admission to a special school will be on the basis of an assessment of a child's level of educational need. Children who fall within levels 4 and 5 of the SIAS Strategy will be admitted to special schools. Those whose level of need is higher than that 'will receive education through Partial Care Centres' such as those run by the applicant's members. The respondents' case is therefore clear. When their policies are implemented, there will be children with severe or profound intellectual disabilities who will be excluded from the schooling to be provided by the respondents as they will fall outside levels 4 and 5 of the SIAS Strategy.¹¹⁸

In its judgment the court dealt with the relevant constitutional rights and international documents.¹¹⁹ The court held that the above-mentioned argument did not address the issues as to why the affected children had been singled out for manifestly less favourable treatment than other children, or why any shortage in funds was not imposed on all children, including the affected ones.¹²⁰ The respondents had, in breach of the rights of severely and profoundly intellectually disabled children in the Western Cape, failed to take reasonable measures to make provision for their educational needs. A programme that excludes a significant segment of society cannot be said to be reasonable.¹²¹ Reasonableness must also be understood in the context of the Bill of Rights as a whole.¹²² This failure was not justified under the limitation clause (s 36) of the Constitution.¹²³

In view of the foregoing, I conclude that the applicant has established that the respondents are infringing the rights of the affected children, both in respect of the positive dimension of the right, by failing to provide the children with a basic education and also in respect of the negative dimension of the right, by not admitting the children concerned to special or other schools. As I have attempted to show, there is in my view no valid justification for the infringement of the rights of the affected children to a basic education and to equality.¹²⁴

¹¹⁸Paragraph 19 at 96.

¹¹⁹Paragraphs 20 to 23 at 97-99.

¹²⁰Paragraphs 26 and 29.

¹²¹*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 43.

¹²²*Id* para 44. See also *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 45.

¹²³Paragraphs 31 to 42.

¹²⁴Paragraph 45 at 108. Likewise the court found that the children's rights to dignity (para 46) and rights to be protected from neglect and degradation (para 47) have been infringed without any valid justification.

The court made an order directing the respondents to take reasonable measures in order to give effect to the rights of the affected children.¹²⁵ This systemic and sustained breach of the rights of the affected children cannot be cured overnight.¹²⁶ The court granted a structural interdict¹²⁷ enabling the respondents to plan the steps to be taken to remedy the wrong,¹²⁸ with directions to report back to the court and the applicant on the progress within twelve months of the date of the court order.¹²⁹

6 The way forward

The paradigm of disability has shifted over the past 20 years from a medical welfare model to a human rights model and this has taken place globally.¹³⁰ The reconceptualisation of disability acknowledges non-discrimination and equality.¹³¹ Inclusive education is a strategy to *include* children with disabilities in society. Inclusive education is about acknowledging and respecting differences and not merely their integration into an existing system.¹³² When a child is included, the barriers to participation will be removed and steps will be taken to ensure the child's social and academic well-being.¹³³ For some children with disabilities the curriculum and the learning process will have to be adapted to allow for meaningful participation in the education context. However, for children with severe and profound intellectual disabilities the curriculum is yet to be

¹²⁵Paragraph 52 at 111B-J.

¹²⁶Paragraph 49 at 108.

¹²⁷Section 38 of the Constitution contemplates that where a right in the Bill of Rights has been infringed, a court may grant 'appropriate' relief: *City of Cape Town v Rudolph* 2004 5 SA 39 (C) per Selikowitz J. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) Ackermann J said that: 'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.'

¹²⁸Paragraph 50: The court referred to *Rail Commuters Action Group v Transnet Limited t/a Metro Rail* 2003 5 SA 518 (C) and *Kiliko v Minister of Home Affairs* 2006 4 SA 114 (C) where a structural interdict was also granted. In *N v Government of Republic of South Africa* (no 1) 2006 6 SA 543 (D) para 32, while recognising that the granting of a structural interdict might amount to unwarranted interference with the authority and discretion of the executive arm of the government, the court held: 'To my mind, such an order is justified in the special circumstances of this case, more especially, as I see it, there has been and continues to be a violation of the applicants' constitutional rights. There is nothing forthcoming from the respondents ... A structured order with a supervisory component is therefore just, equitable and appropriate.'

¹²⁹Paragraph 52 at 111-112. The respondents did report back on time and have until July 2012 to work out a plan of action.

¹³⁰Rioux in Barton (ed) (n 81) at 36; *World report on disability* World Health Organization (2011) 9-10.

¹³¹*Ibid.*

¹³²See White Paper 17 on the distinction between mainstreaming and inclusion.

¹³³Jones in Rioux, Basser and Jones (eds) (n 43) 63.

formulated.¹³⁴ For some children with disabilities the classroom will have to be adapted to allow for meaningful participation in the education context. However, for children with severe and profound intellectual disabilities the classroom is yet to be built.¹³⁵

Human rights are social tools for the achievement of social justice.¹³⁶ The principle of inclusion, like all human rights principles, is aspirational. Its full implementation requires a transformation of society.¹³⁷ It is submitted that the human rights model of disability provides the appropriate framework for the government and society's response to the challenges posed by acknowledging the constitutionally enshrined rights of severely and profoundly disabled children in the South African education context.

¹³⁴See *MDAC v Bulgaria* Complaint no 41/2007, European Committee of Social Rights, Decision of 2008-06-03 and *Autism Europe v France* Complaint no 13/2002, decision on the merits of 2003-11-04 that the current situation with regard to the education of children with severe and profound disabilities is not limited to South Africa; Lord and Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities' in Rioux, Bassier and Jones (eds) *Critical perspectives on human rights and disability law* 273 at 289-291.

¹³⁵Unfortunately the 280,000 learners referred to by Bekink and Bekink (n 8) 144 are still out of school.

¹³⁶Jones in Rioux, Bassier and Jones (eds) (n 43) 64.

¹³⁷*Id* 82.