



Mr Craig Mokhiber

Chief Development and Economic and Social Issues Branch
Office of the United Nations High Commissioner for Human Rights

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By email: registry@ohchr.org

Dear Mr Mokhiber

HUMAN RIGHTS COUNCIL RESOLUTION 22/3: “The work and employment of persons with disabilities”

SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. The focus of our work is on the rights to health, basic education and food, as well as the overarching principles of good governance, rule of law and accountability.

Our activities include research, advocacy and legal action to change the socio-economic conditions that undermine human dignity and development and prevent poor people from reaching their full potential.

As part of our work on the right to basic education, SECTION27 works to ensure that learners with special educational needs, including learners with disabilities, have equal access to this right. In doing so, we have worked on the following issues:

- The provision of Learner Teacher Support Material such as Braille textbooks and workbooks to blind and partially-sighted learners;

- The provision of adequate infrastructure to accommodate learners with disabilities, including wheelchair access. While poor school infrastructure poses a risk to the safety of all learners, the impact of this risk is unique in the case of learners with physical disabilities;
- Access to education for learners seeking instruction in South African Sign Language, and the obligations of provincial education departments in ensuring that such education is available; and
- Advocacy around the creation of posts at schools of, and appropriate employee salaries and benefits for, professionals such as education therapists and orientation and mobility practitioners.

As such, SECTION27 welcomes the opportunity to provide input to the United Nations Office of the High Commissioner for Human Rights on the right to education of persons with disabilities in South Africa.

Our submission is based on the numbered questions contained in the request for input dated 7 August 2013. Should you require any further information from us on any further issues, we would be glad to provide this.

1. Are you aware of any restrictions for persons with disabilities to attend regular schools? Please detail whether they exist in laws or policy, or if they exist only as a result of social barriers.

South Africa, entering into its 20th year of a democracy, is the result of a transition from a society driven by inequalities to a Constitution founded on the principles of equality, dignity and freedom. Historically, persons with disabilities were placed in special needs schooling environments with no effort to integrate them into mainstream society. In addition, as a result of unjust racial laws, education was clearly segregated according to

race, with more resources being allocated to schools attended by white learners than those attended by black learners. Thus persons with disabilities were faced with a double segregation and discrimination, both on the grounds of race and disability.

Currently, there are no laws or policies that prevent persons with disabilities from attending ordinary schools in South Africa. On the contrary, inclusive education has been identified as a priority for the national Department of Basic Education (“DBE”). In her budget speech for 2013/14, the Minister of Basic Education clearly stated, *“[i]n line with the drive to build an equitable system, in 2013/14, we’re prioritising inclusive education.”*

The South African Constitution¹ guarantees the unqualified right to a basic education for everyone.² Section 9 of the Constitution further states that everyone is equal before the law and the state may not unfairly discriminate, directly or indirectly, against anyone on one or more of a number of listed grounds. These listed grounds are derived from the widespread grounds of unfair discrimination that characterised the apartheid era, and include disability. Section 9(2), further, requires the state to take positive steps to advance people with historic disadvantages such as persons with disabilities.

The South African Schools Act³ (“SASA”) is intended to give effect to the right to basic education. SASA places an obligation in section 12(5) on the Member of the Executive Council (“MEC”) responsible for education in each province to take all reasonable measures to ensure that the physical facilities at public schools are accessible to learners with disabilities.

The DBE’s Education White Paper 6 on Inclusive Education⁴ (“White Paper 6”) promotes inclusive education to the extent that this is possible.

¹ Constitution of the Republic of South Africa, 1996.

² Section 29 of the Constitution.

³ Act 84 of 1996.

⁴ Available at

<http://www.education.gov.za/LinkClick.aspx?fileticket=gVFccZLi%2Ft!%3D&tabid=191&mid=484>

The framework proposed by White Paper 6 is to establish an inclusive education training system aimed at identifying challenges faced by learners at an early age and to provide adequate support. Infrastructure and curriculum changes in mainstream schools will allow learners with mild to moderate disabilities to be adequately accommodated in mainstream schools with appropriate support from district-based support teams. Learners with severe and multiple disabilities will require high quality services in specialised schools. It is important to note that, while White Paper 6 is widely accepted among stakeholders, it is still a white paper and therefore does not yet create any legally-binding obligations.

Despite this theoretical framework, learners with disabilities still face practical challenges with fully participating in ordinary schooling environments. Challenges in ordinary schools such as overcrowding, poor infrastructure, inadequate sanitation facilities and school security have a severe impact on all learners, however it is more difficult for learners with disabilities to mitigate the effects of these, particularly where physical disabilities preclude them from doing so. For example, inaccessible sanitation facilities are even less accessible to learners in wheelchairs. Uneven school grounds and potholes in classrooms present challenges to blind and partially-sighted learners and learners in wheelchairs. Deaf or hard-of-hearing learners who depend on sign language or lip reading will struggle where there is no electricity.

The problem of overcrowding also has a more intense impact on learners with disabilities. The prescribed teacher: learner ratio is 1:40 in ordinary primary schools and 1:35 in ordinary secondary schools. This ratio is adjusted in the case of learners with disabilities. For example, for visually impaired, deaf, partially sighted and hard-hearing learners, the teacher: learner ratio should be 1:8 in primary schools and 1:7 in secondary schools, to allow for adequate attention in class. Some classes in South African ordinary schools have up to 150 learners. Not only does this prevent learners from getting the attention they need but there may not be physical space, for example, to accommodate learners in wheelchairs.

Thus, while there are no legal restrictions preventing learners with disabilities from attending ordinary schools, these learners predominantly attend specialist schools as a result of social barriers and challenges with the implementation of laws guaranteeing equality and reasonable accommodation.

2. Does your country have or is currently developing a program or plan to promote inclusion of children with disabilities in regular schools and discourage education in special schools or social institutions? If so, were persons with disabilities and their representative organisations, and other disability related organisations directly involved in the design and application of said programme or plan?

South Africa has ratified the United Nations Convention on Persons with Disabilities. The constitutional framework described above further supports and mandates equal access to education for learners with disabilities, with reasonable accommodation as required.

White Paper 6 does not abolish specialist schools but envisages their development for specialist educational needs for learners with severe or multiple disabilities, while promoting an inclusive environment for learners with mild to moderate disabilities, who are able to cope in the mainstream schooling system.

White Paper 6 envisages learners with disabilities being accommodated in ordinary schools in order for them to realise their true potential. Each learner would preferably need to have a support team in order to maximise participation and minimise barriers to learning.⁵

The implementation of this White Paper calls for the review and reform of all legislation and policy regarding education, including SASA,⁶ the Higher Education Act,⁷ and the Further Education and Training Act,⁸ to bring them in line with the objectives of inclusive education. Further, this paper recognises the need to address teacher training and

⁵ Luger & Others, "Journey to Inclusive Education; a Case Study from a 'township' in South Africa" (2012) 1:1 *African Journal for Disability*.

⁶ 84 of 1996.

⁷ 101 of 1997.

⁸ 16 of 2006.

support, and adequate and appropriate infrastructure for the education of learners with disabilities. At present teachers are not trained to teach learners with special needs. As well as training on this issue, collaborative skills need to be developed among teachers. An inclusive model requires support teams such as counsellors and social workers in order to fully concentrate on learners with disabilities.

Physical accessibility into schools is also an important feature in developing this inclusive model. Basic necessities such as toilets, lighting, water facilities and learning materials need to be adapted to safely accommodate learners with disabilities.

Infrastructure changes such as the building of ramps, sanitation facilities for learners with disabilities and curriculum changes to accommodate learners with disabilities in mainstream schools will allow learners with mild to moderate disabilities to be adequately accommodated in mainstream schools with appropriate support from district-based support teams. Learners with severe and multiple disabilities will require high quality services in specialised schools.

Despite being drafted in 2001, White Paper 6 remains a white paper and therefore does not yet create legally binding obligations. There does appear, however, to be acceptance of its contents among a number of stakeholders.

3. Is the Ministry of Education the only ministry in charge of education or are other ministries (eg Health and Social Affairs) involved when it comes to persons with disabilities? Please describe how other ministries get involved and specify if their involvement results in the denial of access to mainstream schools.

The DBE and the nine provincial education departments are primarily responsible for the education of persons with disabilities. The DBE's mandate is to process guidelines and legislation, and to create capacity for the realisation of the right to basic education for learners with disabilities while the role of the provincial education departments is to implement these. As described above, the SASA⁹ also places an obligation on the MEC

⁹ S 12 (5)

responsible for education in each province to ensure that all reasonable steps are taken to ensure that all physical facilities are accessible for learners with disabilities.

The Department of Women, Children and Persons with Disabilities is responsible for the promotion, facilitation, coordination and monitoring of the realisation of the rights of persons with disabilities. In addition, the Departments of Health, and Social Welfare are also mandated to have interests in the needs of persons with disabilities as far as the treatment of persons with disabilities and the distribution of disability welfare grants go respectively.

Unfortunately, the South African government does not have an integrated approach towards persons with disabilities. Each Department incorporates issues of disability within their specific departmental mandates, however, when it comes to inter-sectoral efforts, then it is a trend that issues of disability do not become part of the discussion. Important policies such as the Integrated School Health Policy,¹⁰ and policy reviews such as the ‘National Health Insurance: The first 18 months’,¹¹ do not explicitly cover disability in their documents. There is still a way to go in placing the interests of learners with disabilities firmly on the agenda of these government departments.

4. Does your country have effective mechanisms to successfully claim in cases of rejection of students with disabilities from mainstream schools? If so, do those mechanisms guarantee reasonable accommodation for services or support needed that are not in place? Please provide information on good practices.

The rights enshrined in the Constitution, such as the rights to basic education, equality and dignity are justiciable rights and must be respected, promoted and fulfilled.¹² Thus if any

¹⁰ Available at <http://www.ci.org.za/depts/ci/pubs/pdf/health/poldraft/schealthpol.pdf>: a policy which addresses the health needs of learners in order for them to benefit more from their education.

¹¹ Available at http://www.doh.gov.za/docs/policy/2013/NHI_1st_eighteen_months.pdf: National Health Insurance is a funding mechanism that is bundle with health reform in an attempt to improve access to health care service for all persons.

¹² S 7(2) of the Constitution.

of these rights is infringed, the person whose rights have been violated or anyone acting in their interests has the opportunity to approach a court for relief.

The SASA, in section 5(9), allows for any learner or parent of a learner who has been refused admission into a public school to appeal the decision to the MEC of Education in the relevant province. Thus, the MEC has the power to admit a learner with disabilities in cases where they have been excluded unreasonably.

Further, the Promotion of Equality and Prevention of Unfair Discrimination Act¹³ (“the Equality Act”), which gives effect to Section 9 of the Constitution, states in section 9 that no person with disabilities may be unfairly discriminated against. This includes denying a person with a disability the facility or support to enable them to progress in society.

The failure to eliminate obstacles and obstructions preventing persons with disabilities to enjoy equal opportunity, or failing to take steps to reasonably accommodate persons with disabilities is also unfair discrimination under section 9(2) of the Constitution. The Equality Act, therefore, promotes an inclusive model for a progressive society, as it gives persons with disabilities equal opportunity by reasonably accommodating such persons in order to allow them to realise their full potential.

Issues specific to discrimination, including discrimination on the basis of disability, are adjudicated by the specialised Equality Courts. Every High Court in South Africa is an Equality Court for the area of its jurisdiction and is given the power to determine whether unfair discrimination has taken place. If a learner has been rejected from an ordinary school based on her disability, or any other grounds, then she would qualify to take this matter to the Equality Court. The court then has the power to make an order to its discretion for a suitable remedy, such as ordering that the learner be accepted to the school.

¹³ 4 of 2000.

5. Are you aware if your country is involved in international cooperation programmes related to the promotion and implementation of inclusive education systems? If so, is your organisation involved in any such programmes?

In 2002 South Africa implemented Inclusive Education Pilot Projects over three provinces, funded by the government of Denmark.¹⁴ The purpose of the project was to assess how well inclusive education works in South Africa and what support mechanisms were needed in order for inclusive education to work.

Some of the important findings of the study were as follows:

- Materials need to be relevant and accessible to all role players in order to support the success of the project;
- Teachers are to understand the barriers to learning that learners with disabilities face in order to prevent teachers from excluding learners, and to show teachers how these barriers link to the process of teaching and learning; and
- In order to develop infrastructure that accommodates learners with disabilities, it is important for education officials in charge of physical planning to understand disabilities and include this in their central planning.

We are not aware of any international collaboration over and above these projects.

Conclusion

SECTION27 would like to thank your offices for providing us with the opportunity of submitting our comments on an important issue such as access to education for learners with disabilities within an inclusive environment. Please do not hesitate to contact us if you require any further information.

¹⁴ Available at

<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDAQFjAA&url=http%3A%2F%2Fwww.thutong.doe.gov.za%2FResourceDownload.aspx%3Fid%3D37391%26userid%3D-1&ei=XP02UoYGgpSFB7KsgaAF&usg=AFQjCNE6Jx-pu0rHz9oTHanBmKKx3ZVz7A&sig2=s18W8IDOG2aof-2445YP9A&bvm=bv.52164340,d.ZG4>